NO. 597730-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LONNIE L. BURTON and MICHAEL LINEAR, et al.,

Plaintiff / Respondent,

v.

SECURUS TECHNOLOGIES d.b.a. JPAY, LLC,

Defendant / Appellant.

BRIEF OF AMICUS CURIAE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

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I. INTRODUCTION

This case implicates two significant issues of importance to the Attorney General of Washington and the public: strong protections for consumers and the ability to vindicate those protections in court. Respondent Linear is incarcerated at a facility managed by the Department of Corrections (DOC). In 2020, he brought a private action under the Consumer Protection Act, RCW 19.86 (CPA) against JPay, one of the country's largest prison communication services providers. After Respondent's claims were arbitrated, JPay moved to compel a second arbitration. The superior court correctly denied that request, determining that the company was not entitled to a second bite at the apple—on issues that an arbitrator already ruled should be decided by the court—simply because JPay revised its arbitration terms after arbitration began.

In appealing that decision, JPay advances a rule under which businesses could subject consumers to an endless cycle of arbitration by tweaking subsequent versions of its arbitration or delegation clauses until the company achieves a favorable arbitration outcome or exhausts

the consumer into giving up. As this case shows, allowing businesses to use arbitration clauses against Washington consumers in this manner turns arbitration from a "shield against prohibitive costs" into "a sword to strike down access to justice." *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 465, 45 P.3d 594 (2002). This is especially true when, as here, the alternative to declining revised arbitration terms has unusually harsh consequences such as the loss of one's ability to virtually communicate with their family. This Court should affirm the superior court's denial of JPay's second motion to compel arbitration.

II. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of amicus briefs on matters that affect the public interest. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 207-09, 212, 588 P.2d 195 (1978). The Attorney General enforces the CPA, RCW 19.86, on behalf of the public, and has a strong interest in ensuring the correct interpretation of the statute's scope. *See* RCW 19.86.080. The Legislature also intended for the Attorney

General to contribute to private-litigant CPA cases, as evidenced by the statutory requirements that the Attorney General be served with any complaint for injunctive relief under the CPA and with any appellate brief that addresses any provision of the CPA. RCW 19.86.095.

The Attorney General submits this amicus brief to urge this Court to affirm the superior court's denial of JPay's motion for a second arbitration. The Attorney General seeks to ensure that the CPA's liberal construction mandate is used to evaluate CPA claims brought by vulnerable consumers. RCW 19.86.920; *see also* RCW 19.86.140. The Attorney General's interests also include ensuring that arbitration, while permitted under the CPA, does not effectively restrict consumers from having their CPA claims adjudicated. *See Mendez*, 111 Wn. App. at 457.

III. ISSUES ADDRESSED BY AMICUS

(1) Whether arbitration disputes related to CPA claims should be evaluated in light of the intent and purpose of the CPA to protect consumers.

(2) Whether consumer contract terms can be changed and applied retroactively to force consumers to return to a second arbitration after arbitration has ended.

IV. STATEMENT OF THE CASE

The Attorney General adopts Respondent's Statement of the Case.[1]

V. ARGUMENT

The CPA liberally protects consumers across Washington, especially vulnerable consumers like those who lack meaningful choice in their business transactions. The Attorney General is statutorily authorized to enforce the CPA, but so too is "any person" who is aggrieved by an unfair or deceptive act or practice. And while courts in Washington recognize that some CPA claims may be addressed in arbitration, defendants like JPay cannot abuse the arbitration process to

[1] This action was originally filed by Respondent Linear and Lonnie Burton, who is also incarcerated in Washington. The Attorney General's understanding of the procedural history of this case is that Burton's claims were resolved in arbitration and are not part of this appeal. Accordingly, the Attorney General uses "Respondent" to refer to Linear, and "plaintiffs" to refer to both Linear and Burton.

effectively prevent consumers from obtaining legal recourse. JPay's tactics here—modifying its arbitration clause and seeking to apply it retroactively to force consumers back into arbitration for a second time—should not be permitted as a matter of law. The Court should affirm the superior court's denial of JPay's second motion to compel arbitration.

