No. 22-230

In the Supreme Court of the United States

THE GOLDEN 1 CREDIT UNION,
Petitioner,

v.

DWAINE BURGARDT,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

BRIEF OF AMICUS CURIAE CREDIT UNION NATIONAL ASSOCIATION, INC. IN SUPPORT OF PETITIONER

LEAH C. DEMPSEY
BROWNSTEIN HYATT FARBER SCHRECK, LLP
1155 F Street N.W., Suite 1200
Washington, DC 20004
(202) 296-7353

LUKE MARTONE
CREDIT UNION NATIONAL ASSOCIATION
99 M Street SE, Suite 300
Washington, DC 20003
(202) 508-6743

JULIAN R. ELLIS, JR.
Counsel of Record
COURTNEY E. BARTKUS
ROSA L. BAUM
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 17th Street, Suite 2200
Denver, CO 80202
(303) 223-1100
jellis@bhfs.com

Attorneys for Amicus Curiae

QUESTION PRESENTED

1. Whether a special rule prohibiting parties to a contract from adding an arbitration provision via an opt-out procedure manifesting mutual assent—when other types of contract modifications using this procedure are allowed—discriminates against arbitration and is contrary to the FAA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (con't)

Statutes

TABLE OF AUTHORITIES (con't)

Rule

Other Authorities

TABLE OF AUTHORITIES (con't)

TABLE OF AUTHORITIES (con't)

TABLE OF AUTHORITIES (con't)

INTEREST OF AMICUS CURIAE[1]

The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States representing America's credit unions, which serve more than 130 million members. Credit unions are not-for-profit, financial cooperatives established "for the purpose of promoting thrift among [their] members and creating a source of credit for provident and productive purposes." Federal Credit Union Act of 1934, Pub. L. No. 73-467, § 2, 48 Stat. 1216, 1216 (1934) (codified as amended at 12 U.S.C. § 1752(1)); *see also* Cal. Fin. Code § 14002 (same).

Many credit unions are small, local institutions with limited staff and resources. Over 40 percent of all credit unions employ five or fewer full-time employees, more than 25 percent have less than $10 million in assets, and over 60 percent have less than $100 million in assets. Membership in credit unions is legally restricted to specific groups that are defined in credit union charters. These groups must share a common bond of occupation, association, or location. 12 U.S.C. § 1759(b)(1)–(3). By law, therefore, credit unions serve specific and known populations, and only those individuals who are within the field of membership.

Credit unions do not issue stock; their capitalization is based on member deposits and retained earnings. Thus, member deposits are directly at risk from

---

[1] All parties were given timely notice, and all parties have consented to this filing. No party's counsel authored this brief in whole or in part, and no person or entity other than amicus curiae, its counsel, or its members made a monetary contribution intended to fund the brief's preparation or submission.

litigation spawned by aggressive plaintiffs' lawyers seeking to profit through class litigation.

Credit union members also play a significant role in governance. Credit union boards are typically comprised of members who volunteer to serve as directors. As the only consumer-owned cooperatives in the financial marketplace, credit unions have a long tradition of protecting their members' interests. Arbitration agreements serve an important function in this regard: they curb harmful class litigation, which threatens the resources of the entire membership.

SUMMARY OF THE ARGUMENT

This Court has long recognized the benefits of arbitration and has directed states to treat agreements to arbitrate no different than other contracts. This "equal-treatment principle" is a foundational tenet of the Federal Arbitration Act (FAA), and the Court has repeatedly, and consistently, enforced it. CUNA urges the Court to do so once again by reviewing a California common law rule that discriminates against arbitration in the contract-modification process.

I. The anti-arbitration rule announced in the decision below ignores measurable benefits to members of credit unions. Studies have confirmed that consumers are more successful in arbitration—both in frequency and the amount awarded. Not only do consumers win more, but arbitration saves time, is less costly, and is generally more accessible to the average consumer than traditional litigation. Restricting access to arbitration by application of anti-arbitration rules like California's will harm credit union members, thereby shifting the focus to class litigation, which promises only illusory benefits that enrich a few.

II. Credit unions are particularly susceptible to over-zealous application of anti-arbitration rules. Credit unions are member-owned and their governance is uniquely structured to promote their service-based mission, including serving underserved and unbanked consumers, often in rural settings. Not only do credit unions provide services to those who lack access to traditional banking, as member-oriented institutions, credit unions are also critical partners to communities and governments. They underwrite grants, they invest in communities, and they are integral to the execution of certain government programs.

