No. 77406-4

SUPREME COURT OF THE STATE OF WASHINGTON

DOUG SCOTT, LOREN TABASINSKE & SANDRA TABASINKE,

Petitioners,

v.

CINGULAR WIRELESS LLC,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT CINGULAR WIRELESS LLC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes, Legislative and Administrative Materials, and Rules

Other Authorities

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from or related to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. Many of those advantages would be forfeited if the class action device were superimposed on arbitration. As a result, arbitration agreements frequently preclude the parties from seeking to arbitrate their disputes on a classwide basis.

Because Petitioners' challenge to the validity of class action

waivers in arbitration provisions, if successful, would wreak havoc with countless arbitration provisions in contracts entered into by the Chamber's members, the Chamber has a strong interest in having its views on the validity of these provisions considered by the Court.

STATEMENT OF THE CASE

The Chamber adopts Cingular's Statement of the Case.

SUMMARY OF THE ARGUMENT

This case presents issues of exceptional importance for businesses and consumers alike. Petitioners seek to invalidate a commonly used contractual provision, governed by the Federal Arbitration Act ("FAA"), that requires both parties to arbitrate disputes on an individual, rather than classwide, basis. Notwithstanding the fact that Cingular's arbitration clause allows Cingular customers to pursue in arbitration all available remedies under state and federal law (including claims for compensatory and punitive damages, statutory penalties, and attorneys' fees and costs), and permits both parties to opt out of arbitration and resolve their disputes in small claims court (CP 355-356), Petitioners contend that the arbitration provision is "unconscionable" under Washington law solely because Cingular customers are prohibited from bringing their claims in a class action. As Petitioners put it: "At bottom, this appeal is not really about arbitration but about the right to class action relief." (Pls.' Op. Br. 42.)

The Chamber agrees with Cingular that the arbitration clause at issue here is fully enforceable as a matter of federal law, and is not procedurally or substantively unconscionable under Washington law. The Chamber will not repeat those arguments here. Instead, the Chamber writes separately to address the assumptions underlying Petitioners' arguments: that there exists a "right" to class action relief, and that class actions are necessary to vindicate the rights of consumers.

Petitioners betray a fundamental misunderstanding of the nature of class actions. They are merely procedural vehicles and cannot vitiate parties' substantive rights -- including Cingular's right, protected under the FAA, to arbitrate in accordance with the terms of its contracts. Having agreed to arbitrate their claims on an individual basis, Petitioners have no "right" to bring their claims as part of a class action, in arbitration or otherwise.

The Chamber also will address the consequences of Petitioners' position for arbitration generally. Petitioners' attempt to rewrite the parties' arbitration agreement to impose a classwide arbitration process would result in the abandonment of arbitration as a means of resolving disputes. If, pursuant to state law "unconscionability" principles, arbitration agreements requiring individual arbitration are materially altered to impose classwide arbitration, businesses will choose not to

arbitrate at all -- a result directly contrary to the strong federal policy of encouraging arbitration. There will be no predictability or assurance that parties' contractual terms will be respected -- notwithstanding the FAA's guarantee that such terms must be enforced as written -- and both consumers and the business community will be deprived of the benefits of arbitration recognized by federal and Washington law.

ARGUMENT

I. THERE IS NO "RIGHT" TO DISREGARD AN EXPRESS CONTRACTUAL ARBITRATION PROVISION IN ORDER TO PURSUE A CLASS ACTION.

Congress long ago "declared a national policy favoring arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56, 115 S. Ct. 1212, 1216, 131 L. Ed. 2d 76 (1995) (internal quotations omitted). Washington law is in accord. *E.g.*, *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 341 & n.4, 103 P.3d 773, 780 & n.4 (2004). The FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 764, 151 L. Ed. 2d 755 (2002) (internal quotations omitted), and its "principal purpose" is to "ensur[e] that private arbitration agreements are enforced according to their terms," *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488 (1989).

