No. 23-55259

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California,
No. 2:15-cv-07522-JFW-RAO

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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RULE 40(b)(2) STATEMENT

In *FTC v. Commerce Planet, Inc.*, this Court held that claims for restitution "confer[] no right to a jury trial," no matter whether they are "legal" or "equitable." 815 F.3d 593, 602 (9th Cir. 2016). The district court here relied on *Commerce Planet* to hold that a $134-million award of "legal" restitution did not trigger the jury-trial right. As Judge Nelson's concurrence explains, this Court "should reconsider [*Commerce Planet*] en banc" because it conflicts with Supreme Court caselaw and creates a split with the Fifth Circuit. Op.19-28 (Nelson, J., concurring).

The panel attempted to sidestep *Commerce Planet* by holding that Appellants "waived" their right to a jury trial "during the initial district court proceedings." Op.4. But, under this Court's then-existing precedents, there was nothing for Appellants to waive. CFPB had expressly requested "equitable" restitution, and binding precedent foreclosed any argument that CFPB's request was actually legal in nature or subject to the Seventh Amendment. The panel's waiver finding thus contravenes decisions from the Supreme Court, this Court, and multiple other courts of appeals holding that there can be no waiver of a *known* right if assertion of the right "would have been futile under binding precedent" at the time of the purported waiver. *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1119 (9th Cir. 2022); *see, e.g.*, *Smith v. Yeager*, 393 U.S. 122, 125-26 (1968) (per curiam).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, 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.

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INTRODUCTION

In 2016, CFPB sought over $200 million in "equitable" restitution stemming from an allegedly misleading lending program through which Appellants *lost* about $30 million because many borrowers paid back far less than what they received. After an intervening Supreme Court decision, *Liu v. SEC*, 591 U.S. 71 (2020), held that equitable monetary relief cannot exceed net profits and thus would produce no award in the loss-incurring-circumstances here, CFPB reframed its request as one for "legal" restitution. Appellants protested that *legal* restitution implicates the Seventh Amendment right to a jury trial. "[B]ound" by this Court's decision in *Commerce Planet*, 815 F.3d 593 (9th Cir. 2016), however, the district court concluded that it could award $134 million in "legal" restitution without "trigger[ing]" the Seventh Amendment. *CFPB v. CashCall, Inc.*, 2023 WL 2009938, at *7 (C.D. Cal. Feb. 10, 2023). As Judge Nelson wrote separately to explain, *Commerce Planet* defies Supreme Court precedent, conflicts with the Fifth Circuit, and should be overruled by "the en banc court." Op.28.

The panel majority effectively assumed that *Commerce Planet* is no longer good law but nevertheless affirmed the eye-popping restitution award on the ground that Appellants "waived" their Seventh Amendment rights all the way back in 2016—just months after *Commerce Planet*, years before *Liu*, and when CFPB was still explicitly seeking *equitable* restitution. Op.4. While that holding avoids

directly confronting *Commerce Planet*, it is no less problematic—and no less worthy of the full Court's attention. In fact, that waiver-of-a-foreclosed/futile-claim holding conflicts with precedent from the Supreme Court, this Court, and many others.

It is well settled that a party cannot validly waive a constitutional right unless it actually *possesses* that right and has "*knowledge of its existence*." *United States v. King Features Ent., Inc.,* 843 F.2d 394, 399 (9th Cir. 1988) (emphasis added). It is likewise settled that a party lacks the requisite *knowledge* of a right when "binding precedent" foreclosed any assertion of the right at the time of the purported waiver. *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1119 (9th Cir. 2022). That rule plainly governs (and forecloses a waiver finding) here: As of 2016, this Court's precedents allowed federal agencies to obtain "equitable" restitution in amounts exceeding "net profits," *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016), and held that *neither* legal nor equitable restitution "confers" a "right to a jury trial," *Commerce Planet*, 815 F.3d at 602. Not until 2020, when the Supreme Court decided *Liu*, was there any basis in this Circuit to assert a Seventh Amendment objection to CFPB's $235-million request for "restitution." Accordingly, Appellants were in no position to intentionally relinquish "a *known* right" to a jury trial in 2016. *See King Features*, 843 F.2d at 399 (emphasis added). And because there was no valid waiver of Seventh Amendment rights, *this* is "the appropriate case" for this Court to "reconsider [*Commerce Planet*] en banc." Op.20 (Nelson, J., concurring.).

