No. 09-893

IN THE

Supreme Court of the United States

AT & T MOBILITY LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982).. 25

FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991)........ 25

FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996).. 25

FTC v. Febre, 128 F.3d 530 (7th Cir. 1997). 25

Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007), *reh'g denied* (Jan. 29, 2008)....7, 8, 10, 21

Gilmer v. Interstate/ Johnson Lane Corp., 500 U.S. 20 (1991)...................................*passim*

Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008)...................................... 19

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OTHER AUTHORITIES

151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) 16
"ChoicePoint Settles Data Security Breach Charges; to Pay $10 Million in Civil Penalties, $5 Million for Consumer Redress" (Jan. 26, 2006), http://www.ftc.gov/opa/2006/01/choicepoint.shtm 25-26
Consumer Arbitration Before the American Arbitration Association Preliminary Report, http://www.searlearbitration.org/report 14
"Court Halts Bogus Invention Promotion Claims" (Apr. 19, 2006), http://www.ftc.gov/opa/ 2006/04/davison.shtm 25

TABLE OF AUTHORITIES—Continued

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David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. (Nov. 2007) 17, 18, 19

Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. (RAND Institute for Civil Justice 2000) 16

"Deceptive Marketers Banned from Selling Mortgage Relief Services; One Defendant Ordered to Pay $11.5 Million" (July 26, 2010), http://www.ftc.gov/opa/2010/07/lmshope.shtm 25

Edmund L. Andrews, "Settlement for Nynex and F.C.C.," N.Y. Times, Oct. 5, 1990 23

Edward C. Anderson & Kirk D. Knutson, *"Class" Arbitration? What About the Rights of Absent "Class" Members?*, 7 Engage (2006), http://www.fed-soc.org/doc lib/20080214_LitAndreson.pdf 20

"Fairbanks Capital Settles FTC and HUD Charges" (Nov. 12, 2003), http://www.ftc.gov/opa/2003/11/fairbanks.shtm 26

Fax.com, Inc., Forfeiture Order, 19 F.C.C.R. 748 (2004), http://www.fcc.gov/eb/Orders 23

H.R. Rep. No. 97-542, at 3 (1982) 13

Harris Interactive, *Arbitration: Simpler, Cheaper and Faster Than Litigation*, http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (Apr. 2005) 14

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"Home Mortgage Lender Settles "Predatory Lending" Charges" (Mar. 21, 2002), http://www.ftc.gov/opa/2002/03/famco.shtm 26
Horizon Telecom, Inc., Notice of Apparent Liability, 23 F.C.C.R. 3485 (2008), http://www.fcc.gov/eb/Orders 23
Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. Disp. Resol... 18
Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. (1998)............. 14
Linsday R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F... 18
"Mortgage Relief Marketer Will Return $2.4 Million to Consumers to Settle FTC Charges" (July 29, 2010), http://www.ftc.gov/opa/2010/07/homeassure.shtm........... 25
NOS Communications, Inc. and Affinity Network Incorporated, Order and Consent Decree, 17 F.C.C.R. 26853 (2002), http://www.fcc.gov/eb/Orders.............................. 23
"Rite Aid Settles FTC Charges That It Failed to Protect Medical and Financial Privacy of Customers and Employees" (July 27, 2010), http://www.ftc.gov/opa/2010/07/riteaid.shtm................................ 25

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Rule 3 of AAA Supplementary Rules for Class Arbitrations, http://www.adr.org/sp.asp?id=21936 19

Rule 3 of JAMS Class Action Procedures, http://www.jamsadr.com/rules-class-action-procedures/ 19

Searle Institute, *Creditor Claims in Arbitration and in Court Interim Report No. 1, Exec. Summ.* (Nov. 2009), http://www.law.northwestern.edu/searlecenter/uploads/CREDITOR%20CLAIMS %20IN%20ARBITRATION%20AND%20IN%20COURT%20INTERIM%20REPORT%20NO.%201.pdf 16

Sprint Communications Company L.P., Order and Consent Decree, 20 F.C.C.R. 5576 (2005), http://www.fcc.gov/eb/Orders 23

Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 14

"Subprime Loan Victims to Receive Additional Redress" (Feb. 2, 2004), http://www.ftc.gov/opa/2004/02/first.shtm 26

The Hot Lead LLC, Forfeiture Order, 23 F.C.C.R. 5282 (2008), http://www.fcc.gov/eb/Orders 22

Tr. of Oral Argument, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), 2003 WL 1989562 19

INTRODUCTION

Amici Curiae American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Consumer Bankers Association ("CBA"), Financial Services Roundtable and California Bankers Association ("CABA") (together, "*Amici*") respectfully submit this brief in support of Petitioner AT & T Mobility LLC ("ATTM"). All counsel of record provided blanket consent to the filing of *amici* briefs in this case.[1]

AMICI'S INTEREST IN THIS CASE

The ABA is the principal national trade association of the banking industry in the United States. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional and money center banks. The ABA also represents savings associations, trust companies and savings banks. ABA members hold an overwhelming majority – approximately 95% – of the domestic assets of the U.S. banking industry. The ABA frequently appears in litigation, either as a party or *amicus curiae*, in order to protect and promote the interests of the banking industry and its members.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services

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[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici* and their members made a monetary contribution intended to fund the preparation or submission of the brief.

firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA has provided services to its members for more than 90 years. The association's officers, board and staff are dedicated to continuing this legacy of commitment through the addition of new members and programs, and increasing the quality of existing services.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally-insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue and 2.3 million jobs.

