No. 25-343

In the Supreme Court of the United States

CASHCALL, INC., ET AL., PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived a Seventh Amendment claim by joining a status report that stated that "the parties have agreed to waive their right to a jury and proceed with a bench trial." Pet. App. 8 (brackets omitted).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 135 F.4th 683. A prior opinion of the court of appeals (Pet. App. 52-82) is reported at 35 F.4th 734. The order of the district court (Pet. App. 30-51) is available at 2023 WL 2009938. A prior order of the district court (Pet. App. 83-124) is available at 2018 WL 485963.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2025. On April 24, 2025, the court issued an amended opinion and denied a petition for rehearing (Pet. App. 1-2). On July 11, 2025, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 22, 2025. On August 13, 2025, Justice Kagan further extended the time

to and including September 19, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner CashCall, Inc., is a California corporation that makes unsecured, high-interest loans to consumers. Pet. App. 3. Seeking to avoid state usury laws, it incorporated a lender under the laws of the Cheyenne River Sioux Tribe. *Ibid.* The lender issued loans at interest rates ranging from 89 to 169 percent. *Id.* at 55. The loans included choice-of-law clauses stating that the loans would be governed by tribal law. *Id.* at 3. Petitioner then bought the loans and collected payments from consumers. *Ibid.*

The Consumer Financial Protection Bureau (CFPB or Bureau) believed that petitioner's collection efforts were unlawful because the loans, including the choice-of-law clauses, were invalid under state law, meaning that the loans did not give rise to legally enforceable obligations. Pet. App. 3. In 2013, the Bureau brought a civil enforcement suit in federal district court against petitioner, its chief executive officer, and affiliated companies. *Ibid.* The Bureau alleged that petitioner's lending scheme was an "unfair, deceptive, or abusive act or practice," in violation of 12 U.S.C. 5536(a)(1)(B). Pet. App. 3.

2. The district court granted the Bureau partial summary judgment on liability. Pet. App. 3. At a subsequent hearing, the Bureau stated, based on "discussion with defense counsel," that the parties "would be willing to waive a jury for any further proceedings." *Id.* at 8 (brackets omitted). Petitioner confirmed that it "generally agreed with everything that the Bureau has represented to the Court." *Ibid.* (brackets omitted).

After the district court asked the parties to file a written report setting out their positions, the parties submitted a joint report stating that "the parties have agreed to waive their right to a jury and proceed with a bench trial to determine the appropriate relief, should trial be necessary." *Ibid.* (brackets omitted).

The district court conducted a bench trial and imposed a civil penalty of $10,283,886. Pet. App. 3, 124. The court rejected the CFPB's request for restitution of the total interest and fees paid on the invalid loans. *Id.* at 3.

3. Both parties appealed. Pet. App. 4. While the appeal was pending, this Court issued its decision in *Liu* v. *SEC*, 591 U.S. 71 (2020). The Court in *Liu* explained that equitable practice traditionally "authorized courts to strip wrongdoers of their ill-gotten gains" but "restricted the remedy to an individual wrongdoer's net profits." *Id.* at 79.

Relying on *Liu*, petitioner then argued in the court of appeals that, because the CFPB had sought equitable restitution, any award of restitution had to be limited to petitioner's net profits. Pet. App. 4. Although the Bureau had previously characterized the restitution it sought as equitable, it responded that, "in substance," the remedy it had sought was actually "legal restitution, not equitable restitution." *Ibid.*

The court of appeals affirmed the district court's finding of liability. Pet. App. 4. It vacated the civil penalty and remanded the case to the district court with instructions to impose a higher penalty. *Ibid.* And it vacated the denial of restitution, reasoning that the district court's rationale for denying restitution was flawed. *Ibid.* The court of appeals declined, however, to decide "whether the Bureau had waived a claim to

legal restitution or how, if at all, *Liu* might limit equitable restitution." *Ibid.* (citation omitted). Instead, it left those issues for the district court to resolve on remand. *Ibid.*

4. On remand, petitioner argued that, because the Bureau had previously characterized the relief it sought as equitable restitution, the district court could award only such restitution. Pet. App. 5. Petitioner also stated that an award in excess of net profits is "beyond a court's equitable powers and necessarily then implicates a defendant's Seventh Amendment rights." *Ibid.* But petitioner "did not challenge the validity of the jury-trial waiver that it had made during the initial proceedings before the district court." *Ibid.*

The district court determined that the Bureau could seek legal restitution. Pet. App. 5. It explained that "[w]hether the relief sought by the CFPB qualifies as legal or equitable depends not on the CFPB's characterization, but rather on the nature of the underlying remedies sought." *Id.* at 45. The court stated that the Bureau "has continuously sought, what by its nature is, legal restitution." *Id.* at 44. Because *Liu* "did not purport to limit the scope of legal restitution," the court declined to "limit the restitution in this case to net profits." *Id.* at 47. The court then entered a restitution award of $134,058,600 (along with a revised civil penalty of $33,276,264). *Id.* at 51.