STATEMENT OF ISSUES

1. Whether this Court should overrule *Commerce Planet*, which held that claims for "legal" restitution "confer[] no right to a jury trial." 815 F.3d at 602.

2. Whether the panel erred in holding that Appellants knowingly "waived" their jury-trial right by consenting to a bench trial at a time when assertion of that right would have been futile under binding precedent.

BACKGROUND

A. Factual Background

In 2009, CashCall established the loan program at issue here through a partnership with a Native American-owned business called Western Sky Financial, LLC. 2-ER-136-37. Western Sky agreed to originate loans from a Sioux reservation, and CashCall purchased and serviced the loans. Appellants relied on specific legal advice that "the loans would be made under the laws of the tribe and would not have to comply with licensing and usury laws in states where borrowers resided." *CFPB v. CashCall, Inc.*, 2018 WL 485963, at *3 (C.D. Cal. Jan. 19, 2018); *see id.* at *10 (Appellants were repeatedly advised "that the Tribal Lending Model was defensible" and "the Choice of Law provision" was "enforceable").

In 2010, the Western Sky program kicked off. It offered loans ranging from $700 to $10,000 geared toward borrowers with steady income but relatively low credit ratings and limited or no access to traditional sources of credit. *Id.* at *1-2, *5. The loans were unsecured and charged only simple interest; there were no

prepayment penalties; and borrowers were encouraged to repay their loans early. *Id.* at *5-6.

The program was short-lived and unprofitable. Although the loans carried high interest rates (to balance the anticipated high number of defaults), the default rate exceeded expectations; approximately one-tenth of borrowers never made a single repayment of principal. 3-ER-340. All told, CashCall lost nearly $30 million on the program. 3-ER-433.

B. Procedural History

1. On December 16, 2013, rather than leave the enforcement of state law to the states, CFPB initiated this federal enforcement action on the theory that Western Sky loans to consumers in 16 states were "unfair, deceptive, or abusive" within the meaning of the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. §5536(a)(1)(B), because they (allegedly) violated state laws. 4-ER-505-13, 532. In August 2016, the district court awarded CFPB partial summary judgment as to liability. *CFPB v. CashCall, Inc.*, 2016 WL 4820635, at *9-11 & n.8 (C.D. Cal. Aug. 31, 2016). The district court imposed individual liability on Appellant Paul J. Reddam because he owned and led CashCall and the other relevant entities. *Id.* at *11-12.

On September 7, 2016, the district court held a pretrial hearing, during which it asked what remedies CFPB was seeking and whether they conferred a "right to a

jury trial." 3-ER-456. Among other things, counsel stated that CFPB intended to "seek restitution of interest and fees," describing this as "an equitable remedy" that "would be the Court's … to decide." Op.9. Relying on these representations (and the extant state of Ninth Circuit law), Appellants agreed to "proceed with a bench trial." Op.10.

The district court denied CFPB's request for equitable restitution. It reasoned that restitution was not "appropriate" because Appellants reasonably relied on the advice of counsel in structuring the program and did not "act[] in bad faith, resort[] to trickery or deception," or commit "fraud." *CashCall*, 2018 WL 485963, at *13. Alternatively, the court held that CFPB failed to prove that the $235-million sum it requested reasonably approximated CashCall's unjust gains. *Id.* at *13-14. The court denied CFPB's request for injunctive relief but imposed a civil penalty of $10.28 million. *Id.* at *16.

2. Both sides appealed. The panel vacated the district court's denial of restitution because it rested on legally irrelevant considerations; ordered a heightened civil penalty; and remanded for further proceedings. *CFPB v. CashCall, Inc.*, 35 F.4th 734, 749-51 (9th Cir. 2022). The panel declined to consider "whether [CFPB] … waived a claim to legal restitution or how, if at all, *Liu* might limit equitable restitution," leaving those issues for the district court. *Id.* at 750.