The CABA is a non-profit trade association established in 1891. The CABA represents most depository institutions that operate in the State of California.

Many of *Amici*'s members, constituent organizations and affiliates (collectively, "Members") have independently adopted as standard features of their consumer contracts provisions that call for individual arbitration of disputes arising from or relating to those contracts, upon the election of either party. They use arbitration because it is a prompt, fair, inexpensive and effective method of resolving disputes and because arbitration minimizes the disruption and loss of good will that often results from litigation.

Amici's Members strive diligently to ensure that their arbitration agreements provide a fair, efficient and cost-effective means for both Members and their customers to resolve disputes between them. The core mandate of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1, *et seq.*, is to enforce private arbitration agreements according to their terms. The Panel below, however, erroneously concluded that the FAA should yield to the policy of the California courts that agreements providing for individual arbitration can be invalidated as "unconscionable" under state law simply because, in the view of the California courts, the unavailability of class action procedures will result in insufficient deterrence of violations of the law.

The Panel's decision, if allowed to stand, will invalidate the overwhelming majority of arbitration agreements, which provide for individual arbitration and disallow class proceedings. This subverts the practical value of arbitration and the policy of the FAA to resolve disputes swiftly and inexpensively in

accordance with private arbitration agreements. Thus, *Amici* and their Members have a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has recognized narrow grounds for invalidating an arbitration agreement; such agreements "may be invalidated by '*generally applicable contract defenses*, such as fraud, duress, or unconscionability.'" *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (emphasis added) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). The arbitration agreement in the present case clearly does not meet this description since the California policy favoring classwide resolution of claims is not a "generally applicable contract defense" and, thus, does not provide a basis for the revocation of "any contract." Accordingly, under the plain language of FAA § 2, the policy relied upon by the Panel in reaching its decision cannot be used as a legal basis to invalidate ATTM's arbitration agreement.

Moreover, a contractual provision barring class-wide arbitration should not automatically vitiate an arbitration agreement. This Court has instructed that the unavailability of class procedures does not justify invalidation of an arbitration agreement unless Congress itself has evinced an intention to prohibit an agreement that provides exclusively for individual arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (construing arbitration clause in the context of a claim under the

federal Age Discrimination in Employment Act (the "ADEA")). Likewise, just last Term, this Court held in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), that courts and arbitrators may not impose their own policies favoring class actions on parties that had not contracted for class-wide arbitration. The Ninth Circuit's departure from this Court's precedents independently justifies reversal of the decision below.

While the plain language of Section 2 of the FAA and this Court's decisions in *Gilmer* and *Stolt-Nielsen* should resolve this case, the Ninth Circuit's policy reasoning fails on its own terms. The Ninth Circuit, following the lead of the California state courts, gave insufficient weight to the benefits of arbitration and the costs and problems associated with class actions. Regarding the notion that violations of the law are insufficiently deterred in the absence of a potential class action remedy, the Panel failed to recognize the existence of a comprehensive system of regulatory oversight and an impressive array of potential administrative and legal sanctions designed to ensure compliance with the law.

Accordingly, this Court should reverse the decision below and hold that the FAA preempts States from conditioning the enforcement of an arbitration agreement on the availability of class arbitration when, as here, class arbitration is not necessary to ensure vindication of the parties' substantive rights.

ARGUMENT

I. California Policy Favoring Class Actions Does Not Constitute a Ground for the "Revocation of Any Contract," as Required Under the Plain Language of Section 2 of the FAA to Justify Invalidation of ATTM's Arbitration Agreement.

The law recognizes a strong interest in the enforceability of contracts in accordance with their terms. *See Sander v. Alexander Richardson Investments*, 334 F.3d 712, 721 (8th Cir. 2003) ("Public policy demands enforcing contracts as written and recognizing the parties' freedom to contract."). Prior to the adoption of the FAA, this public policy was circumvented with respect to arbitration agreements by state and federal courts alike, which refused to enforce such agreements. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009).

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements . . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288 (2002) (quoting *Gilmer*, 500 U.S. at 24). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983). Accordingly, Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. FAA Section 2 creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). It "command[s] that an arbitration agreement

is enforceable just as any other contract . . . ." *Vaden*, 129 S. Ct. at 1275.

Pursuant to Section 2, this Court has recognized a narrow class of cases where arbitration agreements will not be enforced. Like other contracts, arbitration agreements "may be invalidated by '*generally applicable contract defenses*, such as fraud, duress, or unconscionability.'" *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (emphasis added) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

While generally applicable contract defenses can justify a refusal to enforce an arbitration agreement in proper circumstances, this Court has never suggested that an arbitration agreement can be held invalid based on a state policy that does not apply to all contracts. Yet several California courts and the Panel below have done just that by attaching the label of "unconscionable" to all arbitration agreements that conflict with the state's policy favoring class actions. These decisions run directly afoul of the plain language of Sections 2 and 4 of the FAA and turn the Supremacy Clause on its head.