A. Washington's CPA is Liberally Construed

The purpose of the CPA "is to protect the public and foster fair and honest competition." *Greenberg v. Amazon.com, Inc.*, 3 Wn.3d 434, 453, 53 P.3d 626 (2024) (quotation marks omitted) (quoting *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009)). To that end, the CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. Since the CPA's enactment in 1961, a cornerstone of the law has been the requirement that it "shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920. Courts in Washington have consistently recognized and applied this liberal construction mandate when

determining the meaning and scope of the CPA. *See State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 269, 279-80, 501 P.2d 290 (1972) (rejecting interpretation that would limit CPA to purely intrastate commerce); *see also Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 801, 363 P.3d 587 (2015) ("*Reader's Digest* is an example of liberal construction of the CPA to effectuate its purpose: to protect the public against unfair or deceptive acts.").

Consistent with this mandate, courts routinely reject efforts to narrow or limit the reach of the CPA through restrictive readings of its terms. *See, e.g.*, *Greenberg*, 3 Wn.3d at 454 (confirming that the CPA prohibits unfair practices even if they are not deceptive); *Young v. Toyota Motor Sales, U.S.A.*, 196 Wn.2d 310, 320, 472 P.3d 990 (2020) (declining to introduce new materiality element); *Thornell*, 184 Wn.2d at 802 (holding that "trade or commerce" includes in-state practices affecting out-of-state consumers); *Panag*, 166 Wn.2d at 39-41 (holding that the CPA does not require plaintiff to be in a direct business relationship with the defendant); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82-83, 170 P.3d 10

(2007) (holding that causation element of private CPA claim does not require reliance); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-88, 719 P.2d 531 (1986) (declining to read an intent requirement into the CPA).

The liberal construction mandate is thus the lens through which a court must interpret the CPA. *Thornell*, 184 Wn.2d at 799. And even beyond the language of the statute, any procedural or substantive action that runs counter to the CPA's remedial intent and beneficial purpose should be carefully and narrowly construed to protect Washington consumers.

B. State and Private Enforcement of the CPA is Vital

The CPA grants the Attorney General broad enforcement authority. *See generally* RCW 19.86; *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357 (1950) (state "law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest"). The CPA also authorizes "[a]ny person" who has been injured by an unfair or deceptive act or practice to bring a private action to enforce their rights

under the CPA. RCW 19.86.090. Importantly, "[p]rivate actions by private citizens are now an integral part of CPA enforcement." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007), *abrogated on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011); *see also Hangman Ridge*, 105 Wn.2d at 784 (noting that the Legislature "provide[d] for a private right of action" so individuals "would be encouraged to bring suit" in "response to the escalating need for additional [CPA] enforcement capabilities"). When bringing a CPA claim, a private citizen acts as a "private attorney[] general" to protect the public's interest. *Scott*, 160 Wn.2d at 853; *see also Panag*, 166 Wn.2d at 40 ("A plaintiff bringing a CPA action can serve the goal of protecting the public."). This is because "[c]onsumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interest." *Scott*, 160 Wn.2d at 853 (citations omitted).

C. JPay Profits Off Incarcerated Washingtonians, a Vulnerable Group Protected by the CPA

Significant portions of Washington's incarcerated population share demographic characteristics for which the CPA contains special protections. RCW 19.86.140 (authorizing enhanced penalties for "unlawful acts or practices that target or impact" vulnerable consumers). Incarcerated individuals in Washington are disproportionally people of color.[2] People with disabilities are disproportionately incarcerated—among state and federal prisons in 2016, 66 percent of incarcerated people reported having a disability.[3] Veterans are also more likely to be incarcerated.[4]

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[2] Race and the Criminal Justice System, Task Force 2.0, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, *Fred T. Korematsu Center for Law and Equality*, (2021), at 19-20 https://digitalcommons.law.seattleu.edu/korematsu_center/116; *see also id*. (noting that in 1980, Washington State "had the worst Black/White disproportionality ratio in the country" and while this has improved, race disproportionality persists.)

[3] Laurin Bixby et al., *The Links Between Disability, Incarceration, and Social Exclusion*, Health Affairs, Vol. 41, No. 10 (2022), https://doi.org/10.1377/hlthaff.2022.00495.