In contrast to the longstanding federal substantive right to arbitrate according to the terms of the contract, the ability to pursue claims for money damages in a class action is merely procedural -- and a relatively recent procedural innovation at that. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332, 100 S. Ct. 1166, 1171, 63 L. Ed. 2d 427 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 114, 780 P.2d 853, 859 (1989) (class action is "procedural mechanism"); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 Colum. L. Rev. 866, 866 (1977) (modern class action is "something out of the ordinary, an essentially new turn in legal events"). Modern federal class action practice did not emerge until 1966, when revisions to Rule 23 first provided that money damages judgments would be binding on all class members who did not opt out -- a "most adventuresome innovation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231, 2245, 138 L. Ed. 2d 689 (1997). In Washington, class actions for monetary damages are also a recent phenomenon. *See Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle*, 70 Wn.2d 222, 232-33, 422 P.2d 799, 805-06 (1967) (Washington adopted old Federal Rule 23 in 1960); 3A Wash. Prac., Rules Practice CR

23 (4th ed. 1991) (Washington adopted current version of CR 23 in 1967).

Notwithstanding the procedural efficiencies that sometimes can be effected through the class action mechanism -- when properly employed -- a party's substantive right to arbitrate "may not be sacrificed on the altar of efficient class action management." *In re Piper Funds, Inc. Inst'l Gov't Income Portfolio Litig.*, 71 F.3d 298, 303 (8th Cir. 1995). The "procedural device" of a class action "cannot be allowed to expand the substance of the claims of class members," *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998), or to deprive a defendant of its substantive rights, *e.g.*, *Amchem*, 521 U.S. at 612, 117 S. Ct. at 2244, 138 L. Ed. 2d 689. As the Seventh Circuit has held:

> [The] procedural device [of a class action suit] does not entitle anyone to *be* in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants.

Caudle v. American Arb. Ass'n, 230 F.3d 920, 921 (7th Cir. 2000).

Accordingly, the ability to pursue claims on a classwide basis is "merely a procedural one . . . that may be waived by agreeing to an arbitration clause." *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000). "When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial," including the

possibility of pursuing a class action . . . ." *Champ v. Seigel Trading Co.*, 55 F.3d 269, 276-77 (7th Cir. 1995) (internal quotations omitted).

Permitting parties to waive the ability to pursue classwide resolution of disputes by choosing individual arbitration is therefore neither fundamentally unfair nor unconscionable. Arbitration is a matter of consent, not coercion. *E.g.*, *Mastrobuono*, 514 U.S. at 56-57, 115 S. Ct. at 1216, 131 L. Ed. 2d 76. Thus, "nothing in the [FAA] authorizes a court to compel arbitration of any issues . . . that are not already covered in the agreement." *Waffle House*, 534 U.S. at 289, 122 S. Ct. at 754, 122 L. Ed. 2d at 754. "[P]arties are generally free to structure their arbitration agreements as they see fit," and may "specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256, 103 L. Ed. 2d 488. Just as parties to an arbitration agreement may "stipulate to whatever procedures they want," *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994), they may agree to exclude certain remedies and procedures that they do *not* want, such as class actions.

For these reasons, courts across the country -- including Washington appellate courts and nearly every federal appellate court to address the issue -- have enforced arbitration provisions that prohibit classwide arbitration, holding that there is nothing unconscionable about

requiring parties to proceed to individual arbitration. (*See* Def.'s Br. on Appeal 15-19 (citing cases); Def.'s Supp. Br. 4-6, 12-14.)

The freedom to determine the arbitration procedures applicable to a particular dispute is in large part what distinguishes private arbitration from courtroom litigation. Whereas the parties to an action in court cannot escape the rules governing discovery, evidence, and appeals, by agreeing to arbitrate they intentionally relinquish "the procedures and opportunity for review of the courtroom." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S. Ct. 1647, 1655, 114 L. Ed. 2d 26 (1991).

Indeed, what is an arbitration agreement but a waiver of the right to a trial by jury, a right with a far richer pedigree than the right to proceed on a classwide basis? Yet it is well established that arbitration agreements are not unenforceable merely because they waive the right to a jury trial. *E.g.*, *Adler*, 153 Wn.2d at 360, 103 P.3d at 789.

II. CLASS ACTIONS ARE NOT NECESSARY TO VINDICATE THE RIGHTS OF CONSUMERS.

Petitioners' argument is also predicated on an erroneous factual assumption: that a class action is the only means by which the rights of consumers can be vindicated. In fact, class actions not only are not required to provide consumers with an effective remedy against corporate abuses, but they often are *contrary* to the interests of consumers, serving

instead the interests of the plaintiffs' class action bar.

