Case No. 19-15707

In the United States Court of Appeals
for the Ninth Circuit

KIMETRA BRICE, EARL BROWNE and JILL NOVOROT,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

PLAIN GREEN LLC,

Defendant,

and

HAYNES INVESTMENTS, LLC AND STEPHEN HAYNES,

Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of California
Hon. William Horsley Orrick, District Judge
No. 3:18-cv-01200

BRIEF OF AMICI CURIAE PUBLIC JUSTICE AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus Public Justice does not issue stock and has no parent corporations. Amicus the National Consumer Law Center does not issue stock and has no parent corporations.

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STATEMENT OF INTEREST

Public Justice is a nonprofit legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress for their injuries in the civil court system.[1] As part of its Access to Justice Project, Public Justice has appeared before multiple courts in previous cases presenting important issues regarding tribal payday lending and mandatory arbitration. For example, Public Justice represented the borrowers in *Hayes v. Delbert Services Corp*., 811 F.3d 666 (4th Cir. 2016), one of the cases with which the panel here split. Further, in 2017, Public Justice published an authoritative, first-of-its kind report that scrutinizes relationships between online payday lenders and Native American tribes that are used to evade state and federal laws.[2]

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[1] No party's counsel authored this brief in whole or in part nor did a party, its counsel, or any other person contribute money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4). All parties have consented to the filing of this amicus brief.

[2] Kyra Taylor et al., Public Justice Foundation, *Stretching the Envelope of Tribal Sovereign Immunity?* (2017), https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including Consumer Arbitration Agreements (8th ed. 2020) and Consumer Class Actions (10th ed. 2020) and actively has been involved in the debate concerning tribal payday lending, mandatory pre-dispute arbitration clauses, class action waivers, and access to justice for consumers. NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

The arbitration agreement at issue in this case shelters a "rent-a-tribe" scheme, in which a private payday lender created a sham partnership with a Native American tribe to cloak itself in tribal immunity and evade state and federal laws. Rent-a-tribe schemes are deliberately opaque, produce little benefit for tribes, and enable lenders to operate in a law-free zone, where they can exploit consumers with impunity. The upshot is sobering. Payday loans—especially unregulated payday loans—trap borrowers in endless cycles of debt, causing untold economic hardship. In California, where plaintiffs live, interest on consumer loans like the ones at issue here are capped at 10% per year, yet Plain Green and Great Plains charge interest rates up to 448%—almost *45 times* the legal limit. Rent-a-tribe schemes should not be permitted to abuse arbitration as a way to avoid scrutiny of their operations.

Moreover, the panel majority's analysis here ignores important parts of the agreement at issue. The majority decision affirms sending to an arbitrator the question of whether Plain Green's arbitration agreement impermissibly prospectively waives borrowers' federal rights. The panel justified that decision, in part, on the existence of federal-law back-end, post-arbitration borrower protections. But the panel failed to address the terms of the agreement that restrict class proceedings and limit post-arbitration review. These terms, if enforceable, mean that the borrower protections underpinning the panel's decision do not exist. At the least,

there are serious questions as to whether the procedures the majority relies on are, in fact, available—none of which the majority decision addresses.

ARGUMENT

I. Like All Forms of Payday Lending, Rent-a-Tribe Schemes Are Immensely Harmful, and Arbitration Should Not Be Used to Shield These Illegal Schemes.

A. Rent-a-tribe and other payday lending put borrowers in dire financial straights.

The payday lending business model is predicated on preying on cash-strapped consumers. The average payday borrower makes just $30,000 a year and lives paycheck to paycheck. Pew Charitable Trusts, *Payday Loan Facts and the CFPB's Impact* (May 26, 2016); Nathalie Martin, *1000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 Ariz. L. Rev. 563, 608 (2010).[3] Seven in ten payday borrowers use their loans for regular, recurring expenses such as rent and utilities. *See* Pew, *Payday Loan Facts and the CFPB's Impact*.[4]

Unlike traditional banks, payday lenders do not verify that borrowers can pay back their loans. They also solicit customers who will likely "roll over" their loans

[3] https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/payday-loan-facts-and-the-cfpbs-impact.
[4] https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/payday-loan-facts-and-the-cfpbs-impact.