Limiting credit unions' use of arbitration agreements will harm these critical financial partners. Because credit unions have been slower to incorporate arbitration agreements into their member agreements, they will be less competitive and will operate at a disadvantage against larger financial institutions. Credit unions—many of which run on lean staff and operations—will also bear increased operating costs, both from compounding and costly class litigation and from having to comply with a convoluted compliance environment fraught with hazards.

III. CUNA urges review and reversal of the decision below to clear the confusion and put credit unions on a level playing field. Presently, operational uncertainty abounds in determining the enforceability of arbitration agreements added through mutual assent, including the notice-and-opportunity-to-opt-out process used by The Golden 1 Credit Union (Golden 1). The standards fabricated by the courts are confusing, often conflicting, and lack even-handed reasoning that comports with the equal-treatment principle. In truth, these "standards" are an amalgamation of exceptions

to generally applicable contract principles that discriminate against arbitration based on arbitration-specific factors. A straightforward application of the FAA's equal-treatment principle resolves this case in favor of enforcing the arbitration agreement.

ARGUMENT

Section 2 of the Federal Arbitration Act (FAA) makes arbitration agreements "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 section accomplishes two aims: (1) it states an "enforcement mandate," making "agreements to arbitrate enforceable as a matter of federal law," and (2) it provides "a saving clause," allowing "invalidation of arbitration clauses on grounds applicable to 'any contract.'" *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 (2022) (citing 9 U.S.C. § 2). Jointly, these aims establish an "equal-treatment principle," which prohibits invalidation of arbitration agreements based "on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

This equal-treatment principle is rooted in a legislative abdication of "judicial hostility to arbitration," *Viking River Cruises*, 142 S. Ct. at 1917, by affirming a federal policy of enforcing "private arbitration agreements … according to their terms," *Concepcion*, 563 U.S. at 344 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). This Court has been steadfast in policing

states' targeted (and often novel) discrimination of arbitration through its enforcement of this principle.

I. The Decision Below Ignores the Measurable Benefits That Arbitration Provides to Credit Union Members.

Arbitration is a widely accepted dispute-resolution process that benefits consumers. Consumers win more frequently (and greater amounts) in arbitration; it is faster, more flexible, and less costly than traditional litigation; and it is more accessible to every-day consumers. The decision below threatens to undermine these measurable benefits by restricting credit unions' access to arbitration, leaving their members to rely on illusory class litigation, which rarely provides meaningful relief to consumers.

A. Simply put, consumers win more in arbitration, and data has consistently shown that arbitration yields more favorable results for consumers than litigation. A recent comparative study by the U.S. Chamber of Commerce revealed that, in cases proceeding to adjudication, consumer success in arbitration far surpassed that in litigation. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration*, at 4 (Mar. 2022), https://bit.ly/3BWgRf8 (*Chamber Arbitration Report*). According to the study, which reviewed arbitration and court-based actions between 2014 and 2021, consumers prevailed in 41.7% of arbitrations compared to just 29.3% in court. *Id.* Not only that, but consumers achieved higher awards in arbitration. Consumers prevailing in arbitration were awarded an average of $79,945 ($20,356 median), compared to $71,354 ($6,669 median) in litigation. *Id.* Numerous

commentators have observed similar findings. *See, e.g.*, Alan Kaplinsky & Mark Levin, *The CFPB's Final Arbitration Study: What's the Real Story?*, Ballard Spahr (Mar. 11, 2015), https://bit.ly/3MbRLOe (analyzing CFPB study and concluding "consumers fare just as well in arbitration as in court"); *2020 Dispute Resolution Statistics*, FINRA (last visited Oct. 12, 2022), https://bit.ly/3ygEs9g (reporting results of customer-claimant arbitration awards and stating that customers were awarded damages in over 40% of arbitrations from 2015 to 2020).

B. Arbitration provides a convenient, flexible, and cost-effective dispute-resolution process. Over the past decades, arbitration has gained significant acceptance as an alternative dispute-resolution forum. This alternative provides a speedy, practical, and effective forum that eliminates many of the inefficiencies that slow down traditional litigation.