Petitioners cite the introductory findings of Congress in passing the Class Action Reform Act of 2005 ("CAFA"): that class actions *can* be "an important and valuable part of the legal system." 28 U.S.C. § 1711 note, Pub. L. 109-2, 119 Stat. 4, § 2(a)(1) (Feb. 18, 2005); *see* Pls.' Supp. Br. 18. Petitioners, however, omit the remaining findings that prompted Congress to pass CAFA in the first place:

> Over the past decade, there have been abuses of the class action device that have--
>
> (A) *harmed class members with legitimate claims and defendants that have acted responsibly*;
>
> (B) adversely affected interstate commerce; and
>
> (C) undermined public respect for our judicial system.

Pub. L. 109-2, 119 Stat. 4, § 2(a)(2) (emphasis added). As Congress found: "Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." *Id.* § 2(a)(3).

By contrast, the alternatives to class actions -- as contemplated by and fully consistent with Cingular's arbitration clause -- provide for the fair, inexpensive, and effective resolution of claims like those of Petitioners.

First, individual arbitration -- long a cost-effective means of resolving disputes -- has become even more so in the last few years. In particular, the costs of consumer arbitration have been declining "as arbitration institutions compete to provide low-cost arbitration services." Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 755 (2001). For example, the American Arbitration Association (the institution selected in Cingular's arbitration provision) caps a consumer's responsibility for arbitrator fees at $125 on claims of $10,000 or less; provides for fee waivers or deferrals in hardship cases; and makes arbitrators available to conduct hearings on a pro bono basis. *See* American Arbitration Association, *Supplementary Procedures for the Resolution of Consumer-Related Disputes* (available at http://www.adr.org/sp.asp?id=22014); American Arbitration Association, *Administrative Fee Waivers and Pro Bono Arbitrators Services* (available at http://www.adr.org/sp.asp?id=22040). Other arbitral institutions have similar provisions. *See, e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 95 & n.2, 121 S. Ct. 513, 524 & n.2, 148 L. Ed. 2d 373 (2000) (Ginsburg, J., concurring in part and dissenting in part).

Furthermore, empirical studies reveal not only that individual arbitration is faster and cheaper than litigation, but that consumers fare equally well -- in fact, *even better* -- in arbitration than in litigation, with

respect to both the likelihood of success and the size of the award. *See* Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconsionability*, 19 Ga. St. U. L. Rev. 761, 763-66 (2003); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 45-49, 54 (1998). These studies also reveal that consumers who actually participate in arbitration are satisfied with both the arbitral process and its outcome. *E.g.*, Ernst & Young, *Outcomes of Arbitration, An Empirical Study of Consumer Lending Cases* (2004) (available at http://www.arb-forum.com/media /EY_2005.pdf).

Second, Petitioners' suggestion that consumers with small claims would not be able to retain attorneys to prosecute those claims on an individual basis is likewise misplaced. There is no reason to believe that individual arbitration will "choke off the supply of lawyers willing to pursue claims." *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000). For example, many consumer protection statutes, like Washington's, provide for actual and treble damages, attorneys' fees, and costs to a prevailing plaintiff, *see* RCW 19.86.090 -- more than enough incentive for an attorney to take the case. These remedies (and more) are fully available under Cingular's arbitration clause. *See supra* p. 2.

Moreover, under Cingular's arbitration provision, Petitioners have the option of pursuing these claims in small claims court -- a mechanism

long recognized as an efficient and cost-effective alternative to litigation in superior court. *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 879 (11th Cir. 2005) (rejecting challenge to class-arbitration waiver in part due to preservation of small claims court option), *petition for cert. filed*, 74 U.S.L.W. 3162 (Sept. 12, 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 n.19 (5th Cir. 2004) (same). As the Superior Court concluded (RP 10):

> Now, I know that high-powered lawyers don't go to small claims court, but lots of regular people do. And the reason that small claims court exist[s] is because this court is concerned to make sure that consumers have a place to go to litigate their disputes. Small claims court is available in every courthouse, it's cheap, and we apply all the law that's available to consumers in any other court action, including significant protections like the Consumer Protection Act[,] in small claims court.