3. On remand, the parties joined issue over whether, post-*Liu*, CFPB could reframe its request for monetary relief as "legal" rather than equitable. *See, e.g.*, 2-ER-131-32, 2-ER-123-24, 2-ER-77-83, 2-ER-61-64, 2-ER-47-49, 2-ER-32-35. Appellants argued that if the district court were to enter a "legal" restitution award that "exceed[ed]" Appellants' "net profits," it would "necessarily … implicate[] [their] Seventh Amendment rights." 2-ER-83. The district court rejected that argument, deeming itself "bound" by *Commerce Planet*'s holding that "an action seeking restitution (whether characterized as legal or equitable) does not trigger the right to a jury trial." *CashCall*, 2023 WL 2009938, at *7. The court proceeded to order $134 million in "legal" restitution and impose a $33.28-million civil penalty. *Id.* at *9. Because the entity defendants have few remaining assets, Mr. Reddam—whom the district court found reasonably relied on the advice of counsel and did not "act[] in bad faith, resort[] to trickery or deception," or commit "fraud," *CashCall*, 2018 WL 485963, at *13—is likely on the hook for the bulk of this $167-million judgment.

C. The Panel Decision

Appellants appealed the restitution award but not the civil penalty. At oral argument, Judge Nelson aptly described the $134-million restitution award—for a program netting a $30-million *loss*—as "shocking." Oral.Arg.Audio 17:35-37. He explained: "When we decided this case two years ago, I never in a million years

would have thought that this would come back with a $134 million restitution award." Oral.Arg.Audio 17:25-35.

Even more "shocking," the panel affirmed. The panel did not squarely embrace the district court's holding that, under *Commerce Planet*, CFPB's claim for "legal" restitution did not trigger the Seventh Amendment. It instead "assum[ed]"—*contra Commerce Planet*—"that [Appellants] had a Seventh Amendment right to a jury trial," but held that they "waived that right during the initial district court proceedings." Op.4, 9. Judge Nelson wrote a concurring opinion "to explain why *Commerce Planet* dilutes the jury trial right, and why, in the appropriate case, [the Court] should reconsider it en banc." Op.19-20.

ARGUMENT

I. The En Banc Court Should Reconsider *Commerce Planet*'s Holding That Claims For Legal Restitution Do Not Implicate The Seventh Amendment.

Under *Commerce Planet*, "no form of restitution triggers the right to a jury trial." Op.9. "[B]ound" by that precedent, the district court held that Appellants were not "entitled to a jury trial," "regardless of whether CFPB … sought legal or equitable restitution." *CashCall*, 2023 WL 2009938, at *7. As Judge Nelson has cogently explained, however, *Commerce Planet* is "wrong"—indeed, indefensible after *Liu*—and this Court "should reconsider it en banc." Op.19-20 (Nelson, J., concurring).

1. The Seventh Amendment guarantees "the right of trial by jury" in "Suits at common law." U.S. Const. amend. VII. Given the great importance that the founding generation attached to this right, *see, e.g.*, The Declaration of Independence para.20 (U.S. 1776), "every encroachment upon it has been watched with great jealousy," and it is long settled that the right is not limited to common-law claims, but extends to statutory claims that are legal (as opposed to equitable) in nature. *SEC v. Jarkesy*, 603 U.S. 109, 122 (2024).

During the 1980s and 1990s, a handful of Supreme Court decisions characterized restitution as an equitable remedy. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993); *Teamsters v. Terry*, 494 U.S. 558, 570 (1990); *Tull v. United States*, 481 U.S. 412, 424 (1987). Upon closer scrutiny, however, the Supreme Court concluded that restitution has historically been "available in certain cases at law, and in certain others in equity." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002). The Court further explained that whether a claim for restitution "is legal or equitable depends on 'the basis for the plaintiff's claim' and the nature of the underlying remedies sought." *Id.* at 213 (brackets omitted).

As Judge Nelson's concurrence explains, although it was decided years after *Great-West*, *Commerce Planet* failed to "grapple with the difference between legal and equitable restitution." Op.23. It instead "asserted that the [Supreme] Court has labeled *all* restitution as equitable relief that necessarily falls outside the Seventh

Amendment's scope." Op.23 (citing *Commerce Planet*, 815 F.3d at 602). While that may have been true of the Supreme Court's pre-*Great-West* caselaw, it "simply ignores" *Great-West*'s express rejection of the notion "'that *all* forms of restitution are equitable.'" Op.24 (quoting *Great-W.*, 534 U.S. at 218 n.4). It also ignores that *Great-West*'s test for whether a given claim for restitution is legal or equitable mirrors the test for whether the Seventh Amendment applies. Op.22-23. Simply put, "*Commerce Planet* was wrong the day it was decided," Op.19, as it "bucks the Supreme Court's decision in *Great-West*," Op.25.