Time Savings. Arbitration benefits consumers because it is significantly less time-consuming than litigation. Between 2014 and 2021, consumer arbitrations that proceeded to a hearing took, on average, 321 days (265 median) to resolve, whereas litigation averaged 439 days (315 median). *Chamber Arbitration Report*, at 4; *see also id.* at 16 (noting "the average time was nearly 27% faster in arbitration than litigation"). A quicker resolution timeframe returns money to consumers faster; it also lowers costs for both consumers and financial institutions. This latter feature benefits everyone in the market: because cost savings are passed on directly to consumers.

Arbitration provides this time savings without diminishing the quality of adjudication. Indeed, established arbitral institutions, such as American

Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc. (JAMS), provide reputable services through efficient and streamlined procedures. The AAA, for instance, provides its consumer rules online so consumers and financial institutions alike have easy access to its procedures. *See generally* American Arbitration Association, Consumer Arbitration Rules (last updated Sept. 1, 2014), https://bit.ly/3RwkkXF (*AAA Consumer Rules*). For its part, JAMS has committed to "minimum standards of procedural fairness" in consumer arbitration, a ten-point policy ensuring procedural fairness. *See* JAMS, *Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (July 15, 2009), https://bit.ly/2Ast2l7.

Relatedly, arbitration also allows parties to choose an arbitrator with specific knowledge and experience in the industry or with the disputed issues. Leveraging specialized knowledge expedites proceedings and drives consistency in results. For example, Golden 1's arbitration agreement requires the chosen arbitrator to be a "retired judge or attorney with more than 10 years of experience and knowledge of the laws applicable to financial transactions." Appellant's App. Vol. 1 at AA128, *The Golden 1 Credit Union v. Burgardt*, C092637 (Cal. Ct. App.) (Golden 1 Arbitration Agreement). This benefit is particularly acute in consumer-finance disputes. An arbitrator with substantial experience in the financial industry is more likely to understand and efficiently apply complex financial laws and regulations, as well as navigate the interaction between those laws and relevant consumer-protection statutes.

Accessibility. Arbitration is more accessible to consumers as well. The arbitration process is less rigid, making it less intimidating for consumers, including those litigating pro se. This contrasts with traditional litigation, which follows a complicated web of rules of civil procedure, evidentiary rules, local rules, and judicial-practice standards. Few consumers are equipped to decipher and manage these mandatory rules without the aid of an attorney, and the general rule is that "[p]ro se litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), *overruled on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012). To that end, arbitration's flexibility provides consumers with intangible benefits (e.g., something as simple as speaking with the arbitrator in a more relaxed setting, as opposed to a courtroom). *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (benefits of arbitration include "simplicity" and "informality"); *see also* Hans A. von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, The Heritage Foundation, at 2–3 (Jul. 2013), https://bit.ly/3RFhnDY (noting "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution" (quoting *Concepcion*, 563 U.S. at 345)). The simplicity of consumer arbitration also reduces extraneous motions practice and other procedural hurdles that are often unpredictable and costly.

Less Costly. Arbitration is more cost-effective for both consumers and financial institutions. This is accomplished through several means. Consumer-arbitration rules often require business-respondents to pay most costs, reducing expenses for consumers. For

example, in AAA arbitrations where the claimant is a "consumer," the rules provide that the consumer pays a capped $200 filing fee and the business pays for all other costs, including case-management and hearing fees, as well as the arbitrator's compensation. *See AAA Consumer Rules*, at 35–37. That is not the case in litigation; each party pays its own costs upfront and may even be subject to paying the other side's costs if they lose, *see* Fed. R. Civ. P. 54(d)(1).

The cost disparity between consumer arbitration and litigation is apparent in this case. Had Burgardt followed through with arbitration under the Golden 1 Arbitration Agreement, which incorporates the AAA Consumer Rules, his costs would have been greatly reduced. *Compare AAA Consumer Rules*, at 33–34 (consumer filing fee capped at $200), *with Statewide Civil Fee Schedule*, Superior Court of California (Jan. 1, 2020), https://bit.ly/3y9bfx9 ($435 filing fee in civil cases plus motions fees of $20-$500 per motion).