An attack on the substance of an arbitration agreement, as opposed to an attack on whether the agreement was properly formed, necessarily addresses only a narrow class of contract (in this case, a consumer agreement involving small amounts of money and a class action waiver) and *not* "any" contract. Thus, as the Third Circuit recognized in *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), when properly understood the FAA only permits a court to deny a motion to compel arbitration because of defects in contract formation (*e.g.*, procedural unconscionability or fraud in the factum), not on

public policy or substantive unconscionability grounds. *See id.* at 395 (plaintiff's unconscionability defense was preempted by the FAA where it was "not predicated on a contention that [defendant] misled [plaintiff] as to the [contract's] terms or forced her by some unlawful coercion to enter into it and accept the arbitration provision," but rather on "what [the provision] provides, i.e., arbitration of disputes on an individual basis in place of [class] litigation . . . .").

A contrary result would conflict with the "'primary' purpose of the FAA . . . to ensure that 'private agreements to arbitrate are enforced according to their terms,'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (citations omitted), and simultaneously create unnecessary tension between Sections 2 and 4 of the FAA. While Section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, Section 4 of the FAA provides more broadly that arbitration agreements must be enforced "in accordance with the terms of the agreement." 9 U.S.C. § 4. These slightly different formulations can be harmonized only if Section 2's "revocation" savings clause is read to carve out only a narrow, *procedural* exception to Section 4, since otherwise, as in the present case, the exception to arbitration could swallow the rule. As stated in *Allied-Bruce Terminix Cos. v. Dobson*:

> [Section] 2 [of the FAA] gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law

> or in equity for the revocation of any contract." *What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful* . . . .

513 U.S. 265, 281 (1995) (citations omitted) (emphasis added). *See also National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990) ("Congress created an exception to the general rule [that an arbitration clause will be enforced according to its terms] only when there is a flaw in the *formation* of the agreement to arbitrate") (emphasis added).

Manifestly, the particularized arbitration "unconscionability" principles developed by California state courts and applied by the Panel below represent a naked policy preference favoring class actions over individual arbitration – *not* the application of universal contract formation principles. Accordingly, the decision below should be reversed.

II. ATTM's Arbitration Agreement Is Enforceable Under the Standards Established by This Court.

In *Gilmer*, this Court addressed whether to require individual arbitration of a claim under the ADEA, even though the ADEA expressly authorizes class claims. It held that, under the FAA, arbitration agreements must be enforced "in the manner provided for in [the arbitration] agreement," 9 U.S.C. § 4, unless "'Congress itself has evinced an intention to preclude'" such arbitration. 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). This is true "even if

the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Gilmer*, 500 U.S. at 32.

Consistent with *Gilmer*, most federal courts of appeals have regularly enforced arbitration agreements with class action waivers.[2] In contrast, the Ninth Circuit, applying California law, has routinely refused to enforce agreements providing for individual arbitration.[3] A small number of other circuit

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[2] *See, e.g., Gay, supra* (enforcing individual arbitration of a $39.92 claim under the Federal Credit Repair Organizations Act and the Pennsylvania Credit Services Act as a matter of Pennsylvania and Virginia law and stating that a contrary result would be preempted by the FAA); *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th Cir. 2007) (enforcing class action waiver and compelling arbitration of federal antitrust claims); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (enforcing class action waiver under Louisiana law and suggesting that the FAA would preempt state law if it invalidated the class action waiver); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002) (suggesting that there is no non-waivable right to maintain a class action under the federal Truth in Lending Act ("TILA"), RICO or Kentucky law); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553 (7th Cir. 2003) (enforcing a class action waiver based on the FAA principle that arbitration agreements must be enforced in accordance with their terms); *In re Piper Funds, Inc.*, 71 F.3d 298, 303 (8th Cir. 1995) (stating that a party's "contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management"); *Caley v. Gulfstream Aerospace Corporation*, 428 F.3d 1359 (11th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) (finding a class action waiver not unconscionable under Georgia law and suggesting that the FAA would preempt state law if it invalidated class action waivers).

[3] *See, e.g., Omstead v. Dell, Inc.*, No. 08-16479, 2010 WL 396089 (9th Cir. Feb. 5, 2010) (refusing to enforce Texas choice of law clause and holding class action waiver unlawful under

decisions also have rejected individual arbitration of federal claims, in all cases based on the perception that the plaintiff would not have been able to vindicate his or her rights in an individual arbitration because of, for instance, the complexity of proof in the case or the perceived negative value of the claim. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (antitrust case involving perceived negative value claim); *In re American Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009) (same), *petition for writ of certiorari granted, judgment vacated and case remanded for further consideration in light of Stolt-Nielsen*, 130 S. Ct. 2401 (2010);[4] *Fensterstock v. Education Finance Partners*, 09-1562-CV. 2010 U.S. App. LEXIS 14172 (2d Cir. July 12, 2010) (small claims); *Litman v. Cellco P'ship*, No. 08-4103, 2010 U.S. App. LEXIS 10405 (3d Cir. May 21, 2010) (same); *Homa v. American Express Company*, 558 F.3d 225 (3d Cir.