multiple times. Most borrowers cannot afford to pay back their loans within the first billing cycle—typically two weeks—so they "roll over" (i.e., refinance) their loans into subsequent cycles, incurring additional interest and fees. Moreover, to cover the initial loan and its interest, borrowers often take out new loans; 76 percent of payday loans are taken out to pay back prior payday loans, and borrowers who take out five or more loans a year generate 90 percent of the industry's business. Uriah King & Leslie Parish, Center for Responsible Lending, *Phantom Demand: Short-Term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume* 11 (2009); Uriah King & Leslie Parish, Center for Responsible Lending, *Springing the Debt Trap* 9 (2007).[5]

These debt traps mean that borrowers often default. *See* Max King, *Tribal Lending After* Gingras, 19 Duke L. & Tech. R. 122, 125 (2021) (more than half of consumers default on their payday loans within a year). Because lenders profit from finance fees, losses from defaulting borrowers account for only a small percentage

[5] https://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf; https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/springing-the-debt-trap.pdf.

of payday lenders expenditures. *See* Pew Charitable Trusts, *Payday Lending in America: Policy Solutions* 28 (2013).[6]

Debt traps lead to a slew of negative outcomes. People who take out payday loans are more likely to file for bankruptcy, become delinquent on credit card payments, delay medical care and prescription drug purchases, and lose their bank accounts because of excessive overdrafts. King, 19 Duke L. & Tech. R. at 125. Payday loan use is a risk factor associated with high blood pressure, weight gain, inflammation, and anxiety. Paul E. Kantwill & Christopher L. Peterson, *American Usury Law and the Military Lending Act*, 31 Loy. Consumer L. Rev. 500, 537 (2019).

Payday lending in America is rampant. Each year more than 12 million Americans take out payday loans, amassing nearly $50 *billion* in debt. James R. Barth et al., *Where Banks Are Few, Payday Lenders Thrive,* Milken Inst. Rev. (Jan. 21, 2014).[7] The thick market for payday loans in conjunction with their high cost has translated, unsurprisingly, into big profits for payday lenders: Payday lenders pocket

[6] https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pewpaydaypolicysolutionsoct2013pdf.pdf.

[7] https://www.milkenreview.org/articles/where-banks-are-few-payday-lenders-thrive.

about $9 billion in fees annually. Jeannette N. Bennett, *Fast Cash and Payday Loans*, Federal Reserve Bank of St. Louis (April 2019).[8]

B. Rent-a-tribe schemes are ruses to evade state and federal law and rely on arbitration agreements to do so.

Payday lenders purport to partner themselves with Native American tribes to avoid compliance with state and federal regulation of payday lending. Because payday loans have such a negative impact on consumers, regulators have increasingly cracked down on payday lenders, either by effectively outlawing them through low enough interest rate caps, or by imposing other types of consumer-protection measures, such as requiring ability-to-repay determinations or prohibiting roll-over loans. *See* Carlie Malone & Paige Marta Skiba, *Regulation and Recent Trends in High-Interest Credit Markets*, 16 Ann. Rev. L. & Soc. Sci. 311, 316 (2020) (21 states have substantially amended their payday lending laws in the last six years).

Tribal affiliation is attractive to lenders because Native Americans tribes, as sovereign "domestic dependent nations," enjoy broad immunity from suit, even for commercial activities conducted off-reservation. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790, 803 (2014). Under a typical rent-a-tribe scheme, a payday lending company will reorganize under a tribe's name to form a tribal lending entity

[8] https://research.stlouisfed.org/publications/page1-econ/2019/04/10/fast-cash-and-payday-loans.

(TLE) that claims to share the tribe's sovereign immunity from suit. Because of their purported tribal ownership, TLEs claim blanket immunity and avoid the consequences of violations of applicable state regulations, including state interest rate caps and ability-to-repay requirements. Though some tribes have their own lending regulations, few afford consumers the same protections accorded by state law. Taylor, *Stretching the Envelope of Tribal Sovereign Immunity?* 4.[9]

Unsurprisingly, then, lenders purporting to be affiliated with Native American tribes make up a growing share of the market. In 2010, 35 of the 300 companies making payday loans through the internet claimed ownership by Native American tribes, collectively originating more than $420 million in loans. Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, Wall St. J. (Feb. 10, 2011).[10]

But these TLEs are only nominally owned by tribes. *See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes*, 69 Wash. & Lee L. Rev. 751, 777 (2012). Most often, the true loan companies are headquartered far away from tribal lands, controlled by non-tribal executives, and funded by non-tribal sources. *See* Heather Petrovich, *Circumventing State Consumer Protection*

[9] https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf.

[10] https://www.wsj.com/articles/SB10001424052748703716904576134304155106320.

