Nos. 08-55825 & 08-55830
Decision Filed: November 19, 2009
(Ikuta, Schroeder, Siler)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREG MASTERS,
Plaintiff-Appellee,
vs.
DIRECTV, INC., *et al.*,
Defendants-Appellants.

JOHN MURPHY,
Plaintiff-Appellee,
vs.
DIRECTV, INC., *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
For the Central District of California, Western Division
The Honorable Florence-Marie Cooper

Case Nos. 08-00906 FMC (VBKx) & 07-6465 FMC (VBKx)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

A. Pursuant to Fed. R. App. P. 26.1, counsel for the Chamber of Commerce of the United States of America (the "Chamber"), certifies that the following Certificate of Interested Persons/Corporate Disclosure Statement is complete and correct. Neither the Chamber nor any parent, subsidiary, or affiliate has issued shares or debt securities to the public.

B. Counsel for the Chamber further certifies that there are no other persons, associations of persons, or corporations (including those related to a party as a subsidiary, conglomerate, affiliate or parent corporation) having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing more than 3,000,000 businesses and organizations of every size and in every sector of the Nation's economy. The Chamber's members have an acute interest in this case because they routinely enter into contracts that contain choice-of-law provisions. Chamber members rely on the enforceability of these provisions to provide certainty about the law governing their conduct. The Panel's decision casts that reliance into doubt—representing a disturbing departure from settled California law. If rehearing is not granted, the Panel's decision invites a tidal wave of nationwide class action litigation in the federal district courts in California. Even more troublesome, it would establish California's consumer-protection law as an additional source of regulation for the operations of California-based businesses in all 50 states. Because that result is contrary to well-established law and would have dire consequences for the Chamber's members, the Chamber respectfully submits this brief as *amicus curiae*.

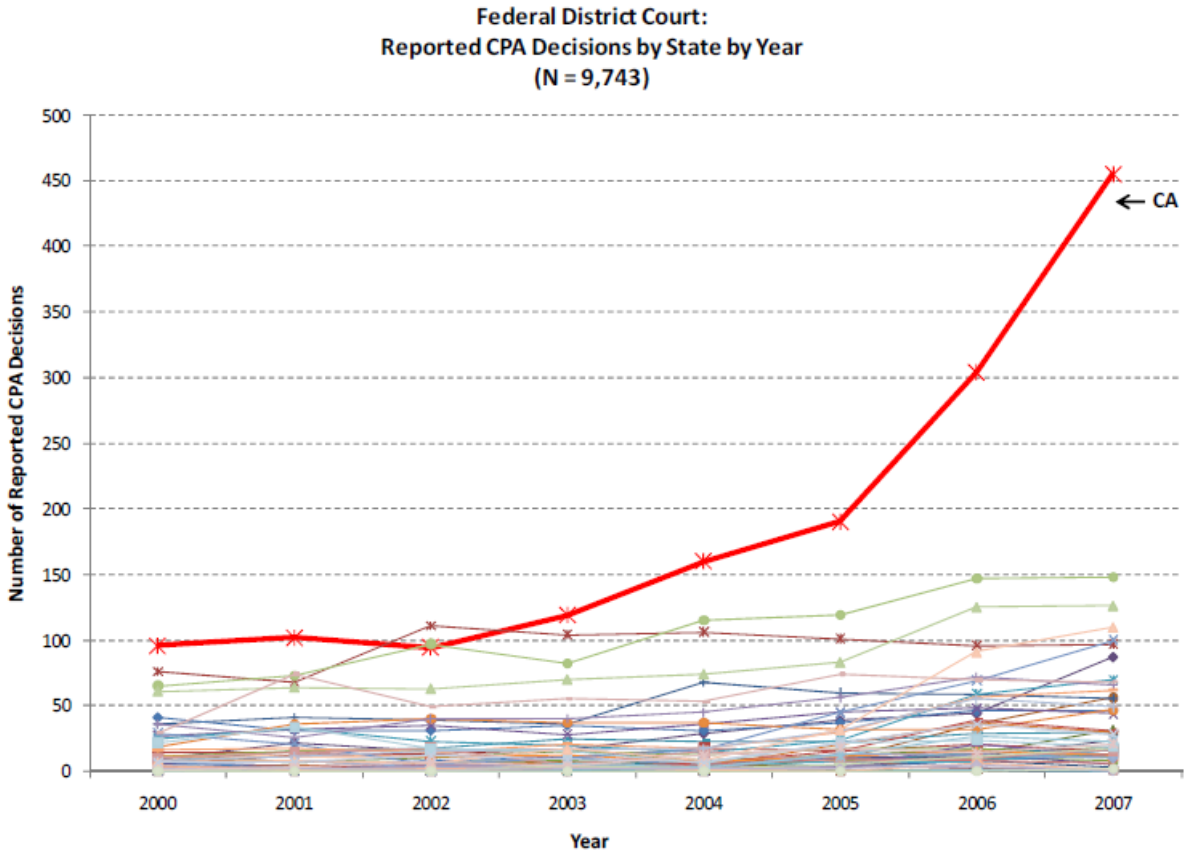
[1] Both parties have consented to the filing of this brief. Fed. R. App. P. 29(a); 9th Cir. R. 29-2(a).