California law); *Oestreicher v. Alienware Corporation*, No. 07-16531, 2009 WL 902341 (9th Cir. April 2, 2009) (refusing to enforce Florida choice of law clause and holding class action waiver unlawful under California law in the context of a $4,000 claim for a defective computer); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007) (holding class action waiver unconscionable under California law and refusing to find FAA preemption).

[4] Most of the *Amici* in this case also participated as *amici* in support of the successful *certiorari* petition filed by American Express in *Merchants' Litigation*. In that brief, *amici* demonstrated that the Second Circuit departed from *Gilmer* and established FAA jurisprudence when it invalidated the parties' agreement without any evidence of Congressional intent to prohibit individual arbitration (and, indeed, even though Congress explicitly declined to provide for class enforcement when it passed the Sherman Act). *Amici* also showed that the Second Circuit erred in concluding that the named plaintiff had a negative value claim in an individual arbitration proceeding.

2009) (same); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007) (same). The result in each of these cases is clearly wrong under *Gilmer* because nothing in the FAA (or any of the federal statutes at issue) evidences any congressional intent to preclude agreements to arbitrate exclusively on an individualized basis.

These decisions are flatly inconsistent with this Court's recent decision in *Stolt-Nielsen*, which rejected the "negative-value claim" justification that the arbitrators adopted in that case when they erroneously allowed the claim to proceed as a class-arbitration. *See Stolt-Nielsen*, 130 S. Ct. at 1769 n.7.

This Court's recent decision in *Stolt-Nielsen* confirms that the Ninth Circuit erred in refusing to enforce ATTM's arbitration agreement. In *Stolt-Nielsen*, the Court held that, under the terms of the parties' agreement, the arbitration had to take place on an individual basis because "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1775 (emphasis in original). The Court precluded class arbitration because the parties had "reached 'no agreement' on that issue." *Id. Stolt-Nielsen* thus reaffirmed the FAA's "fundamental" principle that "'arbitration is a matter of consent, not coercion,'" *id.* at 1782 (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)), and that parties are therefore "'free to structure their arbitration agreements as they see fit.'" *Id.* at 1763 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). The contrary rule of the California courts – which permits the abrogation of the parties' arbitration agreement

based on the courts' own perception of public policy – must yield to that fundamental principle. Indeed, the Court in *Stolt-Nielsen* expressly stated that the FAA requires courts and arbitrators "to interpret and enforce a contract, not to make public policy." *Id.* at 1767. Here, likewise, the Ninth Circuit erred in giving precedence to California's public policy judgments over the agreement of the parties. Accordingly, the decision below should be reversed under the principles established in *Gilmer* and *Stolt-Nielsen*.

III. California Courts and the Ninth Circuit Have Given Insufficient Weight to the Benefits of Arbitration and the Costs and Problems Associated with Class Actions.

The Panel decision failed to accord sufficient weight to the benefits of arbitration and the disadvantages of class proceedings. "The advantages of arbitration are many: It is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing . . . dealings among the parties." H.R. Rep. No. 97-542, at 3 (1982). These "advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted). In the instant case, the District Court concluded that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." Cert. Pet. at 42a.

The benefits of arbitration are not limited to parties who have disputes. Rather, *all* contracting

parties benefit from the lower dispute resolution costs inherent in arbitration. This is because economic considerations encourage companies to pass on to their customers, in whole or in part, the lower dispute resolution costs they incur as a result of arbitration. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91-93.

Moreover, published studies show significant additional benefits to arbitration, as well as high levels of satisfaction for parties who participate in arbitration. *See, e.g.*, Harris Interactive, *Arbitration: Simpler, Cheaper and Faster Than Litigation*, http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (Apr. 2005) (strong satisfaction with arbitration results and process, including speed and simplicity); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998) (director of ACLU's National Task Force on Civil Liberties in the Workplace concludes that employees collectively receive *10.4%* of their demand in litigation, compared with *18%* in arbitration, and "arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history").

On March 12, 2009, the Searle Civil Justice Institute of Northwestern University School of Law released the first in-depth study of consumer arbitrations administered by the AAA. *See Consumer Arbitration Before the American Arbitration Association Preliminary Report, available at* http://www.searlearbitration.org /report. The study, which was based on a review of 301 consumer arbitrations that were closed by award between April and December

2007, reached the following conclusions: (1) The upfront cost of arbitration for consumer claimants is quite low (an average of $96 for claims less than $10,000 and $219 for claims between $10,000 and $75,000). These amounts are below the levels specified in the AAA fee schedule for low-cost arbitrations and are the result of arbitrators reallocating consumer costs to businesses. (2) AAA consumer arbitration is an expeditious way to resolve disputes (an average of 6.9 months). (3) Consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed). (4) No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business. (5) Arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was $14,574. (6) A substantial majority of consumer arbitration clauses (76.6%) fully complied with the AAA Due Process Protocol. (7) AAA's review of arbitration clauses for Protocol compliance was effective (98.2% of the time) at identifying and responding to clauses with Protocol violations. (8) AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses. In 2007, AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its case load) because the business failed to comply with the Protocol. (9) As a result of AAA's Protocol compliance review, some businesses either waive problematic provisions or revise arbitration clauses to remove provisions that violate the Protocol.