Laws: Tribal Immunity and Internet Payday Lending, 91 N.C. L. Rev. 326, 342 (2012). In other words, the tribe merely acts as a front for payday lenders seeking to avoid compliance with state regulations.

Lender-tribe affiliations are notoriously opaque, and "there is little sunlight on the true financial arrangements between tribes and payday lenders." Martin & Schwartz, 69 Wash. & Lee L. Rev. at 777. Public Justice's report reviewed hundreds of documents that lenders have submitted to courts as proof of tribal ownership and concluded that such documents "typically provided few details about the relationship between the payday lender and tribe, such as financial arrangements or oversight, and instead focused on the tribe's need for money and the tribal council's alleged intent that the lender share in the tribe's sovereign immunity." Taylor, *Stretching the Envelope of Tribal Sovereign Immunity?* 4.[11] Moreover, because consumers borrow from TLEs with tradenames (e.g., "Plain Green") that do not indicate tribal ownership and transact via adhesion contracts—where a lender's tribal affiliation is hidden in dense legalese—they are rarely aware that they are doing business with a TLE who cannot be held liable for violating state and federal laws. Petrovich, 91 N.C. L. Rev. at 346.

[11] https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf.

Lenders use to crafty techniques to dupe courts and wrap themselves in tribal immunity. For example, businessman Mark Curry and the Otoe-Missouria tribe set up American Web Loan as a tribal corporation, but both parties agreed that Curry's non-tribal companies "would handle practically every aspect of business operations: lead generation, follow-up communications, loan processing, money transfers, software management, customer support, credit reporting, and collections." Ryan Goldberg, *How a Payday Lender Partnered With a Native American Tribe to Bypass Lending Laws and Get Rich Quick*, The Intercept (May 31, 2021).[12] Meanwhile, Curry worked to create the illusion of tribal control: The tribe "appointed a nominal head to write out the loan checks . . . and set up a call center in Red Rock [on tribal land] and a consumer finance regulatory body whose ordinances would create the impression of oversight." *Id.* Curry's companies bore the financial risk and reward, and Curry's non-tribal companies retained 99 percent of the loan portfolio, while the tribe kept just one percent. The ploy proved highly lucrative—but only for Curry. From 2010 to 2016, Curry's firms' share of the profits totaled $110 million, while the tribe's amounted to just $8 million. *Id.*[13]

[12] https://theintercept.com/2021/05/31/payday-lender-native-american-tribe-american-web-loan/?comments=1#comments.

[13] American Web Loans is hardly an isolated example when it comes to legally dubious, tribal-affiliated payday lenders. Public Justice's report found 100 lending websites affiliated with tribes and concluded that "[f]ew tribes appeared to actively regulate the lenders they purportedly owned." Taylor, *Stretching the Envelope of*

That nearly all of American Web Holding's profits went to the non-tribal lender is not unique. Rent-a-tribe schemes primarily enrich unscrupulous payday lenders, not tribes: "[T]ribes get the crumbs while non-tribal outsiders use their tribal sovereignty to make huge profits." Martin & Schwartz, 69 Wash. & Lee L. Rev at 767. "[I]n the rent-a-tribe model, the tribe may receive no more than a token percentage of the lending revenues—even as little as one percent—while the bulk of the lending profits are funneled off to wealthy non-Indians who use the money to fund their personal hobbies." *See* Leslie Bailey, *Payday Lending: Boon or Boondoggle for Tribes?*, Public Justice (March 5, 2015).[14] Tribes' paltry stake in payday lending businesses pales in comparison to what they gain from other enterprises—under the federal Indian Gaming Regulatory Act, for instance, tribes must receive at least 60% of the profits from each gaming enterprise. *See* Martin & Schwartz, 69 Wash. & Lee L. Rev at 777 (contrasting rent-a-tribe schemes with requirements under the Indian Gaming Regulatory Act).

Responsible Native American leaders look at rent-a-tribe arrangements with growing suspicion. Native Americans themselves are harmed by predatory loans and are all too familiar with the economic havoc they wreak. First Nations Dev. Inst.,

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Tribal Sovereign Immunity? 2, 4, https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf.

[14] https://www.publicjustice.net/payday-lending-boon-or-boondoggle-for-tribes/.