ARGUMENT

"Federal district judges in California, batten down the hatches. The floodgates have been opened to nationwide class actions under California law against California-based companies, regardless of the laws of any other state to the contrary." That is the alarming message of the Panel's opinion. And the plaintiffs' bar already is trumpeting it as "a major victory" because out-of-state customers now can pursue nationwide class actions in California even when barred "by the law of each customer's state of residence," which the customer agreed would apply. *See* Public Justice, *Federal Appeals Court Clears Way for Nationwide Class Action Lawsuit against DirecTV for Alleged 'Bait-and-Switch' Scheme* (Nov. 19, 2009), *at* http://www.publicjustice.net/Newsroom/News/masters-v-directv.aspx.

Few areas of litigation have been growing as fast as consumer class actions. As the chart appended below reflects, federal courts in California already are bearing the brunt of this increase, with the number of reported decisions involving California's consumer-protection laws growing about 474% since 2000—a dramatic increase as compared to actions brought under the laws of other states in other federal district courts. *See* Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation Preliminary*

Report 21-22 & chart 4 (Dec. 2009), *at* http://www.law.northwestern.edu/searlecenter/uploads/CPA_Proof_113009_final.pdf.



The Panel's decision here will cause the number of class actions filed in California federal courts to skyrocket still further.

Moreover, the Panel's decision is nothing short of extraordinary. It is one thing to declare that, because California public policy favors class actions, arbitration agreements that prohibit class arbitration cannot be enforced as to ***California*** consumers with small claims. *See Laster v. AT&T Mobility LLC*, 584

F.3d 849 (9th Cir. 2009).[2] But it is another thing altogether to export California's public policy to the ***other 49 states***—of which some do not allow class actions at all, and many more have deliberately chosen to enforce agreements to arbitrate on an individual basis. The Panel's decision is even more distressing because, in order to reach this policy outcome, it disregarded a contractual choice-of-law provision. The refusal to enforce the choice-of-law provision is particularly egregious here because the contract selects the law of the state where the customer lives and signed up for and received service—the very law that a customer would reasonably expect to be chosen, and that a business would reasonably predict to apply to its relationship with that customer.

The Panel's holding is deeply flawed in multiple respects: (i) its application of California's choice-of-law rules is in conflict with this Court's and the California Supreme Court's prior decisions; (ii) it contravenes the Rules Enabling Act's mandate that the rules of procedure, including the class-action device, may not be used to alter the substantive rights and obligations of the parties; and (iii) it violates constitutionally-based principles of interstate comity and federalism. Rehearing is warranted not only because of the importance of the decision—it invalidates millions of choice-of-law provisions in one fell swoop, and its

[2] The Chamber disagrees with *Laster* and other cases applying California law to strike down class-arbitration waivers, but for purposes of this amicus brief that disagreement is beside the point.

reasoning threatens tens of millions more—but also because it is in conflict with prior decisions of this Court. This Court should grant review and hold that the commercially reasonable choice-of-law provisions in DIRECTV's contracts are fully enforceable.

I. REHEARING IS WARRANTED BECAUSE THE PANEL BADLY MISINTERPRETED CALIFORNIA'S CONFLICTS-OF-LAWS PRINCIPLES IN ESSENTIALLY INVALIDATING MILLIONS OF CHOICE-OF-LAW AGREEMENTS.