A second study by the same organization, this one involving debt collection, showed that "[c]reditors prevailed less often (that is, consumers prevailed

more often) in the arbitrations studied than in court . . . even after controlling for differences among the types of cases and the venue in which they were brought" and that "[c]reditor recovery rates in the arbitrations studied were lower than, or comparable to, creditor recovery rates in court . . . [e]ven after controlling for differences among the cases." Searle Institute, *Creditor Claims in Arbitration and in Court Interim Report No. 1, Executive Summary* (Nov. 2009) (emphasis eliminated), *available at* http://www.law.northwestern.edu/searlecenter/uploads/CREDITOR%20CLAIMS%20IN%20ARBITRATION%20AND%20IN%20COURT%20INTERIM%20REPORT%20NO.%201.pdf.

By contrast, the existence of substantial problems with class actions cannot be disputed. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. p. 401 (RAND Institute for Civil Justice 2000) (leaving open the "great big question" whether class actions, on balance, serve the public well); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (rejecting settlement giving class counsel a "generous fee" because the settlement "sold . . . 1.4 million claimants down the river"); *In re Gen. Motors Corp.*, 55 F.3d 768, 778 (3d Cir. 1995) (noting that class actions can become a vehicle for collusive settlements); 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner, sponsor of Class Action Fairness Act) ("The class action judicial system has become a joke, and no one is laughing except the trial lawyers . . . all the way to the bank."). Certainly, reasonable consumers could well prefer cost savings and other arbitration benefits to the speculative prospect of "relatively paltry potential recoveries" in class actions. *Amchem Prods., Inc. v.*

Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

In light of the benefits that arbitration can provide, Congress has encouraged parties to arbitrate disputes in accordance with the contracts they have executed. *See* 9 U.S.C. § 2. "[T]he FAA's legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding – apart from its non-judicial nature, it has little in common with what Congress approved in 1925." David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 57 (Nov. 2007) ("*An Uninvited Guest*") (emphasis original). In this regard, proponents of the FAA who testified before Congress described arbitration as "face to face" in nature and prompt, inexpensive and procedurally streamlined. *Id.* at 59-60.

One of the leading witnesses characterized arbitration as "something so much cheaper than litigation that . . . its use would reduce the price of consumer goods . . . ." *Id.* at 59 n.16 (citations omitted). Another leading witness advised Congress that arbitration would avoid long delays resulting from court congestion, preliminary motions and other steps taken by litigants. *Id.* at 59. Accordingly, Congressional reports recommending adoption of the FAA made clear that, "when it enacted the FAA, Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined – in other words, just the type of proceeding that had been described by the witnesses during the pre-enactment hearings." *Id.* at 61.

Where parties have contracted for individual arbitration, imposing class arbitration effects a "fundamental change" to the parties' agreement. *Stolt-Nielsen*, 130 S. Ct. at 1776. Class arbitration "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties," including absent parties. *Id.* The parties' expectations about privacy and confidentiality in individual arbitration are also "potentially frustrat[ed]" when disputes are litigated on a class-wide basis. *Id.* Perhaps most critically, class arbitration drastically raises the stakes "even though the scope of judicial review is much more limited." *Id.*

In effect, superimposing class-action procedures on arbitration "brings the burdens of litigation into the arbitral forum. . . . [T]he greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration . . . lessens the distinction between the two processes." Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. Disp. Resol. 259, 272; *accord* Linsday R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 649 (class procedure "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration"). Thus, class arbitration, which attempts to combine two separate and distinct forms of dispute resolution, creates an unworkable tangle inferior to either a true judicial or arbitral forum.

Not only is class arbitration inconsistent with the streamlined procedures that are the *sine qua non* of

the individual arbitration contemplated by the FAA, but it also generates unique costs. For example, the "clause construction" determination, which addresses whether a particular agreement permits class arbitration,[5] has no counterpart in the courts. Clause construction disputes can be time-consuming and costly. *See An Uninvited Guest*, at 63-64. Thus, class arbitration creates delays and costs incompatible with the expectations of parties who bargained for individual arbitration.