5. The court of appeals affirmed. Pet. App. 1-29.

The court of appeals rejected petitioner's argument that the district court's award of legal restitution after a bench trial violated the Seventh Amendment, holding that petitioner had waived any right it may have had to trial by jury. Pet. App. 7. The court observed that, in a joint status report filed with the district court, the par-

ties had "agreed to waive their right to a jury and proceed with a bench trial." *Id.* at 8. Petitioner had not sought to withdraw that waiver before the bench trial, and it had participated in the trial without objection. *Id.* at 9. The court accordingly found that petitioner had "made an express, knowing, and voluntary waiver of its right to trial by jury." *Id.* at 8.

Petitioner contended that its waiver was invalid because, when petitioner made the waiver, it assumed that the remedy that the Bureau was seeking qualified as equitable rather than legal restitution. Pet. App. 11. In rejecting that contention, the court of appeals explained that the parties had not been "confused about the *substance* of the relief the Bureau was seeking—restitution in the form of the 'total amount of interest and fees paid' by consumers on invalid loans—but" instead had shared a "mistaken understanding of the appropriate characterization of that relief." *Ibid.* The court further observed that, in waiving its Seventh Amendment right, petitioner "may also have made a strategic judgment that, having been found liable for employing deceptive practices to victimize thousands of consumers, it might fare poorly before a jury." *Ibid.*

The court of appeals concluded that petitioner's "waiver was valid even if [petitioner] would not have made it absent the parties' mistaken characterization of the relief the Bureau sought." Pet. App. 11. The court explained that it had "never held that a party's legal error can vitiate its waiver of a jury-trial right, or that a party must demonstrate a correct understanding of the law for its waiver to be effective." *Ibid.* The court also noted that, "even on remand," when the Bureau had made clear that it was seeking legal restitution, petitioner "still did not demand a jury trial." *Id.* at 13.

Judge Ryan Nelson concurred. Pet. App. 19-29. He agreed with the court of appeals that petitioner had "waived any Seventh Amendment right to a jury trial on the [CFPB's] claims for restitution." *Id.* at 19. He stated that, under circuit precedent, "even if [petitioner] had not waived a jury, it still would not have been entitled to one." *Ibid.* Judge Nelson "wr[o]te separately to explain why [that circuit precedent] dilutes the jury trial right, and why, in the appropriate case, [the Ninth Circuit] should reconsider it en banc." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-34) that the district court's award of legal restitution without a jury trial violated the Seventh Amendment, and that petitioner did not validly waive that right. The court of appeals correctly found a valid waiver, and its decision does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. Amend. VII. Like other constitutional rights, however, the Seventh Amendment right may be waived. See *United States* v. *Moore*, 340 U.S. 616, 621 (1951). To be valid, a waiver of a constitutional right must be knowing and voluntary. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

The court of appeals correctly determined that petitioner had "made an express, knowing, and voluntary waiver of its right to trial by jury." Pet. App. 8. At a hearing after the district court had granted it partial summary judgment on liability, the Bureau stated, based on "discussion with defense counsel," that the

parties "would be willing to waive a jury for any further proceedings." *Ibid.* (brackets omitted). Petitioner confirmed that it "generally agreed with everything that the Bureau has represented to the Court." *Ibid.* (brackets omitted). Then, after the court requested a report setting out the parties' positions in writing, the parties submitted a joint report stating that "the parties have agreed to waive their right to a jury and proceed with a bench trial to determine the appropriate relief, should trial be necessary." *Ibid.* (brackets omitted).

"At no point before trial did [petitioner] suggest that it was entitled to a jury trial or seek to withdraw its waiver." Pet. App. 9. "The case proceeded to a bench trial, in which [petitioner] participated without objection." *Ibid.* And after the court of appeals vacated the district court's initial denial of restitution and remanded the case, petitioner "still did not demand a jury trial." *Id.* at 13.

2. Petitioner contends (Pet. 21) that "a litigant cannot validly waive a constitutional right when binding circuit precedent denied the right at the time of the purported waiver." Petitioner claims (Pet. 33) that, under Ninth Circuit precedent, the Seventh Amendment does not guarantee a jury trial on a claim of legal restitution.