The California Supreme Court has declared that "California courts shall apply the principles set forth in Restatement [(Second) of Conflicts of Laws] section 187 [(1971)], which reflect a ***strong policy favoring enforcement*** of" contractual choice-of-law provisions. *Nedlloyd Lines B.V. v. Super. Ct.*, 834 P.2d 1148, 1151 (Cal. 1992) (emphasis added). That court has subsequently made clear that "*Nedlloyd*'s analysis is properly applied in the context of consumer adhesion contracts" (*Washington Mut. Bank v. Super. Ct.*, 15 P.3d 1071, 1079 (Cal. 2001))—which under California law include virtually any standard-form consumer contract. In other words, Section 187 of the Restatement—and therefore California law—establishes a powerful presumption in favor of enforcing choice-of-law provisions, subject only to limited exceptions.

Specifically, parties' choice-of-law agreements generally must be enforced unless both of two conditions are met: (i) "the chosen state's law [is] contrary to a fundamental policy of" the state whose law would apply in the absence of the

choice-of-law provision; ***and*** (ii) the latter state "has a materially greater interest than the chosen state in the determination of the particular issue." Restatement, *supra*, § 187(2)(b); *see also, e.g., Washington Mut.*, 15 P.3d at 1078 & n.5.

It is clear that the party resisting the choice-of-law clause bears the burden of proving the exception: "the parties' choice generally will be enforced unless ***the other side can establish both*** that the chosen law is contrary to a fundamental policy of California and that California has a materially greater interest in the determination of the particular issue." *Washington Mut.*, 15 P.3d at 1079 (emphasis added).

The Panel departed radically from these settled principles in several respects. ***First***, in holding that a fundamental policy of California would be violated by enforcement of the choice-of-law provision, the Panel relied solely on a negative inference: Because petitioner DIRECTV had failed to show that California courts had ***expressly ruled out*** extending California's pro-class action policy to out-of-state consumers, the Panel viewed that silence as tantamount to requiring it to export that policy to all 49 other states. *See* Panel Op. 2-3 ("No California court has ruled that this fundamental policy applies only to protecting California residents, and because we have no basis for creating such a limitation, we must conclude that the 'fundamental policy' prong of the *Nedlloyd* test is met in this case.").

That approach simply cannot be squared with what California courts actually have said: (1) that there is a "strong policy" favoring the enforcement of choice-of-law provisions—*i.e.*, a presumption that the parties' agreement will be honored—and (2) that the out-of-state named plaintiffs bear the burden of proving that applying the law of the chosen state would conflict with a fundamental policy of the state whose law otherwise would apply. In the absence of a clear statement by the California courts that California's policy against enforcing class waivers against its own citizens extends to citizens of ***other*** states, the Panel should have concluded that no such policy exists rather than assuming it into existence. To conclude otherwise would reverse the presumption of enforceability and "subvert the Restatement section 187 analysis." *In re Detweiler*, 305 F. App'x 353, 356 (9th Cir. 2008) (applying Restatement § 187 under Washington law).

That is all the more true, because the contracts chose the law where the customer resides and the contracts were entered into and performed. The Restatement specifies that "[t]he more closely the state of the chosen law is related to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice-of-law provision." Restatement, *supra,* § 187 cmt. g. It is simply implausible that California's heretofore unexpressed interest in allowing non-residents to bring class actions against California companies is fundamental at all, much less so

fundamental as to necessitate disregarding the fact that the parties chose the law of the states where the customers reside, the contracts were entered, and the contracts were performed.

Second, the Panel's holding fails at the very threshold because neither California public policy nor its interests are part of the Restatement Section 187 analysis at all. In declaring that California law has any bearing on the challenges by the Georgia and Montana plaintiffs to their arbitration agreements, the Panel badly misconceived the Restatement test. Specifically, Section 187 makes clear that the comparison is not automatically between the law selected by the contract and that of the forum state (here, California). Rather, Section 187(2)(b) requires a comparison between the chosen state and the state "which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." *See also Nedlloyd Lines*, 834 P.2d at 1152 n.5 (when "the law of yet a third state, rather than California's, would apply absent the parties' choice, … a California court will look to the fundamental policy of the third state"—not California—"in determining whether to enforce the parties' choice of law"); *Washington Mut.*, 15 P.3d at 1078 & n.5 (same); *accord Int'l Bus. Machs. Corp. v. Bajorek*, 191 F.3d 1033, 1038 (9th Cir. 1999) (in applying Section 187, "the state with the contrary policy" must be "the state of the applicable law under section 188 were it not for the choice of law provision").