2. More recent Supreme Court decisions make *Commerce Planet* not just wrong, but indefensible. In *Liu*, the Court vacated a decision from this Circuit that had "ordered disgorgement equal to the full amount" that two fraudsters "had raised from investors," without deducting the fraudsters' business expenses. 591 U.S. at 78. In reaching that conclusion, the Court emphasized that equitable monetary remedies must be limited to a defendant's "net profits … after deducting legitimate expenses." *Id.* at 84. And as the panel here recognized, "*Liu*'s reasoning … appli[es] to all categories of equitable relief, including restitution." Op.11 (quoting *CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 710 (7th Cir. 2021)). *Liu* thus underscores that *Commerce Planet* was wrong to "treat[] legal and equitable restitution the same." Op.26 (Nelson, J., concurring). Equitable restitution is limited

to net profits and may be awarded without a jury; legal restitution may exceed net profits, but it triggers the constitutional right to a jury trial.

"The Supreme Court's recent decision in *Jarkesy* is even more instructive." Op.26. *Jarkesy* reaffirmed that the nature of "the remedy [i]s the 'more important' consideration" in determining the availability of the jury-trial right and found it "all but dispositive" that the federal government was seeking a "prototypical common law remedy." 603 U.S. at 123. As Judge Nelson explained, "[l]egal restitution, like [the remedy in *Jarkesy*], is a 'prototypical common law remedy.'" Op.26 (Nelson, J., concurring). Consequently, *Jarkesy* "'effectively decides' the Seventh Amendment question" in Appellants' favor. Op.27.

3. En banc reconsideration is warranted not only because *Commerce Planet* is "wrong," Op.19, but also because it puts this Court "at odds with the Fifth Circuit," Op.27. In *United States v. ERR, LLC*, the government brought a statutory claim under the Oil Pollution Act, seeking "restitution" of the amount it paid a third party for oil-spill remediation, along with "administrative-adjudication costs, attorney's fees, and interest." 35 F.4th 405, 407-09 (5th Cir. 2022). In assessing whether the claim triggered the Seventh Amendment, the Fifth Circuit "expressly rejected the argument—so central to *Commerce Planet*—that 'restitution *always* sounds in equity.'" Op.27 (Nelson, J., concurring). The Fifth Circuit concluded that the

government's restitution claim "sound[ed] in law and hence trigger[ed] [the] Seventh Amendment right to a jury." *ERR*, 35 F.4th at 414.

Here, CFPB openly conceded that the $134-million award it obtained on remand is "inherently legal." 2-ER-61. And CFPB could hardly have done otherwise: The award far exceeds Appellants' (non-existent) net profits from the Western Sky program and so, under *Liu*, it is "properly characterized as legal." Op.12. Under *Commerce Planet*, however, a government agency seeking hundreds of millions of dollars in monetary relief may evade *both* the longstanding restrictions on federal courts' equitable powers (e.g., the limitation to net profits) *and* the protections of the Seventh Amendment simply by labeling a monetary award as "restitution." *See* Op.19-20 (Nelson, J., concurring); *CashCall*, 2023 WL 2009938, at *7. That defies the Supreme Court's caselaw and conflicts with the Fifth Circuit's decision in *ERR*. This Court should grant rehearing en banc to bring its caselaw in line with Supreme Court precedent and eliminate this glaring circuit split.

II. The Panel's Holding That Appellants Waived Their Seventh Amendment Rights Is No Obstacle To Rehearing And Itself Justifies Rehearing.

