NO. 14-462

# In the Supreme Court of the United States

DIRECTV, INC.,

*Petitioner,*

—v—

AMY IMBURGIA, ET AL.,

*Respondents.*

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

## BRIEF OF PROFESSOR PETER LINZER AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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JULY 24, 2015

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## INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is a Professor of Law at the University of Houston Law Center, where he has taught Contracts, Contract Drafting and Constitutional Law for thirty-two years.[1] He is a former Chair of the Contracts Section of the Association of American Law Schools and an Elected Member of the American Law Institute. He was Editorial Reviser of the Restatement Second of Contracts (1981) and a member of the Members Consultative Group of the Restatement Third of Restitution and Unjust Enrichment (2011). He has written extensively on contracts of adhesion and, in particular, the Court's jurisprudence with respect to the Federal Arbitration Act. *See*, *e.g.*, 6 *Corbin on Contracts* §§ 26.5-.6, at 461-88 (rev. ed., Peter Linzer, ed. 2010, Joseph M. Perillo, General Editor). His concerns include certiorari policy, *see* Linzer, *The Meaning of Certiorari Denials,* 79 COLUM. L. REV. 1229 (1979); statutory and contract interpretation; and the relation of the Court to Congress, the States and federal administrative agencies. He is concerned that a hasty decision by this Court would be disrespectful to Congress and a

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[1] Blanket letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for the *amicus curiae* states that no counsel for a party authored this brief in whole or part and that no party other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

The *amicus*'s affiliation with the University of Houston is included for identification purposes only, and does not imply that the positions in this brief are on behalf of it.

possible source of conflict between the Court and the Consumer Financial Protection Bureau, to which Congress has delegated the issues involved here.

## SUMMARY OF ARGUMENT

The Court has stated its awareness that the Congress that enacted the Federal Arbitration Act in 1925 acted twelve years before the expansion of the Commerce Power and was dealing with a procedural innovation typically negotiated between parties represented by counsel in business transactions, and then resisted by conservative courts, legislatures and counsel. While the Court has recognized that many of its decisions have arguably gone beyond Congress's original intent, it has relied on later Congresses' unwillingness to amend the FAA to overrule the Court. But Congress, after considerable debate, in Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), 12 U.S.C. § 5518, directed the Consumer Financial Protection Bureau ("CFPB") to study compulsory consumer financial service arbitration agreements and to "prohibit or impose conditions" on them, consistent with its study. In March of this year the CFPB issued its study and is now receiving comments on it, preparatory to deciding its substantive regulation of compulsory consumer financial service arbitration agreements. One of its major findings was that arbitration clauses act as a barrier to class actions.

This case involves exactly that issue. In 2007 Petitioner, DIRECTV, authored a contract of adhesion with Respondent that in its Section 9 called for compulsory arbitration and forbade class arbitration, but also provided that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." There is no dispute that at the time the adhesion contract was entered into California case law forbade class action waivers in consumer contracts. Nonetheless, Petitioner urges this Court to override California law because of its decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), decided four years after Petitioner wrote the arbitration clauses, and to extend federal control of arbitration contracts to disturb the California courts' rulings on contract interpretation. It asks the Court to do this despite Congress's delegation to the CFPB, and despite the expectation that the CFPB will issue new regulations dealing with just the sort of consumer arbitration contract involved in this case.

It is respectfully submitted that the Court should dismiss the writ of certiorari as improvidently granted and avoid the potential for conflict with Congress and the CFPB. In addition, this will avoid the intrusion on federalism that would be caused by this Court directing a State court to interpret a provision in light of a ruling by this Court that was not made until four years after the Petitioner wrote the contract.

## ARGUMENT

### I. GIVEN THAT THE PETITIONER ASKS THE COURT TO SIGNIFICANTLY EXTEND THE FAA, THAT CONGRESS HAS DELEGATED THE REVISION OF PRE-DISPUTE CONSUMER COMPULSORY ARBITRATION CONTRACTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU, AND THAT THE CFPB IS DELIBERATING REVISION OF COMPULSORY CONSUMER ARBITRATION CONTRACTS, PARTICULARLY WITH RESPECT TO CLASS ACTIONS, THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

It is well understood that the Congress that wrote the Federal Arbitration Act in 1925 did so before the expansion of the Commerce Power in 1937 or the overruling of *Swift v. Tyson*, 16 Peters (41 U.S.) 1 (1842), by *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). Nonetheless, this Court has given the FAA a wide expansion. The early expansions appear justified, as in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967), which involved not a consumer contract of adhesion, as in this case, but a negotiated consultation agreement entered into as part of a corporate buy-out and which included an arbitration clause presumably negotiated by both parties' lawyers. In fact, in a footnote to the majority opinion, Justice Fortas wrote that "[w]e note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power

are expressly excluded from the reach of the Act." *Id.* at 402 n. 9. Later cases, however, extended the FAA to consumer, franchise and employment contracts usually involving contracts of adhesion. The Court has justified its position based both on Congress's "enact[ing] legislation extending, not retracting, the scope of arbitration," *Allied-Bruce Terminix*, *supra*, at 272, and on parties' failure to ask the Court to overrule expansive prior cases. See, *e.g.*, *Rent-A-Center West v. Jackson,* 561 U.S. 63, 70 (2010).