The Panel failed even to attempt to identify which state's law would apply for each named plaintiff in the absence of a choice-of-law provision. Had it done so, the choice-of-law analysis would have been an easy one, because the applicable law in the absence of the choice-of-law provision would be the law of the named plaintiffs' home states. As DIRECTV has explained, the factors that are relevant under Restatement Section 188 point squarely to Georgia and Montana. Pet. 8-10. That result is entirely unsurprising: Common sense suggests that a DIRECTV customer who lives in a state other than California would expect that the law governing her contract disputes would be her local law, not the law of some far-off place. Indeed, Section 188(3) specifies that when the "place of negotiating the contract and the place of performance" are the same, "the local law of [that] state will usually be applied." Moreover, when the issue is a "contract rule designed to protect [a] party against the unfair use of superior bargaining power"—here, the plaintiffs' invocation of state unconscionability law as a defense to enforcement of their arbitration agreements—the "state where [that] party … is domiciled has an obvious interest in" applying its law. *Id.* § 188 cmt. c.

Because DIRECTV's contracts with the named plaintiffs select the law of the same states (Georgia and Montana) as would apply even absent a choice-of-law provision, the choice-of-law analysis is straightforward. As the California Court of Appeal has explained, "an early determination that the chosen state and the state

that would provide 'the applicable law in the absence of an effective choice of law by the parties' are ***one and the same*** … obviates any need … to determine which state has the 'materially greater interest' in having its law applied." *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal.Rptr.2d 73, 84 n.12 (Ct. App. 1998) (emphasis added).[3]

Third, even if California would have supplied the applicable law in the absence of a choice-of-law provision, and even if it had some legitimate interest in preserving the class-action mechanism for the use of non-residents, it is inconceivable that such an interest is "materially greater" than that of each plaintiff's home state. The California Court of Appeal has made clear that "California has no greater interest in protecting other states' consumers than other states have in protecting California's." *Discover Bank v. Super. Ct.*, 36 Cal.Rptr.3d 456, 462 (Ct. App. 2005). Whatever interest California may have in policing its corporations' in-state conduct, that interest cannot be more substantial than the interest that other states such as Georgia and Montana have in regulating transactions occurring within ***their*** borders and affecting ***their*** residents. Those states have a powerful interest in having their own policy judgments honored with respect to their own citizens. In fact, a number of states—including Montana, Georgia, and at least six others—either generally do not permit class actions in

[3] The same is true, of course, of the Restatement's "fundamental policy" prong.

state court or do not allow for class actions under their consumer-protection statutes.[4] And as DIRECTV has pointed out, courts in many other states have held that DIRECTV's arbitration agreement is fully enforceable. Pet. 3 n.1. These states have come to different conclusions than California, but—contrary to respondents' arguments—that does not make them "less protective" of consumers than California. Rather, these states have reasonably determined that their citizens are better off being allowed to choose to receive the benefits of individual arbitration and concomitant lower prices for goods and services in exchange for giving up the prospect of being part of a class action.

In our federal system, those judgments—as applied to a state's own citizens—are entitled to respect. As the Supreme Court has explained, it is a "basic principle of federalism" that "each State may make its own reasoned

[4] *See* Mont. Code § 30-14-133(1) (consumer "may bring an individual but not a class action" under Consumer Protection Act); Ga. Code § 10-1-399(a) (consumer "may bring an action individually, but not in a representative capacity" under Fair Business Practices Act); *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004) ("[T]he Louisiana Unfair Trade Practices Act … does not permit individuals to bring class actions."); *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 678 S.E.2d 430, 434 (S.C. 2009) ("[South Carolina Unfair Trade Practices Act] claims may not be maintained in a class action law suit"); *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 310 (Tenn. 2008) ("class actions are … prohibited" under Tennessee Consumer Protection Act); *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002) ("Virginia … lacks a class action procedure"); *Am. Bankers Ins. Co. v. Booth*, 830 So.2d 1205, 1214 (Miss. 2002) ("[T]he rule is that Mississippi does not permit class actions."); *Ex parte Exxon Corp.*, 725 So.2d 930, 933 (Ala. 1998) ("Alabama law does not allow consumers to bring class actions based on deceptive trade practices.").

judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). And because "[s]tate consumer-protection laws vary considerably, … courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002); *see also White v. Ford Motor Co.*, 312 F.3d 998, 1017-18 (9th Cir. 2002) (while two states may approach regulation of product safety differently, "[n]either state is entitled, in our federal republic, to impose its policy on the other").