Although the district court's decision rested on *Commerce Planet*'s dubious Seventh Amendment holding, the panel attempted to sidestep that issue on the theory that Appellants "waived [the jury-trial] right during the initial district court proceedings," Op.4. But the panel's attempt to avoid resolving one conflict with Supreme Court precedent succeeded only in creating another one—and violating

Ninth Circuit precedent to boot. In holding that Appellants waived their right to a jury trial, the panel overlooked the well-established principle that a party cannot validly waive a constitutional right unless it *possesses* that right and has *"knowledge of its existence*" at the time of the purported waiver. *King Features*, 843 F.2d at 399 (emphasis added); *accord* 31 C.J.S. *Estoppel and Waiver* §95 (Dec. 2024 Update) ("[O]ne cannot knowingly waive rights if one does not realize that they exist[.]"). Appellants' acquiescence in a bench trial did not constitute the "intentional relinquishment of a *known* right," *King Features*, 843 F.2d at 399 (emphasis added), because this Court's precedents squarely foreclosed any jury-trial right at the time. The panel's contrary holding warrants reconsideration.

1. The Supreme Court has explicitly cautioned 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) (per curiam). In *Smith*, for example, the Court held that a habeas petitioner did not "relinquish[] a known right" by expressly withdrawing a request for an evidentiary hearing because it was "doubtful whether [he] could have obtained an evidentiary hearing as the law stood in 1961." *Id.* at 125-26. The Court thus permitted the petitioner to reassert his request after an intervening decision "substantially increased the availability of evidentiary hearings in habeas corpus proceedings." *Id.* Similarly, in *Curtis Publishing Co. v. Butts*, the Court held that a publisher did not "waive[] a 'known

right'" by failing to raise a First Amendment defense to a libel claim at a time when "there was strong precedent indicating that civil libel actions were immune from general constitutional scrutiny." 388 U.S. 130, 143-45 (1967) (plurality op.); *accord id.* at 172 n.1 (Brennan, J., concurring in relevant part). Six Justices agreed that the publisher could not reasonably have been expected to understand the scope of his First Amendment rights until the Court's intervening decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

This Court and its sister circuits have repeatedly reaffirmed that "a defendant cannot be deemed to waive" a constitutional right "if the defendant reasonably did not know the [right] was available at the time of the purported waiver." *Wakefield*, 51 F.4th at 1119; *see, e.g.*, *Holland v. Big River Mins. Corp.*, 181 F.3d 597, 605-06 (4th Cir. 1999); *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 692-93 (6th Cir. 1981). Important here, this rule applies where assertion of the right "would have been futile under binding precedent." *Wakefield*, 51 F.4th at 1119 (citing *Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004)); *see also Gucci Am., Inc. v. Li*, 768 F.3d 122, 135-36 (2d Cir. 2014) (similar). That makes sense: No valid purpose would be served by "requir[ing] a litigant to engage in futile gestures merely to avoid a claim of waiver." *Ackerberg v. Johnson*, 892 F.2d 1328, 1333 (8th Cir. 1989). The rule that waiver requires intentional relinquishment of a *known* right thus "protects those who, despite due diligence, fail to prophesy a reversal of established adverse

precedent." *Wakefield*, 51 F.4th at 1119 (brackets omitted) (quoting *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007)).

2. The panel's finding of waiver cannot be squared with these precedents. On September 7, 2016—just six months after this Court decided *Commerce Planet*—CFPB stated its intent to seek "restitution of interest and fees," expressly describing this as an "equitable remedy" for "the Court[] … to decide." Op.9. In light of *Commerce Planet*, Appellants had no viable option but to agree to a bench trial, as any invocation of the Seventh Amendment "would have been futile under binding precedent," and thus Appellants could not reasonably have "know[n]" that the jury-trial right "was available." *Wakefield*, 51 F.4th at 1119. Appellants therefore "could not have intentionally relinquished or abandoned" that right in September 2016, because this Court's "own precedent flatly denied [it to them] at the time." *United States v. Higdon*, 418 F.3d 1136, 1152 (11th Cir. 2005) (Barkett, J., dissenting from denial of rehearing en banc); *accord Ackerberg*, 892 F.2d at 1333 ("[W]e cannot find waiver, the voluntary relinquishment of a known right, in a situation in which no right existed.").

The panel's contrary conclusion thus not only defies the rule that "courts should indulge every reasonable presumption against waiver" of the "fundamental right" to a jury trial, *Solis v. County of Los Angeles*, 514 F.3d 946, 953 (9th Cir. 2008), but also conflicts with settled caselaw that a defendant cannot waive a

constitutional right—even by an express relinquishment—at a time when binding precedent foreclosed the exercise of that right. *See, e.g.*, *Smith*, 393 U.S. at 125-26. Those conflicts amply warrant reconsideration.

