No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CASHCALL, INC.; WS FUNDING, LLC; DELBERT SERVICES CORP.; J. PAUL REDDAM,

Applicants,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

APPLICATION TO THE HON. ELENA KAGAN FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), CashCall, Inc., WS Funding, LLC, Delbert Services Corp., and J. Paul Reddam (collectively, "Applicants") hereby move for an extension of time of 30 days, to and including August 22, 2025, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be July 23, 2025.

In support of this request, Applicants state as follows:

1. The United States Court of Appeals for the Ninth Circuit rendered its decision on January 3, 2025, and denied a timely petition for rehearing and filed an amended opinion on April 24, 2025 (Exhibit A). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case concerns the Seventh Amendment right to a jury trial as it applies to suits for legal—as opposed to equitable—restitution.

3. From 2010 to 2013, Applicants operated a consumer lending program that offered unsecured loans to consumers with steady income but low credit ratings. D.Ct.Dkt.319 at 2, 5-6. The program ultimately failed; Applicants incurred a loss of roughly $30 million because many customers did not pay back their loans. D.Ct.Dkt.271 at 10.

4. The CFPB nevertheless sued Applicants in 2013 for allegedly violating federal consumer lending laws. As initially pleaded, the CFPB sought $235 million in what the agency called "equitable" restitution. Dist.Ct.Dkt.217 at 11. That amount obviously exceeded Applicants' (non-existent) profits. So, had this case been filed after *Liu v. SEC*, which held that the equitable monetary remedies are capped at a wrongdoer's profits, 591 U.S. 71, 87 (2020), it should have been clear that the remedy sought was not, in fact, "equitable" restitution, and could only be recovered as *legal* relief after a jury trial. But under the circuit law that governed at the time—which still governs in the Ninth Circuit today—*all* restitution, "whether legal or equitable," is considered "an equitable remedy for Seventh Amendment purposes." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 602 (9th Cir. 2016). Accordingly, the case proceeded to a bench trial in 2017.

5. That bench trial was a mixed bag. The district court found that Applicants had violated federal law, and thus imposed a civil penalty of $10 million. D.Ct.Dkt.319 at 19. But the court further concluded that Applicants had reasonably relied on the advice of counsel in structuring their loan program and had not acted in bad faith, and thus denied the CFPB's request for restitution. D.Ct.Dkt.319 at 16.

6. Both parties appealed. The Ninth Circuit vacated the district court's judgment in May 2022 and remanded for further proceedings. *CFPB v. CashCall, Inc.*, 35 F.4th 734 (9th Cir. 2022).

7. That is when things went truly off the rails. This Court decided *Liu* during the pendency of the (first) appeal. On remand, Applicants cited *Liu* in support of their contention that if the district court were to enter a "legal" restitution award that "exceed[ed]" Applicants' "net profits," it would "necessarily … implicate[] [their] Seventh Amendment rights." D.Ct.Dkt.352 at 7. The CFPB disagreed, and the district court sided with the agency. The court held that, despite *Liu*, the Ninth Circuit's decision in *Commerce Planet* meant that Applicants had no right to a jury trial, regardless of whether the restitution was legal or equitable. *Id.* at 8. The court then proceeded to issue a revised order for $134 million in restitution and $33 million in civil penalties. *Id.* at 11.

8. Applicants appealed a second time, arguing (among other things) that they were entitled to a trial by jury. In January 2025, the panel declined to reach the Seventh Amendment issue, holding that Applicants had waived any right to a jury trial "during the initial district court proceedings" (i.e., back in 2016). Exhibit A at 4, 9. Judge Nelson, in concurrence, opined that *Commerce Planet* was wrongly decided and should be overturned in an "appropriate case," but agreed that Applicants had waived their rights. *Id.* at 19-20. Applicants filed a timely motion for rehearing en banc, which was denied in April 2025. Exhibit B.

9. Applicants intend to file a petition for certiorari demonstrating that the panel erred by declining to overturn *Commerce Planet*, which is irreconcilable with this Court's caselaw and contradicts every other circuit to consider the issue, and by holding that applicants knowingly and intelligently waived their right to trial by jury at a time when assertion of that right was squarely foreclosed by binding precedent.

10. To begin, *Commerce Planet* is incompatible with *Great-West Life & Annuity Insurance Co. v. Knudson*, in which this Court drew a clear distinction between restitution at law and restitution in equity. 534 U.S. 204, 215 (2002). *Commerce Planet* arbitrarily held that this distinction is irrelevant for Seventh Amendment purposes. This holding made no sense at the time, and this Court's later decisions in *Liu* and *Jarkesy* have only accentuated its flaws. *Commerce Planet* diminishes the Seventh Amendment rights of nearly 70 million Americans, and subjects claims for restitution at law to a constitutional double-standard merely because they share a name with claims for restitution in equity. Four other Circuits have implicitly rejected *Commerce Planet*'s Seventh Amendment holding. *See Pereira v. Farace*, 413 F.3d 330, 340-41 (2d Cir. 2005); *United States v. ERR, LLC*, 35 F.4th 405, 414 (5th Cir. 2022); *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994); *Hughes v. Priderock Cap. Partners, LLC*, 812 F.App'x 828, 836 (11th Cir. 2020).