Indeed, when the shoe is on the other foot, California courts have routinely found that "[a]nother state does not have a materially greater interest in a matter when for fundamental public policy reasons California seeks to protect ***its*** citizens." *Expansion Pointe Props. Ltd. P'ship v. Procopio, Cory, Hargreaves & Savitch, LLP*, 61 Cal.Rptr.3d 166, 180 (Ct. App. 2007) (emphasis added); *see also Am. Online, Inc. v. Super. Ct.*, 108 Cal.Rptr.2d 699, 708-14 (Ct. App. 2001). In other words, California has made it clear that, when its residents sue out-of-state companies, California has a greater interest in having its laws applied than does the state where a company is headquartered. To remain true to this approach, California law conversely must—and does—provide that when an out-of-state plaintiff sues a California company, the state where the plaintiff resides and where the contracts were formed has a greater interest in having its policy judgments

apply. To hold otherwise would create an intolerable one-way ratchet, in which courts would simply apply the law of the state that most benefits the plaintiff. But the law cannot and does not operate with such a stacked deck.

In sum, the Panel misapplied the Restatement—and hence California law—at every turn. Given the millions of fair and commercially reasonable contractual choice-of-law provisions that it eradicated with a stroke of the pen, rehearing is clearly warranted.

II. REHEARING IS WARRANTED TO AVOID ENCOURAGING THE USE OF PUTATIVE CLASS-ACTION LAWSUITS TO ABRIDGE, ENLARGE, OR MODIFY UNDERLYING SUBSTANTIVE RIGHTS IN VIOLATION OF THE RULES ENABLING ACT.

"It is axiomatic that Rule 23 cannot 'abridge, enlarge or modify any substantive right' of any party to the litigation." *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("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.'") (quoting 28 U.S.C. § 2072(b)). Stated another way, the Rules Enabling Act prohibits courts from altering the substantive law governing the parties simply because the named plaintiffs have filed a putative class action.

Yet that is precisely what the Panel did here by hinging its substantive choice-of-law analysis on the fact that the named plaintiffs had filed a putative

class action. According to the panel, "***[b]ecause the current dispute is brought as a nationwide class action***, neither Montana nor Georgia can claim any special interest in having its laws apply to this dispute; each state in which putative class members reside, whether it is California, Montana, or Georgia, has the same interest in protecting its own residents." Panel Op. 3-4 (emphasis added).

That alters the governing substantive law. Surely if one of the named plaintiffs from Georgia or Montana had filed an individual lawsuit against DIRECTV, the Panel could not have found that California, Georgia, or Montana each had the same interest in regulating contract disputes involving that consumer. Rather, each state has the primary interest in the claims brought by its own resident. By aggregating the claims of the out-of-state named plaintiffs with the potential claims of putative class members from California, the Panel altered the substantive law that applies to both the named plaintiffs and ***all*** putative absent class members.

It is precisely to avoid such transformation of the substantive law that—as this Court has held—a federal court "'must apply an ***individualized*** choice of law analysis to ***each*** plaintiff's claims.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001) (emphasis added) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 n.15 (5th Cir. 1996)). And the Panel's decision conflicts not just with *Zinser*. More recently, this Court upheld a district court's

"determin[ation] that predominance was defeated because [a defendant's] intent to seek arbitration of the class would necessitate a state-by-state review of contract conscionability jurisprudence." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 728 (9th Cir. 2007). The Panel's analysis here simply cannot be reconciled with *Lozano*.