Borrowing Trouble: Predatory Lending in Native American Communities (2008).[15] Moreover, rent-a-tribe schemes jeopardize the protections that the U.S. government has afforded tribes. Tribal immunity developed as a tool to safeguard tribal self-governance and promote economic self-sufficiency, *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-58 (1998), but rent-a tribe schemes do little to advance those ends. Scholars have stressed that the use of tribal immunity to engage in no-holds-barred payday lending could stir public backlash and invite congressional scrutiny. *See* Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, 60 Fed. Law. 35, 40 (Apr. 2013). Members of the Supreme Court have voiced similar concerns, noting that "tribal immunity has . . . been exploited in new areas that are often heavily regulated by States. For instance, payday lenders . . . often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality." *Bay Mills*, 572 U.S. at 825 (2014) (Thomas, J., dissenting). Indeed, "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter." *Kiowa Tribe*, 523 U.S. at 758.

[15] https://www.firstnations.org/wp-content/uploads/publication-attachments/2008_Borrowing_Trouble.pdf.

Arbitration agreements that limit or extinguish the application of state and federal law—like the ones at issue here—are indispensable to rent-a-tribe schemes. When enforced, such agreements bar courts from investigating the countless abuses involved when online payday lenders partner with tribes—the fiction of tribal ownership, the dubious use of sovereign immunity, and the flagrant violations of state and federal laws. In other words, unreviewable arbitration agreements grant rent-a-tribe schemes—and the exploitative, illegal practices they employ—legal impunity.

Absent the enforcement of an agreement to arbitrate, where a TLE is sued directly, courts conduct "arm-of-the-tribe" analyses to determine whether TLEs share in a tribe's immunity from suit. These analyses look to the substance of rent-a-tribe schemes, weeding out arrangements where TLEs are only nominally controlled by tribes. This functional arm-of-the-tribe analysis seeks to determine whether so-called tribal entities are "analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether [they are] more like . . . commercial business enterprise[s], instituted solely for the purpose of generating profits for [their] private owners." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1184 (10th Cir. 2010); *see White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (applying *Breakthrough* factors).

Courts have also looked to the substance—not the form—of the arrangement to determine whether tribal law or state law should govern disputes over the legality of the interest rates and other lending practices. In *Consumer Financial Protection Bureau v. CashCall, Inc.*, CV157522JFWRAOX, 2016 WL 4820635, at *5-*9 (C.D. Cal. Aug. 31, 2016), the court applied the "true lender" doctrine to determine that because the TLE bore the risk of the loans, it, and not the tribe, was the true lender. Therefore, under federal common law choice-of-law analysis, there was an insufficient nexus to the tribe to justify the loans being governed by tribal law and state law—including its usury limits—should apply to the transactions instead. *Id.* But where an arbitration agreement applying tribal law is enforced, neither of these types of scrutiny take place, and illegal rent-a-tribe schemes can continue unabated.

II. The Panel's Decision Is Based on Incorrect Assumptions About the Arbitration and Post-Arbitration Procedures Available to the Borrowers Under the Contract at Issue.

Nevertheless, the panel here enforced the delegation clause in a tribal lending arbitration agreement. The panel majority justified its decision, in part, by outlining the back-end procedures available to the borrowers following arbitration of the question whether the agreement impermissibly prospectively waives borrowers' federal rights. But those procedures are flatly contrary to the procedures outlined in the arbitration agreement and, at the least, invite more questions than answers—

particularly given the majority's insistence that enforceability questions go to the arbitrator.

In the portion of its decision entitled "Practical Effects," the majority explains its view of the back-end protections the borrowers will have following enforcement of the delegation clause. Op. 29-30. If the arbitrator reaches the federal-law prospective waiver question and agrees that the agreement prospectively waives federal rights and is unenforceable, "Borrowers may return to federal court and assert their claims." Op. 29. If the arbitrator reaches the question and concludes that federal rights were not prospectively waived, the borrowers may proceed with their federal claims in arbitration. *Id.* Finally, according to the panel, if the arbitrator determines that they may not consider prospective waiver because they are limited to applying tribal law, "Borrowers can return to court and argue the arbitrator exceeded her powers." *Id.* Therefore, the majority concludes, "Borrowers will have the opportunity to assert their federal claims or show that the arbitration agreements 'foreclosed' their ability to do so." Op. 30. According to the panel, the borrowers are protected even if the prospective waiver question is delegated to the arbitrator.

But that is not clear at all. The post-arbitration procedure the majority describes is directly contrary to the post-arbitration procedures outlined by the arbitration clause. As such, at the least, there are substantial questions as to whether the procedures the majority describes would take place.