The cost of class arbitration is hardly its only (or worst) disadvantage. Any class-wide arbitral award would be reviewable only for extremely limited causes, including fraud, bias or gross misbehavior of the arbitrator. *See* 9 U.S.C. § 10; *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (holding that parties may not contractually expand the grounds for appealing arbitration awards). Many companies are willing to risk an erroneous decision in an *individual* arbitration because of the cost savings inherent in arbitration and the desire to pursue a less adversarial way of resolving customer disputes. However, the calculus changes dramatically if the arbitration provision must allow for class proceedings. As one member of this Court commented in referring to class arbitration proceedings: "You might not want to put your company's entire future in the hands of one arbitrator." *See* Tr. of Oral Argument, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *available at* 2003 WL 1989562, at *29. The truth of the matter is that few if any companies – and no

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[5] *See* Rule 3 of AAA Supplementary Rules for Class Arbitrations, http://www.adr.org/sp.asp?id=21936, and Rule 3 of JAMS Class Action Procedures, http://www.jamsadr.com/rules-class-action-procedures/.

companies that make a considered decision – will "bet the bank" on a class arbitration.

"The arbitrator has no authority, *sua sponte*, to assert jurisdiction over a contracting party who has never appeared or agreed to an arbitration proceeding or a modification of his or her contract." Edward C. Anderson & Kirk D. Knutson, *"Class" Arbitration? What About the Rights of Absent "Class" Members?*, 7 Engage 148, 151 (2006), http://www.fed-soc.org/doclib/20080214_LitAndreson.pdf ("*Class Arbitration*"). And the lack of judicial involvement and oversight of classwide arbitration raises significant due process concerns about the protection of absent class members. *See An Uninvited Guest* at 75-78.

This Court has warned that courts should be "mindful that Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 613 (*citing* 28 U.S.C. § 2072(b)). In enacting the FAA in 1925, well before Rule 23 was added to the Federal Rules in 1966, Congress clearly did not contemplate classwide arbitration.

For all these reasons and more, this Court held in *Stolt-Nielsen*, just a few months ago, that class procedures could not be imposed on parties who agreed to arbitration but did not address in their agreement whether the arbitration would necessarily be conducted on an individual basis. According to the Court, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 130 S. Ct. at 1775.

In short, there are good reasons for private parties to prefer individual arbitration of consumer disputes over class proceedings. Under the FAA, that choice must be respected.

IV. Class Actions Are Not Needed To Ensure High Levels of Legal Compliance.

The Panel below refused to enforce ATTM's arbitration agreement because California courts have said that an arbitration agreement with a class action waiver is "unconscionable" when the unavailability of class procedures might lessen the pressure on companies to comply with the law. While courts in California and the Ninth Circuit insist upon preserving the deterrent effect of class proceedings at the expense of individual arbitration, a number of other courts have relied upon government enforcement mechanisms in upholding the validity of arbitration agreements with class action prohibitions. *See, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 375-76 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) (even if class actions are not available in arbitration, numerous administrative mechanisms exist to enforce the federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq*. ("TILA")); *accord, Gay v. CreditInform*, 511 F.3d 369, 381 (3d Cir. 2007), *reh'g denied* (Jan. 29, 2008); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818 (11th Cir. 2001). *See also Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1292 (M.D. Ala. 2003) (sustaining class action waiver in arbitration agreement in view of administrative enforcement mechanisms for ECOA violations and the federal policy favoring arbitration); *In*

re Universal Service Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1137-38 (D. Kan. 2003).[6]

In the instant case, if ATTM (or another provider of telecommunications services) were to impose an unreasonable charge or engage in any unjust or unreasonable practice, it would be in violation of Section 201(b) of the Federal Communications Act of 1934 (the "FCA"), 47 U.S.C. § 201(b), and the Federal Communications Commission (the "FCC") would have broad authority under the FCA to: (1) investigate the provider, 47 U.S.C. § 403; (2) adjudicate complaints regarding its conduct, 47 U.S.C. § 208; (3) issue a ruling ordering it to pay damages, 47 U.S.C. § 209; and (4) assess forfeitures. 47 U.S.C. § 503.[7]

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[6] Congress has *eliminated* private actions entirely (not just class actions) under several consumer credit statutes, relying *entirely* upon the efficacy of robust administrative enforcement. *See, e.g.*, Pub. L. 104-208, Sec. 2604(a) (eliminating private actions under Truth-in-Savings Act); *Perry v. First Nat'l Bank*, 459 F.3d 816 (7th Cir. 2006) (holding that amendments to the Fair Credit Reporting Act eliminated private actions against consumer report users). And when Congress recently enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act"), Pub.L. 111-24, 123 Stat. 1734, it placed a number of the CARD Act's substantive provisions in a part of TILA that is not enforceable through private actions. See 15 U.S.C. § 1640(a) (creating private right of action for violations of *Part B* of TILA); 15 U.S.C. §§ 1665c-e (CARD Act provisions requiring reduction in interest rates in specified circumstances, limiting penalty fees and requiring consideration of the cardholder's ability to repay).