The same is also true under California law. Because "'[c]lass actions are provided only as a means to enforce the substantive law'" and "'[a]ltering the substantive law to accommodate procedure would be to confuse the means with the ends,'" "an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may hinder the prosecution of a multistate or nationwide class action or result in the exclusion of nonresident consumers from a California-based class action." *Washington Mut.*, 15 P.3d at 1079-80 (citation omitted).[5]

That a putative class action cannot alter or augment the substantive law governing individual putative class members is a bedrock principle at the very

[5] The Panel distinguished *Washington Mutual* by stating that it "did not address 'the enforceability of class action waivers in contracts of adhesion.'" Panel Op. 4 (citation omitted). But *Washington Mutual* was expressly directed at consumer "contracts of adhesion." 15 P.3d at 1079. Moreover, although *Washington Mutual* did not involve class waivers, it is the clearest indication of any case cited by either side of whether California's policy favoring class actions extends to non-residents. In holding that courts may not distort choice-of-law principles in order to make a nationwide class action manageable, the California Supreme Court signaled that there is no such fundamental policy. At minimum, the existence of *Washington Mutual* makes it impossible to say that plaintiffs have met ***their burden*** of proving the existence of such a policy.

foundation of how class actions are supposed to function. Otherwise, the class-action device would raise serious due process concerns that call the very legitimacy of Rule 23 into question. Rehearing is essential to ensure that the Panel's decision is brought into line with the Rules Enabling Act and the cases of this Court faithfully adhering to it.

III. REHEARING IS WARRANTED BECAUSE THE PANEL INTERPRETED CALIFORNIA CONFLICTS LAW IN A MANNER THAT VIOLATES THE CONSTITUTION.

Rehearing also is warranted because the Panel's analysis is at odds with fundamental constitutional principles of interstate comity and federalism. The effect of the Panel's opinion is clear: It would transform California's consumer protection law into a nationwide standard for all companies located in California, displacing the law of other states that have made different policy judgments. But our federal system does not permit California's law to reach so far. *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (while there is no "doubt that Congress has ample authority to enact" nationwide consumer protection standards for automobile sales, "it is clear that no single State could do so"). In particular, the Due Process Clause, Commerce Clause, and Full Faith and Credit Clause together impose genuine limits on a state's ability to regulate outside its borders.

For example, the Full Faith and Credit Clause—which requires a state to respect the judgments, decrees, and acts of sister states—serves as "one of several

provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 (1981) (Stevens, J., concurring). It thus precludes "parochial entrenchment on the interests of other States." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). As Justice Stevens put it, the Clause may invalidate a state law that "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State." *Hague*, 449 U.S. at 323 (Stevens, J., concurring).

By effectively disregarding the judgments that other states have made concerning the enforceability of class-arbitration waivers, the Panel's opinion implicates serious concerns under the Full Faith and Credit Clause. "Full faith and credit does not … enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 504-05 (1939).

These principles of interstate comity and federalism are also reflected in other constitutional protections. The Commerce Clause, for example, prohibits state regulation that "control[s] conduct beyond the boundaries of the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The Clause thus "protects against inconsistent legislation arising from the projection of one state regulatory

regime into the jurisdiction of another State." *Id*. at 336-37. And the Due Process Clause precludes one state from applying its law to an out-of-state dispute when to do so is "sufficiently arbitrary and unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

These underlying constitutional principles—which are at the core of federalism—cast serious doubt upon the Panel's effort to bestow on California the role of nationwide regulator for all of the activities of California-based companies. If the Panel decision is allowed to stand, California law would effectively displace the contrary judgments made by state legislatures and state courts across the country—*i.e.*, "the diverse policy judgments of lawmakers in 50 States." *Gore*, 517 U.S. at 570. In short, the Panel's interpretation would permit California to displace the considered judgments of any other states that are considered less protective of consumers than California law (but not when they are more protective, in which event the Panel's one-way-ratchet approach would result in enforcement of the choice-of-law provision). The Constitution does not permit such a radical expansion of one state's law to the exclusion of all others. To hold otherwise would trample upon the core values of interstate comity and federalism.

Rehearing should be granted to ensure the preservation of these essential constitutional principles.

CONCLUSION

The Court should grant rehearing or rehearing en banc.

Dated: December 21, 2009 Respectfully submitted,

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I certify that:

☒ This brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5)and (6). This brief is 4,196 words, excluding the portions exempted by Fed. R. App. P.32(a)(7)(B)(iii), if applicable, and thus complies with the 4200 word limit established by 9th Cir. R. 29-2(c)(2).

DATED: December 21, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2009, I electronically filed Appellants' Petition for Panel Rehearing or Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The following participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system:

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