Finally, federal and state regulatory agencies "possess sufficient sanctioning power to provide a meaningful deterrent" to any misconduct. *Johnson*, 225 F.3d at 369; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32, 111 S. Ct. 1647, 1655, 114 L. Ed. 2d 26 (1991) (EEOC); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-34, 107 S. Ct. 2332, 2340, 96 L. Ed. 2d 185 (1987) (SEC). Here, the Federal Communications Commission is statutorily obligated to protect the interests of consumers in the wireless industry. *E.g.*, *In re Implementation of Sections 3(n) & 332 of the Communications Act Regulatory Treatment*

of Mobile Servs., 9 F.C.C.R. 1411 ¶ 176 (1994); *In re Personal Communications Indus. Assn's Broadband Personal Communications Servs. Alliance's Pet. for Forbearance for Broadband Personal Communications Servs.*, 13 F.C.C.R. 16857 ¶¶ 15-16, 26 (1998). Consumers also may submit complaints to the FCC online. *See* http://www.fcc.gov/cgb/complaints.html. Likewise, the Washington Attorney General is authorized under the Consumer Protection Act to take remedial measures to protect consumers. *See* RCW 19.86.080.

With all these institutional protections available, there is no need to impose class action procedures on arbitration to remedy any perceived wrongs perpetrated upon consumers. To the contrary, when consumer claims are brought in the context of putative class actions, it is primarily the class action attorneys, not class members, who benefit. *See, e.g.*, Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 Law & Contemp. Probs. 167, 168 (1997); Susan B. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1138-1151 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051, 1053-54 (1996).

III. IMPOSING CLASSWIDE ARBITRATION ON AN UNWILLING PARTY WOULD UNDERMINE THE BENEFITS OF ARBITRATION.

Imposing classwide arbitration without the consent of the parties to

the arbitration agreement not only would conflict with the consensual basis for arbitration, but also would undermine the very benefits of arbitration for which the parties *did* contract: the speed, simplicity, and cost-effectiveness of individualized arbitration.

Individual arbitration is a favored means of dispute resolution in part because it "eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation." *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988, 989 (1995). Such arbitration is therefore particularly "helpful to individuals," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280, 115 S. Ct. 834, 842, 130 L. Ed. 2d 753 (1995), and "an attractive vehicle for the resolution of low-value claims," *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004). Arbitration's cost-effectiveness is due precisely to its informality: arbitration usually is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility and is less disruptive of ongoing and future business dealings among the parties," and is "more flexible in regard to scheduling." H.R. Rep. No. 97-542, 97th Cong., 2d Sess. at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777.

Arbitration is able to achieve speedy and cost-effective resolution of disputes by streamlining or eliminating the cumbersome, time-

consuming, and expensive procedural wrangling that characterizes so much of litigation today: complex motion practice, protracted discovery and discovery disputes, often years-long appeals. Class action practice is even more involved. Given the due process considerations implicated when courts attempt to adjudicate the rights of non-parties, the class certification process requires, in addition, searching scrutiny into issues of adequacy of representation, commonality of factual and legal questions, and manageability, among others. *See* CR 23(a), (b); Fed. R. Civ. P. 23(b). Once a damages class is certified, moreover, notice to class members, along with an opportunity to opt out of the class, are required to satisfy due process. *See* CR 23(c)(2); Fed. R. Civ. P. 23(c)(2). Finally, interlocutory appeals of class certification decisions are now available at the federal and state level. *See* RAP 2.3(b); Fed. R. Civ. P. 23(f).

An agreement to resolve disputes through individual arbitration allows the parties to avoid or minimize these procedural complications and resolve their dispute in an efficient and cost-effective manner. But converting an agreement to arbitrate individual disputes into an arbitration of classwide proportions radically alters this calculus. Such disregard of the parties' contract "disrupt[s] the negotiated risk/benefit allocation" and requires the parties to proceed with "a different sort of arbitration." *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995).

This "different sort of arbitration" would subject defendants to potential liability on thousands or even millions of claims in one proceeding, and necessarily would require dispensing with the streamlined process of individual arbitration originally contemplated by the parties. In any case in which arbitration is conducted on an all-or-nothing, classwide basis, arbitration's simplicity and informality would become a thing of the past, as teams of lawyers engage in all-out war.