[4] Allison Corr, *Veterans Who Have Been Arrested or Incarcerated Are at Heightened Risk of Suicide*, Pew Charitable Trusts, (Nov. 8, 2023), https://www.pewtrusts.org/en/research-and-

JPay, a subsidiary of Securus Technologies, is one of the largest providers of prison telecommunications in the country.[5] Its business model, which relies on exclusive contracts with prisons and jails, is to charge high fees to incarcerated people to access electronic messaging, phone calls, video calls, music, and other media.[6] This model has proven quite successful for its shareholders and investors: in 2020, Securus' revenue was $767.5 million, and its operating income was $80.3 million.[7] Like other "prison telecoms," JPay and Securus can "squeeze out as much money as possible in order to earn sky-high

analysis/articles/2023/11/08/veterans-who-have-been-arrested-or-incarcerated-are-at-heightened-risk-for-suicide.

[5] Marleina Ubel, *Prison Profiteers: How Private Companies Profit From Prison Phone Calls and Harm New Jersey Residents*, New Jersey Policy Perspective, (Aug. 2024), https://www.njpp.org/wp-content/uploads/2024/08/NJPP-PrisonProfiteers-Aug2024.pdf.

[6] *Id*.

[7] Bianca Tylek, *Telecom Vendors Used End of Prison Visits During COVID to Profit Off Phone Calls*, Truthout, (July 24, 2021), https://truthout.org/articles/telecom-vendors-used-end-of-prison-visits-during-covid-to-profit-off-phone-calls/ (describing how one of Securus' equity groups took a $2.3 million payout in 2020 on top of its annual $10.2 million management fee).

returns as a company investor or to juice business value upon resale."[8]

Across the US, incarcerated consumers must pay $0.35, on average, to send or receive one page of an email.[9] With a picture included, that cost rises to $0.70, and a "videogram" (a recorded video sent as an attachment) costs an additional $1.05 for a total of $1.75 per message.[10] A thirty-minute video call costs $3.95.[11] But in Washington, that cost is much higher—a video call through JPay is $7.95 for 30 minutes.[12] As one article explains, "e-messaging companies are quietly building a money-making machine virtually unhindered by competition

[8] Nitish Pahwa, *The Robber Barons of Prison Tech*, Slate.com, (Dec. 12, 2023), https://slate.com/technology/2023/12/prison-telecom-gtl-viapath-jpay-securus-private-equity.html.

[9] Valerie Surrett, *The High Costs of Free Prison Tablet Programs*, The Appeal, (Mar. 27, 2024), https://theappeal.org/the-high-costs-of-free-prison-tablet-programs-books-through-bars/.

[10] *Id*.

[11] *Id*.

[12] Jpay, *Washington State Department of Corrections Available JPay Services*, https://www.jpay.com/Agency-Details/Washington-State-Department-of-Corrections.aspx; *see also* Sophia Gates, *Cost-saving prison phone switch hits 'road bumps' in Monroe, elsewhere*, Herald Net, (July 25, 2023), https://www.heraldnet.com/news/cost-saving-prison-phone-switch-hits-road-bumps-in-monroe-elsewhere/.

. . . [w]hatever it costs to send a message, prisoners and their loved ones will find a way to pay it."[13]

Apart from their exorbitant up-front rates, JPay and Securus' hidden fees, poor-quality products, technical glitches, and lack of customer service have made the news nationwide. JPay has been investigated and penalized for its policies of charging consumers fees to access their own money on prepaid debit cards and requiring consumers to sign up for a JPay debit card as a condition of receiving government benefits—in particular, state law funds to help people meet essential needs upon release from incarceration.[14]

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[13] Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, Wired Magazine, (Aug. 3, 2018), https://www.wired.com/story/jpay-securus-prison-email-charging-millions/

[14] Press Release, Consumer Finance Protection Bureau, *CFPB Penalizes JPay for Siphoning Taxpayer-Funded Benefits Intended to Help People Re-enter Society After Incarceration*, (Oct. 19, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration/.

