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Supreme Court of California
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S270798

IN THE
SUPREME COURT OF CALIFORNIA

LAW FINANCE GROUP, LLC,
Petitioner,
vs.
SARAH PLOTT KEY,
Respondent.

KP LAW,
Real Parties In Interest.

After a Published Decision by the Court of Appeal,
Second Appellate District, Division Two, Case No. B305790
From an Order Vacating an Arbitration Award
Los Angeles County Superior Court, Case No. 19STCP04251
Honorable Rafael A. Ongkeko

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE KP LAW, DA VEGA FISHER MECHTENBERG, PARRIS LAW FIRM, JLG LAWYERS, JOSEPH A. KAUFMAN & ASSOCIATES & EQUITY LEGAL GROUP IN SUPPORT OF SARAH PLOTT KEY

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE KP LAW, DA VEGA FISHER MECHTENBERG, PARRIS LAW FIRM, JLG LAWYERS, JOSEPH A. KAUFMAN & ASSOCIATES & EQUITY LEGAL GROUP IN SUPPORT OF SARAH PLOTT KEY

KP Law, Da Vega Fisher Mechtenberg, Parris Law Firm, JLG Lawyers, Joseph A. Kaufman & Associates, and Equity Legal Group (collectively "Amici") respectfully apply for leave to file the accompanying amicus curiae brief in support of Petitioner Sarah Plott Key, pursuant to rule 8.520(f) of the California Rules of Court. Amici are familiar with the content of the parties' briefs.

Amici regularly represent consumers and employees in individual and class action suits and have an interest in ensuring that consumers and employees are treated fairly and are not subjected to unfair arbitration procedures and loan agreements, in particular agreements that impose onerous and unfair provisions that violate California law and public policy. Amici believe that this case involves a highly adhesive arbitration agreement that Respondent Law Finance Group exploited to impose liability upon Petitioner Sarah Plott Key on the basis of an illegal loan agreement that violated the Financing Law and public policy. Amici represent consumers who often are subjected to similar adhesive arbitration agreements and unfair loan contracts, by corporate defendants who take advantage of their greater bargaining power. Through their representation of clients in litigation, Amici are familiar with the law governing arbitration as well as legal protections in various areas of law the Legislature has made clear cannot be waived.

Amici believe their views will assist the Court in resolving this case by addressing the ramifications of the Court of Appeal's Opinion with respect to the enforcement of illegal contracts through the arbitration process.

Amici have no interest in or connection with any of the parties in this case. No party or counsel for a party has participated in the drafting of the proposed amici curiae brief in whole or in part. No party or counsel for a party has made any monetary contribution to fund the preparation or submission of

the brief. Amici have authored the brief on their own behalf in order to present their views on the issues before the Court with the desire to assist the Court in its consideration of those issues.

DATED: May 31, 2022 Respectfully submitted,

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BRIEF OF AMICUS CURIAE
IN SUPPORT OF SARAH PLOTT KEY

I.

INTRODUCTION

There is no dispute in this case that Respondent Law Finance Group LLC's ("LFG") loan agreement with Petitioner Sarah Plott Key violated California's Financing Law. That law reflects a fundamental public policy of this state, and it is designed to prevent consumers from being exploited by unscrupulous lenders at the time of their most acute need. When Petitioner signed the litigation funding agreement at issue in this case with LFG, she did so in the face of the prospect of losing her inheritance. Yet LFG had no qualms about having her sign an agreement that obligated her to pay a shocking amount of illegal compound interest and loan servicing fees. Incredibly, LFG does not argue that what it did was not illegal. Its argument rather is that California courts should let it get away with violating California law because Petitioner did not file her motion to vacate the arbitration award enforcing the illegal contract within 100 days of the service of the award—even though Petitioner's and LFG's attorneys had entered into a stipulation allowing Petitioner to do just that.

LFG's position offends notions of equity or justice. It is also legally untenable. As Petitioner demonstrates in her briefs, the 100-day timeframe is not jurisdictional and can be equitably tolled. This principle is well established both as a matter of California as well as

federal law. For example, very recently, the United States Supreme Court held that the 30 days a taxpayer has to petition the Tax Court for review of a decision resulting from a hearing on a tax levy is not jurisdictional. (*Boechler, P.C. v. Comm'r*, _____ S.Ct. _____, 2022 U.S. LEXIS 2095 (Apr. 21, 2022).) The Court explained that a timing requirement is not deemed jurisdictional by default—it is jurisdictional only if the statutory language "clearly mandate[s] the jurisdictional reading." *(Id.* at p. *10.) Because the statute in that case lacked such clarity, it could be equitably tolled, as "nonjurisdictional limitations periods are presumptively subject to equitable tolling." (*Id.* at p. *16-17.)