With so much at stake, arbitrator selection would demand as many resources as jury selection now does in large court cases. Arbitral finality would be replaced by endless appeals -- which, given the limited standard of appellate review applicable to arbitration orders (9 U.S.C. § 10), likely would be ineffective to rectify errors made by arbitrators inexperienced in class action law. *See infra* p. 18. To prepare for these appeals, parties would have to arrange for transcription of hearings and request written opinions (instead of the usual bare-bones awards), further driving up costs and arbitrator fees. Moreover, the transaction costs of drafting arbitration agreements would increase dramatically. If class action and other litigation procedures were to become the default, lengthy negotiations over whether to include or exclude specific procedures would become the norm. Refusing to enforce a contractual ban on classwide arbitrations, therefore, would sweep complex extracontractual issues (class action

criteria and other litigation procedures), strangers to the contract (thousands or even millions of absent putative class members), and constitutional due process considerations into what was supposed to be a fast and economical individual arbitration.

Consumers and businesses alike will pay the price if arbitration is effectively transformed into litigation, with its attendant costly procedures. *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) ("arbitration offers cost-savings benefits to telecommunication providers and these benefits are reflected in a lower cost of doing business that in competition are passed along to customers") (internal quotations omitted). But the detrimental impact of imposing class action procedures on arbitration would extend beyond cost. The control that parties now have over the shape of arbitral proceedings would be all but impossible once the door is opened for the class action bar. Parties now may agree on virtually every aspect of arbitration, from the scope of discovery, to the admissibility of evidence, to the nature of witness testimony, to the site of the hearing. Class actions, by contrast, "tend to be run by, and for the benefit of, the plaintiffs' attorneys," so individual claimants would have to cede their control to class action attorneys. *See* Drahozal, *supra* p. 10, at 754. And it is no secret that class action lawyers often put their own interests ahead of those of class members, as in "coupon" settlements that provide little

benefit to anyone but lawyers. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. Rev. 991, 993 (2002). As a result, classwide arbitration would require significantly greater judicial involvement than is normal in arbitration, not only because so much would be at stake, but also because the rights of class members must be protected.

It is no answer that arbitrators can supervise class actions as readily as courts. In many respects, arbitral authority is limited. The permissible scope of arbitral subpoenas, for example, is a controversial issue on which the courts are divided. *Compare In re Securities Life Ins. Co.*, 228 F.3d 865, 870-71 (8th Cir. 2000) (enforceable) *with COMSAT Corp. v. National Science Found.*, 190 F.3d 269, 270 (4th Cir. 1999) (not enforceable). Furthermore, the management of class actions is time-consuming, costly, and complex, even when managed by experienced trial judges, much less by arbitrators, who typically lack the case-management skills and experience that trial judges develop from handling class actions. And any errors committed by these inexperienced arbitrators likely would go unremedied on appeal, given the restrictive standard of appellate review of arbitration orders. *See* 9 U.S.C. § 10.

In addition, arbitrators are generally paid by the hour or day or by the amount at issue and, therefore, unlike judges, may have a financial

incentive to expand the scope of proceedings before them, leading to certifications of inappropriate classes. Courts inevitably would be asked to keep arbitrators in check. Such judicial involvement would multiply proceedings, generate attorneys' fees, and "impose[] costs on consumers." Stephen J. Ware, *Paying the Prices of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90.

The loss or reduction of these benefits would reduce parties' incentives to agree to arbitrate disputes in the first place. If companies are subject to class actions whether they litigate or arbitrate, many will choose to litigate to obtain the greater procedural protections available in court, including effective appellate review. Selecting the reduced formalities of arbitration would be hard to justify with millions of dollars worth of claims subject to resolution at one fell swoop. Arbitration would not be improved, but destroyed, by imposing upon it procedures suitable only for litigation. The inevitable result will be to move the resolution of consumer disputes out of arbitration and into the courts.

If classwide arbitration procedures have some benefits in some contexts, parties will agree to them. In the run of cases, however, class treatment is inimical to arbitration and, if imposed on arbitral agreements not calling for such treatment, effectively would nullify those agreements in the face of strong federal and state policies favoring arbitration. The

deterrence of arbitration, which inevitably would follow upon a mandate to arbitrate on a classwide basis, would flatly violate the contrary public policies of the United States and the State of Washington. *That* -- not Cingular's arbitration provision -- would be unconscionable.

CONCLUSION

The *Amicus Curiae* respectfully requests that the Court affirm the decision of the Superior Court.

Date: January 27, 2006

Respectfully submitted,

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