[7] The FCC has aggressively employed these powers, issuing notices of apparent liability for forfeiture or entering into consent decrees with numerous telecommunications companies that have allegedly violated laws designed to protect consumers, including laws prohibiting overcharges. *See, e.g., The Hot Lead LLC*, Forfeiture Order, 23 F.C.C.R. 5282 (2008) (FCC issued

Wireless carriers also have exposure in state enforcement proceedings. For example, the California Public Utilities Commission (the "CPUC") has authority to enforce California laws applicable to providers of wireless services by: (1) issuing orders commanding compliance with state laws, Cal. Publ. Util. Code § 702; (2) conducting investigations on its own motion or after receiving a complaint from a consumer, Cal. Publ. Util. Code § 1701; Rule 5.1 of the CPUC Rules of Practice and Procedure; (3) ordering repayment of excessive surcharges, with interest, Cal. Publ. Util. Code § 734; and (4) ordering penalties of not less than $500 nor more than $20,000 for each offense for failure to comply with an order or

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monetary forfeiture in the amount of $2,591,500 for violations of the Telephone Consumer Protection Act (the "TCPA") and FCC rules relating to unsolicited facsimile advertisements to consumers); *Horizon Telecom, Inc.*, Notice of Apparent Liability, 23 F.C.C.R. 3485 (2008) (apparent liability for forfeiture of $5,084,000 for alleged slamming violations); *Sprint Communications Company L.P.*, Order and Consent Decree, 20 F.C.C.R. 5576 (2005) (Sprint Communications Company L.P. agreed to make a voluntary contribution in the amount of $4 million to terminate slamming investigation); *Fax.com, Inc.*, Forfeiture Order, 19 F.C.C.R. 748 (2004) (FCC issued monetary forfeiture in the amount of $5,379,000 for violations of the TCPA and FCC rules relating to unsolicited facsimile advertisements to consumers); *NOS Communications, Inc. and Affinity Network Incorporated*, Order and Consent Decree, 17 F.C.C.R. 26853 (2002) (two affiliated long distance companies agreed to make a voluntary contribution in the amount of $1 million to resolve deceptive marketing practices allegations). Note that all of the cases cited in this footnote above are available at http://www.fcc.gov/eb/Orders. *See also* Edmund L. Andrews, "Settlement for Nynex and F.C.C.," N.Y. Times, Oct. 5, 1990 (reporting on a consent decree providing for refund of $35.5 million in overcharges, payment of back interest and $1.4 million contribution to the U.S. Treasury).

requirement of the CPUC, in a case in which a penalty has not otherwise been provided. Cal. Publ. Util. Code § 2107. Additionally, the California Attorney General may pursue actions against wireless carriers for restitution, civil penalties, injunctive relief and other remedies. *See, e.g.*, California Business and Professions Code § 17200, *et seq.* (prohibiting unlawful, unfair or fraudulent business practices); and § 17500, *et seq.* (prohibiting untrue or misleading advertising).

Other industries are likewise subject to the threat of regulatory enforcement proceedings. *Amici* can speak authoritatively concerning administrative remedies affecting participants in the consumer financial services industry. The industry operates within a comprehensive state and federal regulatory structure aimed at obtaining compliance with applicable state and federal requirements. Thus, even if the Ninth Circuit or the California courts were free to impose their own policy judgments under the FAA – which they are not – there is no basis for any supposition that the availability of class-wide arbitration is necessary to ensure that the financial sector remains compliant with the law.

For customers of companies that are not depository institutions supervised by the federal banking agencies, the Federal Trade Commission (the "FTC") has broad powers to redress unfair or deceptive acts and practices proscribed by Section 5 of the FTC Act, 15 U.S.C. § 45. It can bring civil proceedings to obtain: (1) a civil penalty of up to $10,000 for each violation, 15 U.S.C. § 45(m); (2) an injunction and ancillary relief, 15 U.S.C. § 53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers . . . [including] rescission or reformation of contracts,

the refund of money or return of property, [and] the payment of damages . . . ." 15 U.S.C. § 57b(b).

The FTC has aggressively employed its consumer protection powers. Reported cases under the FTC Act include *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991) (following *Singer* and affirming award of monetary equivalent of rescission); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (asset freeze); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997) (rescission, restitution and disgorgement).[8]

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[8] In the last week of July 2010 alone, the FTC announced a number of successful regulatory proceedings. *See* "Mortgage Relief Marketer Will Return $2.4 Million to Consumers to Settle FTC Charges" (settlement provides ban from selling mortgage relief and modification services and monetary relief); "Rite Aid Settles FTC Charges That It Failed to Protect Medical and Financial Privacy of Customers and Employees" (July 27, 2010) (FTC and HHS settlement requires Rite Aid to establish a comprehensive information security program designed to protect the security, confidentiality, and integrity of the personal information it collects from consumers and employees and obtain a security audit every two years for the next 20 years; HHS obtains $1 million of relief in related action); "Deceptive Marketers Banned from Selling Mortgage Relief Services; One Defendant Ordered to Pay $11.5 Million" (July 26, 2010) (settlement provides ban from selling mortgage relief and modification services and monetary relief). *See also* "Court Halts Bogus Invention Promotion Claims" (Apr. 19, 2006) (judgment to pay $26 million in consumer redress and permanent bar from deceptive recruiting practices); "ChoicePoint Settles Data Security Breach Charges; to Pay $10 Million in Civil Penalties, $5