The products that JPay and Securus provide are known for being low-quality.[15] And after purchasing shoddy products at "extortionate rates," incarcerated people report receiving "the worst possible service ever.").[16] When people experience technical difficulties with their products, customer service is slow—"users often face long delays in resolving problems with their tablets and communications services."[17] An analysis of complaint records shows that Securus only resolved 12 percent of complaints in a week or less, and the remainder took as long as three months to be cleared.[18]

These patterns are apparent in Washington as well. Incarcerated Washingtonians and their loved ones "complain of constant technical

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[15] Tatiana Walk-Morris, *Prison telecom providers are shifting strategy by exploiting tablet services*, Prism Reports, (Dec. 9, 2024), https://prismreports.org/2024/12/09/prison-telcom-providers-exploit-tablet-services/.

[16] Christopher Blackwell and Ethan Corey, *Prison Telecom Giant Deletes Months of Incarcerated Writers' Work,* The Appeal, (Nov. 7, 2023), https://theappeal.org/securus-prison-communications-washington-deleted-drafts.

[17] Walk-Morris, *supra*.

[18] *Id*.

difficulties, files disappearing and poor customer service."[19] Securus, JPay's parent company, deleted the drafts of incarcerated writers in what they said was a "technical glitch"—but it was not the first time this had occurred.[20]

Important here, companies like JPay have "systemwide monopolies" due to their prison contracts.[21] As a result, "incarcerated people and their families can't choose a different service if they don't like what's offered in their prison."[22] As incarcerated writers in Washington said after Securus deleted their saved work without notice, "Securus'[] tablets and e-messaging app are the only tools we have for sharing our work with the outside world, but they lack basic capabilities that most writers take for granted."[23]

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[19] Gates, *supra* note 12.
[20] Blackwell & Corey, *supra* note 16.
[21] Pahwa, *supra* note 8.
[22] *Id*.
[23] Blackwell & Corey, *supra* note 16.

D. JPay Cannot Apply Arbitration Clauses Retroactively to Repeatedly Subject Consumers to Arbitration

JPay's products and practices, which are notorious across the country and in Washington, may constitute unfair or deceptive acts or practices under the CPA. As a result, it is crucial that incarcerated individuals like the plaintiffs here can have their CPA claims heard through our legal system. But JPay's actions in this litigation—modifying arbitration clauses and then seeking to apply them retroactively to force consumers back into arbitration—effectively bar vulnerable consumers from obtaining legal relief from violations of the CPA. This cannot be permitted.

1. Arbitration is intended to informally resolve legal disputes by avoiding expense and delay

This Court has held that certain claims under the CPA are "amenable to arbitration." *Mendez*, 111 Wn. App. at 457. In some circumstances arbitration can "'avoid the formalities, the expense, and the delays of the court system.'" *Id.* at 454 (quoting *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765-66, 934 P.2d 731 (1997)).

But arbitration is prone to abuse. In order to achieve the intent and policies behind arbitration, the process must be fair. First, consumers signing arbitration clauses must do so with a reasonable opportunity to understand the terms of the agreement and with full knowledge of their right to access a court. *State v. Kaiser*, 161 Wn. App. 705, 722, 254 P.3d 850 (2011); *Zuver v. Airtouch Comm's, Inc.*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004) (a consumer must have a "meaningful choice").

Second, once in arbitration, the process must be informal, inexpensive, and relatively fast. *See Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001) ("'Arbitration is attractive because it is a more expeditious and final alternative to litigation.'") (quoting *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995)); *see also Munsey v. Walla Walla Coll.*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) ("arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation") (citation omitted). If the parties agree to give up their right to access a court, the alternative must be beneficial to both

parties, not just the defendant. As the Washington Supreme Court has explained, "[a]rbitration is intended to be final; parties agree to waive their right to have their disputes resolved in the court system. They cannot submit a dispute to arbitration only to see if it goes well for their position before invoking the courts' jurisdiction." *Godfrey*, 142 Wn.2d at 897.

Finally, once an arbitrator has rendered a decision, it is important that courts, and the parties, follow it. "'Public policy here in Washington strongly favors the finality of arbitration awards.'" *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 16, 408 P.3d 1123 (2017) (quoting *Yakima County v. Yakima Cnty. Law Enf't Officers Guild*, 157 Wn. App. 304, 317, 237 P.3d 316 (2010)). Courts in Washington afford "great deference" to the decisions of arbitrators. *Id*.; *see also State v. Amer. Tobacco Co.*, 28 Wn. App. 2d 452, 478, 537 P.3d 303 (2023) (courts review an arbitration decision only in certain limited circumstances). A court order confirming an arbitration award "has the same force and effect as a final judgment on the merits." *NTCH-WA, Inc. v. ZTE Corp*., 921 F.3d 1175, 1180 (9th Cir. 2019) (cleaned up).