Consumers also save through forum flexibility. Arbitration agreements typically give the consumer discretion to select the forum. But even when the agreement specifies a location, consumer convenience and ease of access are strong considerations. This is true of the Golden 1 Arbitration Agreement; Golden 1 has agreed to Principle 7 of the AAA's Consumer Due Process Protocol Statement of Principles, which requires proceedings to be held "at a location which is reasonably convenient" to the consumer "with due consideration … to travel and other pertinent circumstances." American Arbitration Association, *Consumer Due Process Protocol Statement of Principles*, at 2 (last visited Oct. 12, 2022), https://bit.ly/3TeygXA.

Arbitration provides additional cost savings, promoting convenience, accessibility, and efficiency. For example, consumers may appear by telephone. *See AAA Consumer Rules*, at 22. This allows consumers to participate from anywhere and reduces transactional costs. Indeed, the cost of travel, childcare, extra time off work, etc., all present barriers that contribute to consumers' willingness to pursue claims. The ability for consumers to vindicate their rights from the comfort and convenience of their homes makes arbitration a more consumer-friendly process. This flexibility also contributed to arbitration's unique success during the Covid-19 pandemic. While courts struggled with ever-changing public-health restrictions and limited services, arbitration proceeded largely unhindered. *Chamber Arbitration Report*, at 6.

Preserving Access to Courts. A common critique of arbitration is that it limits consumers' access to the courts. But, for many consumer contracts, this is misleading. The Golden 1 Arbitration Agreement is a prime example: it specifically preserves consumers' right to pursue claims in small claims court. Golden 1 Arbitration Agreement, at AA130. And in California, small claims court handles claims up to $10,000. *See If You're the Plaintiff ... Filing Your Lawsuit*, State of California, Department of Consumer Affairs (2022), https://bit.ly/3UXmp1K. So, Burgardt could have just as well pursued his overdraft-fee claim in state court on an individual basis without running afoul of the Golden 1 Arbitration Agreement.

C. Given arbitration's demonstrated benefits, further restricting the enforceability of valid arbitration agreements through court-imposed, anti-arbitration rules will harm consumers. True, enforcing

arbitration agreements limits class litigation. But the arguments in defense of class actions, often by special interest groups, are overstated. Consumers are rarely made whole through this lengthy and complicated form of litigation. In surveying 562 class actions, the CFPB found that 87% of resolved cases provided no benefit to the class, either because the suit was dismissed or because the named plaintiff settled. U.S. Chamber of Commerce Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, at 12 (Aug. 2022), https://bit.ly/3rmjsdx (citing CFPB, *Arbitration Study: Report to Congress Pursuant to Dodd Frank Wall Street Reform & Consumer Protection Act § 1028(a)*, at 37, § 6 (Mar. 2015), https://bit.ly/2EPEQ4A) (*Chamber Class Action Report*).

While the benefits are marginal, the cost of class litigation has risen to extreme levels, harming businesses of every size. Indeed, in 2021, the cost of class litigation to defendant-businesses reached a new high: $3.37 billion. *See* Carlton Fields, *The 2022 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 6 (2022). This is a 16% increase from 2020. *Id.* Ultimately, it's consumers who pay the price for these unprecedented costs in the form of increased prices and reduced product and service diversity and offerings. *Chamber Class Action Report*, at 26 ("The widespread consensus is that such costs are passed on to the American consumer in the form of higher-priced goods and services, ultimately harming the very people the litigation purportedly benefits.").

Excessive litigation costs are especially harmful to small businesses and financial institutions,

including credit unions. *Id.* at 12 ("The specter of class litigation is particularly daunting for small businesses given their 'significantly fewer financial resources,' which may render them 'unable to conduct the necessary discovery to defend themselves against class certification' or 'defend against class action claims at trial,' subjecting them to even greater unfair settlement pressure." (quoting Matthew Grimsley, *What Effect Will* Wal-Mart v. Dukes *Have on Small Businesses?*, 8 Ohio St. Entrep. Bus. L.J. 99, 116 (2013))); *see also* William P. Barnette, *There Is No Conservative Case for Class Actions*, 22 Fed. Soc. Rev. 192, 193 (2021) ("Class actions are a huge problem for big corporations, but they are even more likely to be an existential threat for smaller businesses.").

Specific to credit unions, increased litigation costs harm credit union members in two distinct ways. *First*, the elevated costs are passed on to other members (who own the credit union). *Second*, credit unions, which operate on smaller economies of scale (as compared to large banks), are forced to reduce their product and service offerings and increase the cost of products and services they continue to provide. This is antithetical to the purpose of credits unions: to serve underserved persons in underserved communities. The reduction of products and business lines directly harms the people and communities that rely on credit unions for their financial needs.