Amici therefore echo Petitioner's arguments that the Court of Appeal erred in concluding that the 100-day timeframe to file a motion to vacate was jurisdictional and therefore not subject to equitable tolling. Amici write to emphasize that the Opinion and LFG's position also must be rejected because they run counter to the fundamental public policy of this state as reflected in the Financing Law (Fin. Code § 22000), and because they would permit predatory businesses to take advantage of adhesive arbitration agreements to enforce patently illegal contracts. Contracts that cannot be enforced in our courts should not be enforceable through the process of arbitration, especially by use of one-sided, adhesive arbitration agreements. Such contracts are void on their face, and they can be struck down as illegal at any time, even if a party does not bring a motion to vacate an arbitration award within the 100 days.

II.

ARGUMENT

A. Enforcement Of The Arbitration Award Would Contravene A Fundamental Public Policy Of This State As Reflected In The Financing Law

In enacting the Financing Law, the Legislature directed that it "(a) … be liberally construed and applied to promote its underlying purposes and policies, which are:

"(1) To ensure an adequate supply of credit to borrowers in this state.

"(2) To simplify, clarify, and modernize the law governing loans made by finance lenders.

"(3) To foster competition among finance lenders.

"(4) To protect borrowers against unfair practices by some lenders, having due regard for the interests of legitimate and scrupulous lenders.

"(5) To permit and encourage the development of fair and economically sound lending practices.

"(6) To encourage and foster a sound economic climate in this state . . . ."

(Fin. Code § 22001.)

As the Court of Appeal has recognized, the remedies the Legislature has provided and the enforcement mechanism it "has created make it clear . . . that the requirements of the Finance

Lenders Law are matters of fundamental public policy which cannot be waived by way of agreement between the parties . . . ." (*Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1326 (*Brack*).)

"The fundamental and unwaivable character of the Finance Lenders Law is also suggested in section 22750. Under section 22750 contracts made in willful violation of the Finance Lenders Law, including in particular violation of the requirement that a lender have a license issued by the commissioner, are void. If the violations are not willful, the lender must nonetheless forfeit any interest or charges. (§ 22752.) In addition, willful violations of the Finance Lenders Law are punishable with both civil and criminal penalties. (§§ 22713, 22753.)" (*Brack, supra,* 164 Cal.App.4th at p. 1326.)

The policies underlying the Financing Law are so fundamental that its provisions cannot even be circumvented when a loan agreement is entered into outside of California. Any contract made in violation of the Finance Law is void on its face, as the Legislature "has made it clear that the Finance Lenders Law is a matter of significant importance to the state and . . . is fundamental and may not be waived." (*Brack, supra,* 164 Cal.App.4th at p. 1327.)

In *Brack*, therefore, the Court of Appeal held that a choice of law provision in a loan agreement designed to "immunize" the lender's activities in California was unenforceable, because it would undermine the "fundamental policy expressed" in the Financing Law. (*Brack, supra,* 164 Cal.App.4th at p. 1328.)

Just as the Financing Law cannot be circumvented by a choice

of law provision, lenders should not be allowed to circumvent it by utilizing adhesive arbitration agreements. Such a result would contravene the fundamental goals the Legislature explicitly articulated for this law. To start, the Legislature sought to protect borrowers against unfair lending practices and encourage the development of fair and economically sound lending practices. (Fin. Code § 22001, subd. (4) and (5).) There is nothing fair or sound about allowing a lender to enforce an illegal loan agreement just because it has included an arbitration clause in its loan contract. The arbitrators in this case enforced an unlawful contract that is grossly unfair to the borrower and issued an award that imposed $1.9 million in illegal fees and other expenses. Clearly, this was antithetical to the Legislature's expressed goals of protecting borrowers and encouraging fair lending practices.