Given the "finality of arbitration decisions," any attempt to circumvent the arbitration process or get a second bite at the apple would "undermine alternative dispute resolution." *Amer. Tobacco Co.*, 28 Wn. App. 2d at 478 (citation and internal quotation marks omitted).

2. JPay unilaterally imposes arbitration terms on vulnerable consumers

JPay's tactics in this litigation are anything but fair. A key component of JPay's argument is that Respondent "continued using JPay's services" after JPay updated the Terms of Service and Warranty Policy, which means he accepted them. Brief of Appellant (Appellant's Br.) at 5 (citing CP 324 ¶ 10). In fact, JPay admits that "incarcerated customers" must "accept any updated terms of service before the customer can use JPay's services or purchase new services." Appellant's Br. at 5 (citing CP 323-24 ¶¶ 3-4). This admission is striking. Because JPay is an exclusive provider at DOC facilities in Washington, incarcerated consumers must either accept updated terms or lose their only option to access digital content or virtually communicate with their loved ones.

Not only are incarcerated consumers forced to sign JPay's arbitration clause to access vital communication services, but according to Respondent, they are also required to do so with no reasonable opportunity to read it. The arbitration clause is accessible to incarcerated consumers "only on shared kiosks in common areas." Brief of Respondent (Resp.'s Br.) at 6 (citing CP 24-27). Those kiosks time out after one or two minutes and are subject to strict use limitations by DOC. *Id*. And the arbitration clause, which is "written in complicated legalese, over numerous pages, [with] unintelligible waivers and one-sided reservations of rights," is "buried at the end of an already lengthy document." *Id*. at 7 (citing CP 24-27). As Respondent notes, the plaintiffs here were surprised by JPay's motion to compel their case to arbitration, as "they did not know about JPay's arbitration clause and did not know what arbitration was." *Id*. at 6 (citing CP 25).

3. JPay abuses the arbitration process to subject consumers to an endless cycle of arbitration

JPay seeks a ruling here that *after* a plaintiff has filed a complaint and their claims have been compelled to arbitration pursuant to an existing arbitration clause, a defendant can update the contract to force the plaintiff *back to arbitration* after the arbitrator has rendered a final decision. Specifically, JPay argues that the amended arbitration terms—which were imposed *after* the trial court compelled arbitration—"apply retroactively" to plaintiff's existing claims.[24] Appellant's Br. at 8. This, if allowed, would subject consumers to an endless cycle of arbitration and would severely limit consumers' access to justice. There is no legal precedent to support JPay's arguments, which are inconsistent with the intent and purpose of the CPA.

[24] Respondent argues that there "is no dispute that the issues JPay raises on appeal—assent and arbitrability of [the amended terms of service]—were all squarely before the arbitrator." Resp.'s Br. at 40. The parties appear to disagree on this point. But from the Attorney General's perspective, it makes no difference. JPay should not be permitted to retroactively apply changes to contract terms, and even if the arbitrator had evaluated those terms, they appear to have rejected them.

JPay cites several cases in support of its position that a second arbitration is appropriate, but none of these cases dealt with a party seeking to return to arbitration after arbitration had already concluded. *See* Appellant's Br. at 19-20 (citing *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (addressing whether employer waived right to compel arbitration in the first instance); *Wiese v. Cach, LLC*, 189 Wn. App. 466, 474, 358 P.3d 1213 (2015) (evaluating whether defendant waived arbitration of class action claims after it previously obtained judgments in collection actions); *Burgess v. Lithia Motors, Inc*., 196 Wn.2d 187, 193, 571 P.3d 201 (2020) (holding that employee cannot seek mid-arbitration judicial relief from arbitration proceedings); *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1029 (9th Cir. 2022) (addressing whether court or arbitrator should decide whether claims are arbitrable); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69, 139 S. Ct. 524 (2019) (holding that a court cannot override a delegation provision that requires arbitrator to evaluate threshold question of arbitrability)). Nor do any of the cases that JPay cites in reply support the extraordinary