At bottom, denying credit unions access to arbitral fora harms consumer members. Consumers who have been financially harmed should not have to wait years for the chance to receive a "coupon" or "voucher" as part of class settlement; they need prompt,

streamlined resolution that meets their individualized needs and affords real relief, where warranted.

II. Arbitration Agreements Uniquely Benefit Credit Unions, Enriching the Underserved Communities in Which They Operate.

Restricting the use of arbitration agreements will uniquely harm credit unions and their members as these institutions modernize their dispute-resolution processes. This, in turn, will frustrate credit unions' valuable service to underserved communities.

A. Credit unions' unique governance structure supports their member-oriented service objectives. Credit unions are the only consumer-owned, not-for-profit cooperatives in the financial market and have a long history of protecting their members' interests. Credit unions generally share fundamental characteristics: (1) membership is defined in the credit union's charter to encompass groups sharing a common bond of occupation or association or those that are located in a certain geographic area; (2) deposits with the credit union make members the owners of the credit union, giving them voting rights; (3) regardless of the amount of deposits, members exercise democratic control of the credit union, meaning each member is entitled one vote; (4) member deposits are the primary funding source for lending and investment activities; and (5) a board of directors, elected by and from the credit union's membership, governs the credit union, serving on a voluntary basis and charged with acting in the best interests of all members. *See* 12 U.S.C. § 1751–61 (Federal Credit Union Act).

Credit unions' business model incentivizes product and service offerings targeted to their members.

Consumer Reports has found that credit unions receive some of the highest consumer satisfaction ratings among evaluated services, with 93% of credit union members reporting they were "highly satisfied" with the services they received. Jeff Blyska, *Choose the Best Bank for You*, Consumer Reports (Dec. 4, 2015), https://bit.ly/3UPPo7l. Unlike banks, credit unions are not guided by profits for shareholders; thus, credit unions provide lower rates on loans, charge fewer and lower fees, and give their members higher annual percentage yields on savings products. Elizabeth Aldrich & Theresa Stevens, *What's the Difference Between a Bank and a Credit Union?*, Forbes (Oct. 6, 2022), https://bit.ly/3Rm5x1p. These benefits are consistent with credit unions' core mission: to provide their members the best terms on financial products and services the credit union can afford.

Because of the unique structure of credit unions, class litigation against these institutions amounts to members suing themselves, as owners. It also means that any relief awarded through class settlements, including what could be millions in attorneys' fees, is necessarily shouldered by all members.

Likewise, restrictions that might appear appropriate for large financial institutions—those which have a different relationship with their customers—are not appropriate for credit unions. Approximately 1,723 credit unions employ five or fewer individuals and 63% of all credit unions are considered "small credit unions," defined as those with less than $100 million in assets. This capitalization is based on member deposits, as credit unions do not issue stock. Thus, the payment of exorbitant attorneys' fees awards and settlements in class litigation only harm members.

The inability to pursue class claims (through class waivers in arbitration agreements) is not to say that members have *no* form of redress. In addition to arbitration, credit unions afford their members direct recourse. Members have the right to vote to remove the credit union's board of directors and management. Credit unions also regularly work with members to provide refunds, negotiate payment plans, and find alternative solutions to resolve complaints.

B. Credit unions provide critical services to consumers who lack access to traditional banks. Credit unions reach underserved communities, providing access to financial institutions for consumers who are underbanked and unbanked. As recent as 2021, 19% of U.S. households were either underbanked or unbanked. Board of Governors of the Federal Reserve System, *Economic Well-Being of U.S. Households in 2021*, at 81 (May 2022), https://bit.ly/3dWeMrF. And yet, between January 2005 and March 2021, banks closed 7,812 net branches. During the same period, credit unions *opened* a net of 1,439 branches. Letter from Credit Union National Association, et al., to Reps. Maxine Waters & Patrick McHenry, House Committee on Financial Services (May 16, 2022), https://bit.ly/3CROznC. And, in 2021, 54 federal credit unions received approval from the National Credit Union Administration (NCUA) to modify their charters to expand into underserved areas. *See* National Credit Union Administration, *2021 Annual Report*, at 21 (Feb. 15, 2022), https://bit.ly/3dTqOly.