That theory for invalidating the express waiver is not properly before this Court. Petitioner argued below only that its waiver was invalid because the waiver had been made "in reliance on the Bureau's statements that the Bureau was seeking equitable restitution." Pet. App. 9; see Pet. C.A. Br. 31-40. The court of appeals therefore addressed only that contention. Petitioner did not raise, and the court did not discuss, petitioner's current theory: that the waiver was invalid because "binding circuit precedent clearly foreclose[d] any ex-

ercise of th[e] right." Pet. i. This Court is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and its ordinary practice precludes certiorari when, as here, the question presented was "not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

The premise of petitioner's new theory—that "binding circuit precedent clearly foreclose[d]" its Seventh Amendment argument, Pet. i—is also debatable. As petitioner observes (Pet. 5), the Ninth Circuit held in *FTC* v. *Commerce Planet, Inc.*, 815 F.3d 593 (2016), cert. denied 580 U.S. 1048 (2017), that a restitution award under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), is "an equitable one for Seventh Amendment purposes and thus confers no right to a jury trial." 815 F.3d at 602. Petitioner argued below that "*Commerce Planet* does not apply outside of its specific statutory context." Pet. App. 7. Petitioner stated, for example, that "[n]othing in *Commerce Planet* * * * justifies denying a jury-trial right [here]"; that the denial of a jury trial in this case rested on "a misreading of * * * *Commerce Planet*"; and that "*Commerce Planet* is plainly distinguishable." Pet. C.A. Br. 2, 18, 27. The Bureau disagreed with petitioner's reading of *Commerce Planet*, but the Ninth Circuit concluded that it "need not resolve that debate" because petitioner had waived any Seventh Amendment right to trial by jury that it may have had. Pet. App. 7. Petitioner's assertion (Pet. 2) that circuit precedent "plainly foreclosed" a Seventh Amendment claim therefore is both open to question and inconsistent with petitioner's own previous arguments.

Regardless of whether circuit precedent foreclosed the Seventh Amendment claim, petitioner's express

waiver of that claim was valid. To be valid, a waiver of a constitutional right need only be knowing and voluntary, see *Brady*, 397 U.S. at 748; it does not matter whether an assertion of the right would have succeeded under circuit precedent. Petitioner's contrary rule would produce absurd results. For example, suppose that a party states: "Under circuit precedent, I have no right to a jury trial in this case. Although that circuit precedent may be overruled by the en banc court or the Supreme Court, I nonetheless waive any right I have to a jury trial because I prefer a bench trial." On petitioner's view, such a waiver would be invalid. Petitioner identifies no logical reason to reach such a result.

Even apart from the general principle that legal rights (including constitutional rights) are presumptively waivable, see, *e.g.*, *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995), there are good reasons to enforce Seventh Amendment waivers. A litigant who understands that he has a constitutional right to jury trial may believe that, in the particular circumstances of his case, the trial court will be a more favorable adjudicator. As the court below explained, petitioner may "have made a strategic judgment that, having been found liable for employing deceptive practices to victimize thousands of consumers, it might fare poorly before a jury." Pet. App. 11. Now that petitioner is dissatisfied with the scope of the monetary relief that the district court ultimately awarded, a refusal to enforce the waiver would effectively give petitioner a second bite at the apple.

3. Petitioner argues (Pet. 26-31) that the courts of appeals disagree about whether a party may waive a claim that is foreclosed by circuit precedent. No such

conflict exists. Petitioner's contrary contention rests on a conflation of waiver and forfeiture.

"Waiver is different from forfeiture." *United States* v. *Olano*, 507 U.S. 725, 733 (1993). "[F]orfeiture is the failure to make the timely assertion of a right." *Ibid.* Waiver, by contrast, is the "intentional relinquishment or abandonment of a known right." *Ibid.* (citation omitted).

Petitioner's cited decisions (Pet. 27) address forfeiture —*i.e.*, a failure to raise an issue—rather than waiver in the strict sense of the term. In those cases, courts stated that they would "excuse a party for failing to raise" an objection if the objection was foreclosed by "binding precedent." *Bennett* v. *City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004); see *Hawknet Ltd.* v. *Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) ("fail[ure] to raise"); *United States* v. *Chittenden*, 896 F.3d 633, 639 (4th Cir. 2018) ("failure to raise") (citation omitted); *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997) ("failure to raise"); *Ackerberg* v. *Johnson*, 892 F.2d 1328, 1333 (8th Cir. 1989) (failure "to file motions they knew to be futile"); *Gray* v. *Phillips Petroleum Co.*, 971 F.2d 591, 592 n.3 (10th Cir. 1992) ("an issue to which a party did not object below"); *Chatman-Bey* v. *Thornburgh*, 864 F.2d 804, 813 n.9 (D.C. Cir. 1988) (en banc) ("failure to assert the defense"); *Forshey* v. *Principi*, 284 F.3d 1335, 1356 (Fed. Cir.) (en banc) ("issue not decided or raised below"), cert. denied 537 U.S. 823 (2002). Those decisions reflect the view that requiring parties to preserve objections that are foreclosed by circuit precedent would needlessly encourage parties to file "futile" motions. *Rogers*, 118 F.3d at 471.