argument that a second arbitration is warranted after the first has concluded. Reply Brief of Appellant at 28-29 (citing *Norton v. Tucker Entm't, LLC*, 2014 WL 5023654, at *4 (N.D. Tex. Oct. 8, 2014) (explaining that "courts compelling arbitration of claims that were pending prior to the formation of the relevant arbitration agreement are rare but not unprecedented in the Fifth Circuit" but without addressing the issue of a party seeking a second arbitration); *Kalenga v. Irving Holdings, Inc.*, 2020 WL 7496208, at *10 (N.D. Tex. Dec. 20, 2020) (arbitration agreements were valid even though they were executed after lawsuit was initiated, but arbitration had not yet commenced in case); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1271 n.1 (11th Cir. 2017) (allowing an arbitration agreement to apply to claims that arose prior to the execution of an arbitration agreement, but saying nothing about seeking a second arbitration)).

While in some situations an arbitration clause could apply retroactively, courts have held that it is a violation of the duty of good faith and fair dealing under state contract law for a party to "add a new term to the original Agreement seeking to retroactively deprive another

party of a legal right"—here, plaintiff's ability to access a legal forum to adjudicate their CPA claims. *Pruett v. WESTconsin Credit Union*, 409 Wis.2d 607, 639, 998 N.W.2d 529 (2023); *see also id*. at 641 (adding an arbitration clause "appears to have been undertaken to recapture a foregone opportunity" and protect the defendant "retroactively from alleged wrongdoing") (cleaned up).

But beyond JPay's inability to identify any authority to support its arguments, the outcome that JPay seeks would effectively narrow the scope of relief that the CPA can provide, in direct contravention of the statute's intent and policies.[25] Limiting vulnerable consumers' access to legal recourse thwarts the CPA's goal of protecting consumers from unfair and deceptive acts and practices, and undermines the role

[25] The Attorney General does not take a position on the underlying merits of Respondent's claims, nor is that question directly before this Court. But as to the procedural questions here, it is appropriate for the superior court, rather than an arbitrator, to evaluate the applicability of the amended arbitration terms as a matter of law. *C.f. Granite Rock Co. v. Int'l Bhd of Teamsters*, 561 U.S. 287, 297, 130 S.Ct. 2847 (2010) (contract formation issues must be resolved by a court rather than an arbitrator); *see also Zuver*, 153 Wn.2d at 302-03 ("the existence of an unconscionable bargain is a question of law for the courts") (cleaned up).

that consumers play as private attorneys general to enforce the statute. *Scott*, 160 Wn.2d at 853. The net effect of JPay's actions is to make it essentially impossible for a consumer to vindicate their rights under the CPA, gutting the broad reach of the statute. *See supra* at 5-8; RCW 19.86.920.

In summary, when done properly, arbitration can resolve legal disputes effectively, without impacting a consumer's access to justice. "But avoiding the public court system in a way that effectively denies citizens access to resolving everyday societal disputes is unconscionable." *Mendez*, 11 Wn. App. at 465. Arbitration, and its underlying goals, "must not be used to work oppression." *Id*. As Division III has said, "[w]hen the goals given in support of contract clauses . . . are used as a sword to strike down access to justice instead of as a shield against prohibitive costs, we must defer to the overriding principle of access to justice." *Id*. So too here. This Court should affirm.

VI. CONCLUSION

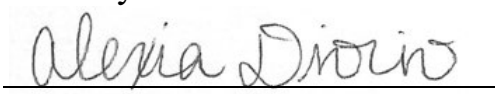
While CPA claims may be arbitrated, JPay's actions here, if allowed, subject consumers to an endless loop of arbitration without

legal recourse. Given the Legislature's directive to broadly and liberally construe the CPA to protect consumers, this Court should affirm the denial of JPay's second motion to compel arbitration to ensure that vulnerable consumers like the plaintiffs here are not prevented from accessing justice.

This document contains 4,290 words in accordance with RAP 18.17(c)(6).

RESPECTFULLY SUBMITTED this 27th day of February, 2025.

NICHOLAS W. BROWN
Attorney General



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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of February, 2025, at Seattle, Washington.

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