11. The panel avoided confronting *Commerce Planet* by holding that applicants had waived their Seventh Amendment rights all the way back in 2016. But that just replaced one problem with another—and created yet another circuit split. To be effective, a waiver of constitutional rights "must be voluntary [,] …

knowing, intelligent … [and] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). This Court has accordingly counseled lower courts against finding waiver of a constitutional right "when the right or privilege was of doubtful existence at the time of the supposed waiver." *Smith v. Yeager*, 393 U.S. 122, 126 (1968); *see also Loper v. Beto*, 405 U.S. 473, 479 n.6 (1972) (plurality opinion) (waiver was "highly unrealistic" at a time when "under our decisions … there was no known constitutional right to be 'waived'"); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143-45 (1967) (plurality) (no waiver when there was "strong precedent indicating" that constitutional defense was unavailable).

12. In 2016, at the time of Applicants' purported waiver, the CFPB had expressly represented that it was seeking "restitution" as an "equitable remedy" that "would be the Court's remedy to decide." D.Ct.Dkt.217 at 11. Then-recent and binding Ninth Circuit precedent held that "equitable" restitution "could be measured by the 'full amount lost by consumers rather than limiting damages to a defendant's profits.'" *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016). This Court's decision in *Liu*, which counsels otherwise, was nearly four years away. And even if Applicants could have established that the restitution sought by respondents was legal rather than equitable, they still could not have asserted a right to trial by jury under the recent and binding precedent of *Commerce Planet*. *See* 815 F.3d at 602. Finding waiver under these circumstances is incompatible with this Court's precedents and with the caselaw of other circuits, which recognize that waiver is not possible when

assertion of the right would have been futile under binding precedent or would require the litigant to prophesize a reversal of established law. *See, e.g.*, *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135-36 (2d Cir. 2014); *Holland v. Big River Mins. Corp.*, 181 F.3d 597, 605-06 (4th Cir. 1999); *Dillon v. Peters*, 341 F.2d 337, 339-40 (10th Cir. 1965).

13. The panel below reasoned that Applicants' "waiver" was nonetheless effective, first because Applicants were aware all along of the substance of the relief the CFPB was seeking, and second because a party's "oversight," "inadvertence," or "good faith mistake of law" does not vitiate waiver of a constitutional right. Exhibit A at 13. Both arguments miss the point. While Applicants were indeed aware from the beginning that respondent sought restitution in excess of their profits, that fact was not even remotely relevant until *Liu*—and more to the point, it remains irrelevant even today in the Ninth Circuit because *Commerce Planet* is still that circuit's law. Furthermore, Applicants committed no mistake of law: As of the purported waiver in 2016, they *correctly* assessed that binding precedent foreclosed assertion of their Seventh Amendment rights. Waiver is not possible under these circumstances. Allowing the panel's waiver holding to stand would encourage litigants "to engage in futile gestures merely to avoid a claim of waiver," *Ackerberg v. Johnson*, 892 F.2d 1328, 1333 (8th Cir. 1989), and would make constitutional rights the province of those litigants wealthy enough to pursue such wasteful litigation.

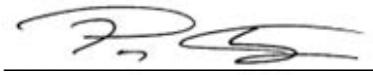
14. Applicants' counsel, Paul Clement, requires additional time to prepare a petition that fully addresses the important issues raised by the decision below in a

manner that will be most helpful to the Court. Mr. Clement has substantial professional obligations between now and July 23, 2025, including replies in support of certiorari in *Monsanto v. Salas*, No. 24-1097 (U.S.), and *Monsanto v. Johnson*, No. 24-1098 (U.S.); an oral argument in *Finesse Wireless LLC v. AT&T Mobility LLC*, No. 24-1039 (Fed. Cir.), to be held on July 10, 2025; and a brief in opposition to the government's motion for a preliminary injunction in *United States v. Russell*, No. 1:25-cv-2029 (D. Md.), due on July 21, 2025. Mr. Clement also has competing deadlines that fall very shortly after July 23, including an oral argument on a motion to dismiss in *Harris v. City of Los Angeles*, No. 5:24-cv-02679 (C.D. Cal.), to be held on July 28, 2025; a response brief in *In re: East Palestine Train Derailment*, No. 25-3342 (6th Cir.), due July 30, 2025; an opening brief in *Hendrix v. J-M Mfg., Inc.*, No. 25-2499 (9th Cir.), due August 1, 2025; and a response brief in *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, No. 25-576 (2d Cir.), due August 4, 2025.

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time to and including August 22, 2025, be granted within which Applicants may file a petition for a writ of certiorari.

Date: July 8, 2025

Respectfully submitted,



Paul D. Clement
Counsel of Record
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Applicants state as follows:

CashCall, Inc., and Delbert Services Corporation certify that they have no parent corporation and no publicly held corporation owns 10% or more of their stock.

WS Funding, LLC, certifies that it is a wholly owned subsidiary of CashCall, Inc., and no publicly held corporation owns 10% or more of its stock.

J. Paul Reddam is an individual.