This case, however, involves waiver—*i.e.*, the intentional and explicit disavowal of a right. Petitioner did

not simply fail to assert the right to trial by jury at the right time. Petitioner affirmatively joined a report stating that "the parties have agreed to waive their right to a jury." Pet. App. 8 (brackets omitted). Petitioner cites no case in which a court has declined to enforce such a waiver on the ground that circuit precedent foreclosed the waived claim. And the rationale for excusing the failure to raise a foreclosed claim—*i.e.*, that enforcing a forfeiture in such circumstances would encourage futile motions—does not apply when a party affirmatively states that it is waiving a right.

For purposes of determining whether any circuit conflict exists, it makes no difference that some of petitioner's cited decisions use the term "waiver" rather than "forfeiture" to refer to the failure to raise a claim. See, *e.g.*, *Hawknet*, 590 F.3d at 92 ("waive this objection by failing to raise it"). Courts, unfortunately, often use the term "waiver" when, strictly speaking, they mean "forfeiture." See *Freytag* v. *Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment). The crucial point, though, is that this case involves the express affirmative abandonment of a right, while the decisions on which petitioner relies involved the mere failure to assert a right.

Regardless, the purported conflict does not warrant this Court's review. As Justice Kagan explained in a case where the Court declined to resolve a circuit conflict about issue preservation, "courts of appeals have wide discretion to adopt and apply 'procedural rules governing the management of litigation.'" *Joseph* v. *United States*, 574 U.S. 1038, 1038 (2014) (statement of Kagan, J., respecting the denial of certiorari) (citation omitted). This Court "do[es] not often review the circuit courts' procedural rules." *Id.* at 1040.

Finally, this case would be an unsuitable vehicle for resolving any circuit conflict. As discussed above, the theory that petitioner raises here was neither pressed nor passed upon below. To the contrary, petitioner argued below that the Ninth Circuit's prior decision in *Commerce Planet* was distinguishable. See p. 8, *supra*. And it is debatable whether, as petitioner now contends (Pet. i), circuit precedent in fact clearly foreclosed its Seventh Amendment claim. See p. 8, *supra*.

4. Petitioner separately argues (Pet. 14-20) that the Seventh Amendment entitled it to a jury trial on the restitution claim here. But that issue is neither properly before this Court nor relevant to the proper resolution of this case. Petitioner waived its Seventh Amendment rights, see pp. 6-7, *supra*, and the court of appeals' decision rested solely on the waiver. The court stated that "[t]he parties debate whether this case involves legal remedies that are within the scope of the Seventh Amendment guarantee." Pet. App. 7. The court concluded, however, that it "need not resolve that debate here. Instead, assuming without deciding that [petitioner] had a Seventh Amendment right to a jury trial, we conclude that it waived that right." *Ibid.*

Petitioner therefore is wrong in asserting (Pet. 33) that this case is an "ideal" vehicle for resolving the underlying Seventh Amendment issue. Resolving that issue would require the Court (1) to entertain a theory for invalidating petitioner's waiver that was not pressed or passed upon below; (2) to accept that theory and hold that the waiver was invalid; and (3) to decide the merits of the Seventh Amendment challenge in the first instance, even though neither of the courts below resolved

it, and even though the point of the waiver was to obviate the need for judicial resolution of that question.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2026

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* In *FCC* v. *AT&T, Inc.*, cert. granted, No. 25-406 (Jan. 9, 2026), and *Verizon Communications Inc.* v. *FCC*, cert. granted, No. 25-567 (Jan. 9, 2026), this Court recently granted certiorari to resolve a different Seventh Amendment issue. Those cases present the question whether a statutory scheme under which an agency may initially assess a civil penalty, but the person against whom the penalty is assessed may obtain a de novo jury trial when the agency sues to collect, satisfies the Seventh Amendment. See Pet. at I, *AT&T*, *supra* (No. 25-406); Gov't Br. at I, *Verizon*, *supra* (No. 25-567). The Court need not hold the petition for a writ of certiorari in this case pending the resolution of *AT&T* and *Verizon*, since resolution of the question presented in those cases will have no bearing on the enforceability of petitioner's express waiver of its Seventh Amendment rights here.