Permitting illegal loan agreements to be enforced through arbitration also would clash with the Legislature's other expressed goals for the Finance Law. The Legislature wanted to "simplify" and "clarify" the law governing loans made by lenders. (Fin. Code § 22001, subd. (2).) But the Court of Appeal's Opinion creates a situation in which some illegal loan agreements are struck down in courts while other, equally illegal ones are enforced by way of arbitration awards—awards that must be confirmed by and given the imprimatur of our state courts.

The legislative goals of fostering competition among finance lenders (Fin. Code § 22001, subd. (3)) would be no less frustrated under the regime implicitly sanctioned by the Opinion. Clearly,

ethical lenders who obey the law will find themselves at a competitive disadvantage against lenders who force borrowers to arbitrate disputes over contracts that would not withstand judicial scrutiny. Further, inconsistencies in how loan agreements are treated in different dispute resolution fora could also lead to divergent lending practices. Instability and uncertainty in the lending industry, and inconsistency in the judicial enforcement of consumer loan agreements, would be detrimental to a "sound economic climate in this state"—another of the Financing Law's important goals. (Fin. Code § 22001, subd. (6).) For all of these reasons, therefore, the Court of Appeal's Opinion inevitably will enervate the Financing Law's core objectives and deal a major blow to borrowers' protections in this state.

LFG may respond to these arguments by claiming that no threat to the Financing Law's purposes could materialize so long as borrowers who lose in arbitration bring a motion to vacate within the 100-day period. A loan agreement that violates the Financing Law, however, is void on its face. It has long been settled by this Court that when a contract is wholly illegal in violation of public policy, courts will not lend their aid to enforce it. (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 147 (*Lewis & Queen*) ["Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids. (Citations.) It is immaterial that the parties,

whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality. (Citation.) It is not too late to raise the issue . . . even on appeal."].)

In *Estate of Prieto*, for example, no claim of illegality was raised in the trial court. On appeal, however, the respondent conceded in its brief the predicate fact establishing the contract's illegality (that the respondent, who sought to recover a real estate commission, was not a licensed broker). The Court of Appeal held that this compelled the application of the rule enunciated in *Lewis & Queen*. The Court of Appeal explained that, irrespective of whether the claim of illegality was raised in the trial court, a court cannot look the other way when confronted with an illegal contract—it must strike it down. (*Estate of Prieto* (1966) 243 Cal.App.2d 79, 86 (*Estate of Prieto*).)

In its Answering Brief, LFG argues that these cases, and similar other cases Petitioner has cited in her brief, did not consider the timing of an illegality challenge—that is, "*when* such an argument can be raised." (Answering Brief at 67.) That is not an accurate characterization of the holding of these cases. *Lewis & Queen* held that "[i]t is not too late to raise the issue" of illegality "even on appeal." (*Lewis & Queen, supra,* 48 Cal.2d at p. 147.) *Estate of Prieto* applied this rule to invalidate an illegal contract even though the problem of illegality was first raised for the first time on appeal. (*Estate of Prieto*, *supra,* 243 Cal.App.2d at p. 86.) If a claim of illegality can be raised for the first time on appeal, it follows that it

can be raised beyond the 100-day for filing a vacatur motion. Contrary to LFG's contention, therefore, these cases do indeed deal with the timing of an illegality challenge

Perhaps the key point LFG seems to be missing here is that the absence of a time limitation on when a contract can be attacked as illegal is rooted in the policy forbidding courts from lending their assistance to the consummation or encouragement of what public policy forbids. The normal rules of waiver and forfeiture do not apply when a court is confronted with an entirely illegal contract that violates fundamental public policy.

When a contract is void in its entirety by reason of violating a fundamental public policy, it can be attacked on that ground at any time. Indeed, even if it is not attacked, a court can and should strike it down on its own motion. Not filing a motion to vacate within the 100-day deadline does not somehow transform an illegal agreement into a lawful one, and it does not make an unenforceable agreement enforceable.

It is important to keep in mind that some borrowers may not have legal representation to fight back against a predatory lender, and they may not realize that there is a legality problem with their loan agreement until months after the arbitration, when the lender tries to enforce a judgment entered on a confirmed award. The Court of Appeal's Opinion would allow a lender to use court processes to enforce a judgment based on a contract that violates a fundamental public policy. The decision therefore undermines the goals of the Financing Law and cannot be squared with decades of precedent

holding that courts should not lend their aid in enforcing contracts that offend the fundamental public policies of this state as the Legislature has expressed them.