Credit unions' unique structure and purpose facilitate the support of underserved communities. Some credit unions (including Golden 1) even carry a "low-income designation," which means a majority of their

members meet low-income thresholds. This NCUA designation exempts low-income credit unions from the statutory cap on member business lending, thereby expanding access to capital for small businesses and diversifying credit union portfolios. Relatedly, through its Community Development and Revolving Loan Fund, the NCUA provided $1.6 million in grants last year to help 109 low-income credit unions expand to underserved communities and improve their digital services and security. *Id.* at 24.

In addition, credit unions have been key players in the effort to distribute resources during the Covid-19 pandemic. The Paycheck Protection Program (PPP) and Health Care Enhancement Act allocated $30 billion to credit unions, community lenders, and small banks with consolidated assets of less than $10 billion that serve businesses in minority, underserved, and rural communities. *Id.* at 7.

The CFPB recognizes the critical role credit unions play in underserved communities, including that they offer a financial lifeline to many families. CFPB, *Community Banks and Credit Unions* (last visited Oct. 11, 2022), https://bit.ly/3rfpJHM. Credit unions provide transparent, fair, and personalized services tailored to their members' needs. For example, rural credit unions are likely to have familiarity with agricultural loans, whereas urban credit unions might be familiar with construction loans. *Cf.* Michael Bartlett, *Some (Re) Assembly Required: How Greater Nevada CU Rebuilt its MBL Program After Regulators Shut it Down*, Credit Union Journal (Aug. 11, 2014) (highlighting credit union that could make loans too small for most banks and fill the growing local demand for construction loans).

Credit unions also actively engage with and invest in the communities they serve. Golden 1 maintains a community grant program that, in 2022 alone, awarded grants to 31 nonprofits totaling nearly $600,000. Golden 1 also awards eligible members and dependents scholarships up to $20,000 per student. Without access to trusted institutions like credit unions, consumers are left with no choice but to turn to predatory payday lenders and check cashers.

C. California's anti-arbitration stance guarantees to harm credit unions. Because of credit unions' lean staffing practices and focus on member-facing services, credit unions have been slower than traditional banks to adopt changes in the industry, including incorporating arbitration agreements into membership agreements. If the decision below stands, it will disadvantage credit unions, particularly in their ability to compete with banks, which have long-incorporated arbitration in their customer agreements.

Limiting credit unions' access to arbitration will exacerbate a concerted effort to target credit unions in class litigation. Analyses in 2019 indicated that consumer class actions had nearly tripled in the preceding decade, with data-privacy and Telephone Consumer Protection Act claims driving the increase. *Lex Machina's Consumer Protection Litigation Report Reveals Companies Paid More than $43 Billion in Damages Over the Last Decade*, Lex Machina (Oct. 23, 2019), https://bit.ly/3RD5EGl. This expansion has fueled a multi-billion industry—one expected to reach $3.6 billion for 2022. *See Chamber Class Action Report*, at 10. Left unaddressed, these increasing litigation costs will be passed to consumers, U.S. Chamber of Commerce Institute for Legal Reform, *Unstable*

Foundation: Our Broken Class Action System & How to Fix It, at 3 (Oct. 2017), https://bit.ly/3Sqof9z (observing that litigation costs are "inevitably passed on to customers, shareholders, or other innocent parties"), particularly if credit unions are unable to use arbitration as an alternative, *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (noting that arbitration offers "the promise of quicker, more informal, and often cheaper resolutions for everyone involved").

California's anti-arbitration rule prevents a competitive modernization of dispute-resolution procedures. Many of the consumer arbitration agreements in effect today were implemented through changes-of-term procedures. These mutual agreements between two contracting parties provide a practical and effective forum for dispute resolution that is faster, simpler, and more affordable than litigation. *See, e.g., Chamber Arbitration Report*, at 7. By refusing to allow credit unions to add arbitration agreements to their membership agreements through mutual assent, California is disadvantaging credit unions.

Further, credit unions who have already incorporated arbitration agreements do not escape the lower court's ruling unscathed. These credit unions are likely to face significant operational implications when managing multiple operative versions of their membership agreements. The burden of keeping track of these distinctions will necessarily fall on credit unions. And these operational burdens come with immense risk: as this long-running case makes clear.