The federal banking agencies have even stronger remedies available to them in the event a depository institution violates the law. Under Section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818, the appropriate agency may initiate cease and desist proceedings and obtain an order that requires the offending institution, among other things, to: (1) cease and desist the unlawful conduct; (2) make restitution or provide reimbursement against loss in the case of unjust enrichment or reckless disregard for the law; (3) rescind the underlying agreement; or (4) take such other action as the agency determines to be appropriate. 12 U.S.C. § 1818(b). In addition, the agency can remove from office any institution-affiliated party who has directly or indirectly violated the law and can prohibit such person from further participating in the affairs of *any* insured depository institution. 12 U.S.C. §§ 1813(u), 1818(e). The agency can also obtain sizable civil money penalties, up to $25,000 or $1 million per day in specified cases. 12 U.S.C. § 1818(i).

Further undermining the Panel's reasoning is the fact that many consumer protection statutes do not rely entirely (or at all) on private parties for enforcement and instead bring to bear the resources of federal or state agencies to ensure that regulated

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Million for Consumer Redress" (Jan. 26, 2006); "Fairbanks Capital Settles FTC and HUD Charges" (Nov. 12, 2003) ($40 million in consumer redress in settlement of charges alleging illegal practices in servicing subprime loans); "Home Mortgage Lender Settles "Predatory Lending" Charges" (Mar. 21, 2002) and "Subprime Loan Victims to Receive Additional Redress" (Feb. 2, 2004) ($65 million in consumer redress paid by First Alliance Mortgage Company in settlement of charges alleging unlawful lending practices).

entities remain compliant with the law. For example, TILA authorizes enforcement authorities to order restitution whenever a creditor discloses a finance charge or annual percentage rate ("APR") that is materially inaccurate. Subject to certain limited exceptions, the enforcement agencies are *required* to order restitution for violations that result from a clear and consistent pattern or practice of violations, gross negligence or a willful violation intended to mislead the consumer. 15 U.S.C. § 1607. Persons who willfully and knowingly violate TILA are subject to fines up to $5,000 and/or imprisonment up to one year. 15 U.S.C. § 1611.

These powerful inducements to comply with TILA are not available to private litigants who must instead show detrimental reliance upon a disputed disclosure to obtain actual damages. *See, e.g., Vallies v. Sky Bank*, 591 F.3d 152, 154 (3d Cir. 2009). The TILA enforcement agencies can (and do) order broad-based relief without regard to the procedural requirements of Fed. R. Civ. P. 23 and the numerous difficulties and legal costs associated with determining compliance with the Rule.

Agency enforcement powers are not static. Just last month, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376. Title X of the Dodd-Frank Act, *id.*, §§ 1001-1100H, designated the "Consumer Financial Protection Act of 2010" (the "CFPA"), establishes a new Bureau of Consumer Financial Protection (the "Bureau"), housed in the Federal Reserve System and with an annual budget equal to at least 10% of the System's operating expenses (approximately $550 million based on 2009 figures), plus an additional

$200 million per year for up to five years at the Bureau's request.

The Bureau is responsible for supervising and examining the consumer compliance of depository institutions with more than $10 billion of assets, most participants in the mortgage lending industry, student and payday lenders, larger participants in markets for other financial services and companies engaged in conduct that poses risks for consumers, as determined by the Bureau based on complaints or information from other sources. *Id.*, §§ 1024-1026. Additionally, the Bureau has sweeping authority to issue rules, applicable to virtually all providers of consumer financial products and services, identifying as unlawful acts or practices it defines as "unfair, deceptive, or abusive" in connection with the offer or provision of a consumer financial product or service to a consumer. *Id.*, § 1031.

Significantly, Congress did *not* provide a private right of action for violation of Bureau rules. Instead, when the Bureau believes it has uncovered a violation of law, including its rules, the CFPA gives it a variety of potent enforcement powers. These include the authority to: (1) impose civil money penalties, ranging from $5,000 per day for garden-variety violations, to $25,000 per day for reckless violations, to $1 million per day for knowing violations; (2) issue cease-and-desist orders to restrain activity or require affirmative action; and (3) obtain various forms of equitable relief, such as rescission or reformation of contracts, refunds, restitution, disgorgement for unjust enrichment, damages or other monetary relief and limits on activities and functions. *Id.*, §§ 1053-55.

The CFPA confers enhanced enforcement powers on other governmental entities as well. Thus, State

attorneys general are expressly authorized to bring civil actions to enforce provisions of Title X or Bureau rules against virtually all providers of consumer financial services (including federally chartered providers), and state regulators are empowered to bring such actions against state-chartered entities. In such actions, the attorney general or regulator can obtain the various forms of relief available to the Bureau, other than civil money penalties, and any remedies otherwise provided by law. *Id.*, § 1042.

In short, there are severe potential consequences for companies that violate the law. There is no credible basis for State courts and/or the Ninth Circuit to invalidate agreements that require individual arbitration of claims.

CONCLUSION

For the foregoing reasons and the reasons set forth in ATTM's brief, *Amici* respectfully request that this Court reverse the judgment below.

Respectfully submitted,

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