B. The Court Of Appeal's Opinion Would Allow For Exploitation Of The Arbitration Process To Oppress Consumers

There is no dispute in this case that the arbitrators enforced a patently illegal loan agreement. LFG may argue, however, that this was an anomaly, and that borrowers can generally trust arbitrators to do the right thing and apply the law fairly and impartially. This kind of claim must be regarded with a healthy measure of skepticism.

This case involved an arbitration with the American Arbitration Association (AAA). Many in the legal industry regard AAA as a legitimate third-party organization with airtight rules to ensure fairness in the selection of truly neutral arbitrators. No doubt, those processes were followed in this case, resulting in the selection of the three arbitrators who adjudicated the controversy. The arbitrators agreed with Key that the loan was a consumer loan and LFG had willfully charged compound interest and servicing fees in violation of the Financing Law. (Opn. 5.) Under Financial Code section 22750, subdivision (a), the loan agreement was therefore void and completely unenforceable. Nevertheless, the arbitrators enforced the illegal and void loan agreement and awarded LFG simple interest, attorneys' fees and costs—to the tune of $1.6 million. (Opn. 2, 5.) The award was 3-0.

That three AAA arbitrators would unanimously enforce an illegal contract despite finding the factual predicates for illegality should give some pause to even the most ardent champions of arbitration. It is reasonable to assume that LFG designates AAA in all of its loan agreements, so that it is no stranger to AAA. The point here is not that the arbitrators in this case were necessarily biased—at least consciously so. It is rather that the potential for bias exists in these kinds of economically imbalanced situations. (*Monster Energy Co. v. City Beverages, LLC* (9th Cir. 2019) 940 F.3d 1130, 1136 [where defendant was a party to the dispute, had appeared before JAMS repeatedly, and had JAMS written into its arbitration agreement, the circumstances created an impression of bias and supported vacatur]; see also *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115 ["Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system. [Citation.] It is perhaps for this reason that it is almost invariably the employer who seeks to compel arbitration."].)

There is another interesting angle about the record in this case that bears on this issue. In the arbitration proceedings, LFG argued vigorously for enforcement of its contract, and of course it won. Yet, in its Answering Brief, LFG has nothing to say in defense of its loan agreement. Clearly, LFG understands what legal arguments are likely to resonate in front of which tribunals—the audience matters. LFG seems to be aware that the question of the legality of the loan

agreement was not a close call. Despite this, LFG fought hard in AAA to enforce it and prevailed.

What the AAA arbitrators did in this case, therefore, cannot casually be dismissed as an isolated instance, something that should not shake our faith that arbitrators generally will behave like courts and not enforce illegal loan agreements. At any rate, whatever the frequency of arbitrator error in enforcing illegal contracts, when such errors do occur, the arbitration process award should not be allowed to essentially cleanse the unlawful loan agreement. The contract remains void, and the borrower must have appropriate judicial recourse to have it set aside. Borrowers who are subjected to adhesive arbitration agreements in the first place should not be subjected to the additional hardship of being left without a remedy when arbitrators ignore fundamental public policy and force them to pay illegal interest and fees. Rather, consistent with long-standing law, borrowers should be free to challenge the legality of such agreements beyond the 100-day period to file a motion to vacate.

III.
CONCLUSION

Although the filing deadline for a motion to vacate an arbitration agreement is subject to equitable tolling, the loan agreement in this case was void on its face. If left to stand, the Opinion will undermine the stated objectives of the Financing Law, weaken the protections that law affords to consumers, and potentially create instability and uncertainty in the treatment of consumer loans. It will also allow unethical lenders to utilize

adhesive arbitration contracts to impose illegal and potentially financially crippling loan terms on consumers. Accordingly, the Amici support its reversal and reinstatement of the trial court's order.

DATED: May 31, 2022

Respectfully submitted,

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CRC Rule 8.520(c)

In compliance with California Rules of Court, rule 8.520(c), the above brief is comprised of 2824 words. To verify this number, I employed the word count feature made part of the Microsoft Word processing program used by my firm's offices.

DATED: May 31, 2022

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Mary Perez, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 and not a party to the within action or proceedings. My business address is 150 East Colorado Boulevard, Suite 206, Pasadena, California 91105, which is located in the county in which the within-mentioned mailing occurred.

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/s/ *Mary Perez*
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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S270798**
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/31/2022

Date

/s/Zareh Jaltorossian

Signature

Jaltorossian, Zareh (205347)

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