III. Review and Reversal of the Decision Below Through Faithful Application of the FAA Will Clear Confusion and Disagreement and Will Level the Playing Field.

Credit unions that want to modify existing membership agreements to add an agreement to arbitrate face a patchwork of confusing and often conflicting standards. Indeed, this morass of standards even trips sophisticated financial institutions with robust compliance programs, particularly when the new standards are applied after-the-fact. The genesis of the confusion is plain: certain states (and courts) harbor contempt for arbitration, which manifests in the adoption of anti-arbitration laws and rules. The decision below is part of an accelerated movement to single out arbitration by constructing barriers, and, in some cases, making it impossible, to modify existing consumer agreements to add arbitration agreements.

Of course, these state-imposed barriers must contend with the Supremacy Clause and the FAA's equal-treatment principle. The Court's consistent and faithful application of this equal-treatment principle has nonetheless spawned a cottage industry of creative maneuvering to avoid the FAA's preemptive reach, most notably by fashioning arbitration-specific, common law rules. California is ground zero for this creative exercise—and this Court has repeatedly been called upon to correct it. *See, e.g.*, *DirecTV, Inc. v. Imburgia,* 577 U.S. 47, 58–59 (2015); *Concepcion*, 563 U.S. at 352; Thomas E. Carbonneau, *"Arbitracide": The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 Am. Rev. Int'l Arb. 233, 239–40 & n.30 (2007) (noting *Badie v. Bank of Am.*, 67 Cal. App. 4th

779 (1998), is an example of "Golden State Animosity" to the Court's FAA precedent).

The distinctions and standards that have grown out of courts' imaginative dogging of the FAA's preemptive dictate are confusing, often conflicting, and lack clear, even-handed reasoning. The anti-arbitration rule at the center of this case proves as much. There is no reasoned distinction for why a member and his or her credit union may agree to modify their agreement to add or change fees, grace periods, or annual-percentage rates through mutual assent (notice and a reasonable opportunity to opt out), but cannot modify the same agreement through the same process to include an arbitration agreement.

This discrimination is improper for many reasons. CUNA's concern, however, is with the confusion and operational uncertainty now surrounding the modification of membership agreements because of lower courts' animus toward arbitration.

A. California is a prime example of the confusion and uncertainty that credit unions face—which, again, are member-owned and, in many instances, have more limited resources than large financial institutions. While the decision below refused to give effect to the Golden 1 Arbitration Agreement because the original membership agreement with Burgardt did not specifically reserve the right to add an arbitration agreement (App. 22a–23a), a federal court in California found the exact opposite and required compliance with the Agreement, *Needleman v. Golden 1 Credit Union*, 474 F. Supp. 3d 1097, 1103–05 (N.D. Cal. 2020). Thus, as of today, CUNA's California members are subject to two irreconcilable decisions: a *published* federal decision (albeit from a district court),

holding that credit unions may compel compliance with an arbitration agreement added to a membership agreement through mutual assent; and an *unpublished* California Court of Appeal decision rejecting this view and holding that a credit union may not modify a membership agreement to add an arbitration agreement unless the original membership agreement contemplated arbitration.

The resulting confusion and uncertainty are guaranteed to disadvantage credit unions. Credit unions in California interested in adding arbitration agreements to existing membership agreements—because of arbitration's many advantages (I & II, *supra*)—do so at their own peril. By now, the decision below is on every class-action listserv, and enterprising lawyers are busy fashioning theories to shop the more favorable forum. This will only compound litigation.

Nor will the disadvantages be limited to credit unions that have yet to add arbitration agreements to their membership agreements (II.C, *supra*). Rather, after the decision below, many arbitration agreements added by California credit unions through processes like the notice-and-opportunity-to-opt-out process used by Golden 1 are in jeopardy of nonenforcement by the courts. This reason alone compels review.

B. The confusion and uncertainty that will befall credit unions is not limited to California. The decision below is part of a growing tangle of cases announcing arbitration-specific rules for when parties may modify consumer contracts to add arbitration agreements.

California state courts hold that the original consumer agreement must contemplate arbitration before modification is permissible, *Badie*, 67 Cal. App.