For starters, the majority fails to grapple with the fact that the plaintiff borrowers are a certified class, while the arbitration agreements prohibit class and consolidated proceedings, in arbitration or elsewhere. Pet. 5 (class certified); *e.g.*, ER106, ER107 (waiver of class and consolidated proceedings and prohibiting arbitrators from conducting class-wide proceedings). The Supreme Court has made clear that no party can be subjected to class arbitration without their consent. So, because the defendants have not consented to class arbitration, class members here would have to arbitrate the prospective waiver questions individually—despite the existing class certification. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019). The question whether the agreement's class-action ban is enforceable in light of class certification leads to another "who decides" question: The agreement expressly provides that the question whether the class-action waiver applies in an arbitration must be decided by a tribal court—not the arbitrator and not a federal court. ER107. Honoring the contractual intent, then, might require a detour to tribal court.[16]

Assuming that the prospective waiver question must be arbitrated on an individual basis, those arbitration decisions would have no precedential or *res*

[16] The agreement goes on to provide that if the tribal court determines that the ban on class-action arbitration is not enforceable, the result is an individual proceeding in tribal court, not a class-action in federal court. ER107.

judicata effect, and different arbitrators may very well reach differing conclusions about their ability to reach the federal-law prospective waiver question (as the panel did here) and, if so, what the answer is. What would differing arbitration decisions mean for the class's ability to proceed? Can the plaintiff with an arbitral decision finding impermissible prospective waiver return to federal court and proceed with the class action—a class action that would include members who got an arbitral decision requiring individual arbitration of the merits? What rights do absent class members have in this scenario? Would they have to proceed with individual arbitration before proceeding as class members? The majority completely ignores this tangle of questions.

The majority also ignores another important complication. According to the agreement, any post-arbitration court proceedings must take place in *tribal*—not federal—court and may be reviewed only for violations of *tribal*—not federal—law. ER106 (provisions for judicial review of arbitration decisions). So it is not a foregone conclusion, as the majority assumes, that a borrower seeking to vacate an unfavorable prospective-waiver decision by an arbitrator can have that decision judicially reviewed in federal court under federal law. *See* Op. 29.

The majority is adamant on this point, explaining that delegating the prospective waiver question is reasonable and fair because the "worst-case scenario" is that "Borrowers will have the opportunity to object to a court that the arbitrator

exceeded her authority and ask that any award be vacated" under federal-law back-end review. Op. 30 & n.12. But that is incorrect. The worst-case scenario for borrowers subject to illegal waiver of their federal rights is that a tribal—not federal—court reviews the arbitrator's decision only for compliance with tribal—not federal—law. That leaves the borrowers with no way to have the arbitrator's decision reviewed for compliance with the federal-law's prospective waiver doctrine.

If the borrowers were to attempt to have the arbitrator's decision reviewed in federal court, that may lead to additional questions that must be delegated to an arbitrator. If a borrower challenges the enforcement of the tribal-court judicial review provision, under the majority's reasoning, that question would be delegated to the arbitrator, renewing the cycle. Ditto on the question whether parties may agree to a different standard of judicial review of arbitral decisions—here, compliance with tribal law—than federal law provides.

There is no clear answer to either of those questions—whether parties can agree to change the forum or the standard for judicial review of arbitral decisions—under federal law. In *Hall Street*, the Supreme Court held that parties seeking to use the Federal Arbitration Act's streamlined procedures for federal judicial confirmation and review of arbitral awards are limited to the standard for review laid out in the FAA. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008)

(holding that the standard laid out in the FAA for vacating an arbitration award is exclusive when FAA procedures are being invoked). But it also left open the possibility that parties could use agree to different standards of review if they are using a different procedural mechanism. *Id.* at 590 (court "deciding nothing about other avenues for judicial enforcement"). Here, of course, the arbitration agreement purports to lay out an entirely different procedural mechanism: judicial review in tribal court. And, indeed, the Supreme Court has explained that the FAA "allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53-54 (2015). How those principles play out when one party is seeking to use the FAA's procedural mechanisms for review in federal court and the contract prohibits the application of federal law during judicial review is unknown.

In sum, the majority's take on the practical effects of its decision to send the prospective waiver question to the arbitrator—including the presumption the borrowers will have their federal rights protected post-arbitration—ignores contrary provisions in the arbitration agreement and raises more questions than it answers, questions that themselves may need to be sent to an arbitrator or tribal court. The majority's delegation of the prospective waiver question offers no respite for consumers whose federal rights have been taken away.

CONCLUSION

For the reasons stated above and those given in Appellees' Petition, the Petition for Panel Rehearing or Rehearing En Banc should be granted.

November 8, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I certify that on November 8, 2021, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

November 8, 2021

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