Petitioner seeks to have this Court extend the FAA to overrule a state's law on contract interpretation. In 2007 DIRECTV wrote the contract of adhesion entered into between the parties and inserted the words "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." *Imburgia v. DirectTV, Inc.*, 225 Cal. App. 4th 338, 341 (2014). It seems clear that in 2007 the law of California forbade a waiver of class action, and it appears to be a matter of state law to interpret a contract provision as of the time it is entered into. (In the California Court of Appeal's note 2 it says, referring to a different provision of section 9 of the 2007 agreement, "The United States Supreme Court did not decide that issue until 2008, however, so its bearing on the 2007 customer agreement is not entirely clear.") It is one thing for this Court to rule that the FAA preempts a provision of state law. It is another to apply the holding of a future decision on the FAA to the interpretation of a contract provision written before the decision was made. That is a further extension of the FAA, and while the Court has relied on Congress's inaction in the past, there is

strong reason not to make a claim of *stare decisis* with respect to further extensions of the FAA today.

Congress has indicated in section 1028 of the Dodd-Frank Act its willingness to see the overhauling of the FAA in consumer financial matters, and the CFPB's March 2015 *Arbitration Study* found that with respect to class actions, like this case, arbitration clauses have been widely used not as a low-cost substitute for judicial litigation, but largely just to block the class actions. In contrast, when companies were sued individually, they almost always allowed the case to be heard in courts. The CFPB summarized its findings as follows:

> **Arbitration clauses can act as a barrier to class actions:** By design, arbitration clauses can be used to block class actions in court. The CFPB found that it is uncommon for a company to try to force an individual lawsuit into arbitration but common for arbitration clauses to be invoked to block class actions. For example, in cases where credit card issuers with an arbitration clause were sued in a class action, the companies invoked the arbitration clause to block class actions 65 percent of the time. Of the 1,200 individual lawsuits the CFPB examined that were filed between 2010 and 2012, companies invoked arbitration less than one percent of the time.
>
> - **Most arbitration agreements prohibit class arbitrations:** Over 90 percent of the arbitration agreements the CFPB studied expressly prohibited class

arbitrations. Those that did not have this express prohibition were from smaller companies that together represented 3 percent or less of their markets.

- **Class arbitrations were minimal.** Only two class arbitrations were filed with the AAA between 2010 and 2012. One was not pursued at all and the other had a motion to dismiss pending as of September 2014.

**No evidence of arbitration clauses leading to lower prices for consumers.** The CFPB looked at whether companies that include arbitration clauses in their contracts offer lower prices because they are not subject to class action lawsuits. The CFPB analyzed changes in the total cost of credit paid by consumers of some credit card companies that eliminated their arbitration clauses and of other companies that made no change in their use of arbitration provisions. The CFPB found no statistically significant evidence that the companies that eliminated their arbitration clauses increased their prices or reduced access to credit relative to those that made no change in their use of arbitration clauses.

http://files.consumerfinance.gov/f/2013503_cfpb_factsheet_arbitration-study.pdf (visited July 23, 2015). Time Magazine's on-line bulletin about the CFPB Study was headlined *CFPB Says Mandatory Arbitration is Bad for Consumers*, http://time.com/

money/3737274/cfpb_mandatory_arbitration_banks_credit_cards/ (visited July 23, 2015)

Section 1028 of the Dodd-Frank Act undermines the stare decisis argument that Congress would tacitly approve a further extension by the Court of the reach of the FAA into State powers. The CFPB's Report to Congress strongly suggests that it will restrict the use of arbitration clauses to strangle class actions, particularly since their use as barriers rather than as low-cost means of dispute resolution is a development that is contrary to what the FAA stands for, and is certainly nothing that the 1925 Congress would have approved of had it been prescient enough to see ninety years into the future. For this Court to accept Petitioner's invitation to move still further into the state prerogative of contract interpretation is to ignore both Congress and the agency that it created and delegated this issue to.

## CONCLUSION

With respect, it is submitted that the best solution to this conflict is to avoid it, by dismissing the writ of certiorari as improvidently granted.

Respectfully submitted,

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JULY 24, 2015

# APPENDIX

## Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, § 1028, 12 U.S.C. § 5518

SEC. 1028. AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION

(a) STUDY AND REPORT.–The Bureau shall conduct a study of, and shall provide a report to Congress concerning the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.

(b) FURTHER AUTHORITY.–The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).

(c) LIMITATION.–The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.

(d) EFFECTIVE DATE.–Notwithstanding any other provision of law, any regulation prescribed by

the Bureau under subsection (b) shall apply, consistent with the terms of the regulation, to any agreement between a consumer and a covered person entered into after the end of the 180-day period beginning on the effective date of the regulation, as established by the Bureau.