To be sure, the panel emphasized that Appellants were "aware all along" that CFPB sought damages far in excess of Appellants' net profits. Op.13. But that fact was not even remotely relevant until the Supreme Court decided *Liu* four years later.[1] And it (erroneously) remains irrelevant to this very day thanks to *Commerce Planet*. Thus, the fact that the government was seeking "equitable" restitution in excess of net profits in a bench trial, as Circuit precedent expressly allowed, hardly put Appellants on notice that they needed to raise or waive a Seventh Amendment right that unambiguously did not exist in this Circuit at the time.

Indeed, the panel's own discussion confirms its error. The panel frankly acknowledged that Appellants' "mistake[]" was "understandable." Op.12. But if that is the case (and it is), then Appellants "cannot be deemed to [have] waive[d]" the jury-trial right, given that they "reasonably did not know [it] was available at the

[1] CFPB's express "equitable" label affirmatively steered Appellants away from raising Seventh Amendment concerns and was consistent with pre-*Liu* Circuit precedent that "equitable" restitution is *not* "limit[ed] … to a defendant's profits." *Gordon*, 819 F.3d at 1195.

time of the purported waiver." *Wakefield*, 51 F.4th at 1119. Under this Court's precedents, then, Appellants' September 2016 "waiver" was invalid.[2]

All that is reason enough for rehearing, but there is more. During the prior appeal, the Supreme Court altered the state of the law: Overruling a decision from this Court, *Liu* held that equitable monetary remedies must be limited to a defendant's "net profits … after deducting legitimate expenses." 591 U.S. at 84. Appellants, like any other litigants, get the benefit of intervening Supreme Court decisions handed down during the pendency of their appeal, and they immediately pointed out that *Liu* created a problem for CFPB because it had requested "'restitution' as a form of *equitable* relief," which, under *Liu*, "must be limited to … 'net profits.'" No.18-55407, Dkt.74 at 15-16; *accord* Op.11. When CFPB responded (on remand) that the restitution it sought was actually "legal in nature," 2-ER-124, Appellants immediately invoked their "Seventh Amendment rights," 2-ER-83. It is little wonder, then, that the district court did not find that Appellants had waived their jury-trial right (either in 2016 or post-*Liu*); it instead concluded that *Commerce Planet* foreclosed their Seventh Amendment argument on the merits. *See CashCall*, 2023 WL 2009938, at *7.

[2] None of the cases on which the panel relied was on point; they involve "oversight," "inadvertence," or "a good faith mistake of law," Op.13, rather than a situation where binding precedent *foreclosed* the assertion of a constitutional right.

The panel, by contrast, erred in suggesting that Appellants "did not … object to participating in the second bench trial" after this Court remanded for the district court to consider the import of *Liu*. Op.14. There *was no* "second bench trial"; in fact, the district court did not "reopen the record on remand." 2-ER-46. The parties instead presented legal argument about whether, post-*Liu*, CFPB could obtain the huge sum it sought by reframing its request as "legal" in nature. *See supra* p.6. And Appellants expressly argued that if the district court were to enter a "legal" restitution award that "exceed[ed]" their "net profits," then it would "necessarily … implicate [their] Seventh Amendment rights." 2-ER-83. It may be that even those post-*Liu* Seventh Amendment objections were futile under *Commerce Planet* and therefore not strictly necessary, but Appellants raised those objections nonetheless as soon as *Liu* made clear that *Commerce Planet*'s days were numbered and any claim for restitution in excess of net profits—however labeled—implicated the Seventh Amendment. In sum, the panel's finding of a September 2016 waiver is neither an excuse for not correcting *Commerce Planet* nor consistent with Supreme Court or Circuit precedent. This case plainly warrants reconsideration.

CONCLUSION

The Court should grant rehearing en banc or, at a minimum, panel rehearing.

Respectfully submitted,

s/Paul D. Clement

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March 3, 2025

CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Circuit R. 40-1(b) because it contains 4,198 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

March 3, 2025

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Paul D. Clement