4th at 803–04, and mutual asset does not change the calculus (App. 22a–23a). *See also Follman v. World Fin. Network Nat'l Bank*, 721 F. Supp. 2d 158, 166 (E.D.N.Y. 2010) (Ohio law) (adopting California's *Badie* rule); *but see Perry v. FleetBoston Fin. Corp.*, No. CIV.A.04-507, 2004 WL 1508518, at *4 (E.D. Pa. July 6, 2004) (Rhode Island law) (adopting *Badie* rule "so long as cardholders do not accept the unilateral change by continuing to use their cards").

Other courts, however, have said that notice and an opportunity to opt out of the modification are critical to determining whether to enforce the arbitration agreement. *Valle v. ATM Nat'l, LLC*, No. 14-cv-7993 (KBF), 2015 WL 413449, at *4 (S.D.N.Y. Jan. 30, 2015) (New York law) (noting the concerns in *Badie* are alleviated when consumers have "ample opportunity" to opt out); *Howard v. Ferrellgas Partners, L.P.*, 92 F. Supp. 3d 1115, 1138 (D. Kan. 2015) (Kansas law) (same). This view closely comports with the Restatement. *See* Restatement (Second) of Contracts §§ 19, 69 (1981); Restatement of the Law, Consumer Contracts § 3 (2019) (tentative draft). Yet, other courts have questioned the relevancy of notice and the opportunity to opt out, *Sevier Ctny. Sch. Fed. Credit Union v. Branch Banking & Tr. Co.*, 990 F.3d 470, 479–80 (6th Cir. 2021), *cert. denied* 142 S. Ct. 2770 (2022) (Tennessee law), or outrighted disregarded it, *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004) (Virginia law) (refusing to enforce modification despite opt-out availability).

Still other courts have held that unilateral modification of consumer contracts to add arbitration agreements is permissible so long as the consumer is on notice. *SouthTrust Bank v. Williams*, 775 So. 2d

184, 191 (Ala. 2000) (Alabama law); *Virgil v. Sw. Miss. Elec. Power Ass'n*, 296 So. 3d 53, 60 (Miss. 2020) (Mississippi law); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 833 (S.D. Miss. 2001), *aff'd*, 34 F. App'x 964 (5th Cir. 2002). These courts reason that such treatment is consistent "with the general law of contracts" and "[f]ederal law prohibits [courts] from subjecting arbitration provisions to special scrutiny." *See SouthTrust Bank*, 775 So. 2d at 191 (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996)).

There are other competing standards burdening modifications when the term to be added is an agreement to arbitrate. The Montana Supreme Court, for instance, has adopted a facially discriminatory rule limiting modifications to add an arbitration agreement absent a "deliberate[], understanding[] and intelligent[]" agreement to arbitrate. *See Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 699 (Mont. 2009). This subjective determination is made by application of ten, non-exclusive factors, *id.*—factors that only apply to determining the enforceability of arbitration agreements, *id.* at 698 (distinguishing modifications changing financial terms from modifications adding arbitration agreements).

To be sure, the bramble of anti-arbitration standards on this score will only thicken. And no doubt, courts' appetite to disfavor arbitration by departing from generally applicable contract principles will continue as more courts describe *Badie* as "seminal," *see Sevier Cnty. Sch. Fed. Credit Union*, 990 F.3d at 479. Absent Court intervention, this promises to keep the question presented here at the forefront, while at the same time compounding the confusion.

It's unfortunate the Court must again and again (and again) intervene to remind of "the FAA's command to place [arbitration] agreements on an equal footing with all other contracts," *Kindred Nursing Ctrs.*, 137 S. Ct. at 1429; but it should do so again.

CONCLUSION

CUNA respectfully requests that the Court grant certiorari or summarily reverse the decision below.

Respectfully submitted,

LEAH C. DEMPSEY
BROWNSTEIN HYATT FARBER SCHRECK, LLP
1155 F Street N.W., Suite 1200
Washington, DC 20004
(202) 296-7353

LUKE MARTONE
CREDIT UNION NATIONAL ASSOCIATION
99 M Street SE, Suite 300
Washington, DC 20003
(202) 508-6743

JULIAN R. ELLIS, JR.
Counsel of Record
COURTNEY E. BARTKUS
ROSA L. BAUM
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 17th Street, Suite 2200
Denver, CO 80202
(303) 223-1100
jellis@bhfs.com

Attorneys for Amicus Curiae

OCTOBER 13, 2022