No. 11-948

IN THE

Supreme Court of the United States

TITAN MARITIME, LLC, a Crowley Company, DBA Titan Salvage,
Petitioner,

v.

CAPE FLATTERY LIMITED,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CALIFORNIA BANKERS ASSOCIATION, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE MORTGAGE BANKERS ASSOCIATION, AND THE CONSUMER MORTGAGE COALITION IN SUPPORT OF PETITIONER

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MOTION OF THE CALIFORNIA BANKERS ASSOCIATION, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE MORTGAGE BANKERS ASSOCIATION, AND THE CONSUMER MORTGAGE COALITION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF TITAN MARITIME, LLC'S PETITION FOR A WRIT OF CERTIORARI

The California Bankers Association, the American Financial Services Association, the Mortgage Bankers Association, and the Consumer Mortgage Coalition (collectively the "*Amici*") move this Court to grant them leave to file the attached brief *amici curiae* in the above-captioned case. The Petitioner has consented to participation by *Amici* in this matter. Respondent did not consent.

Amici are four of the largest national and state trade associations that represent members in the banking and financial services industries. *Amici* consistently rely on arbitration agreements as an efficient means of resolving disputes and managing legal exposure. The decision by the United States Court of Appeals for the Ninth Circuit in *Cape Flattery Limited v. Titan Maritime, LLC* frustrates the objective of predictable judicial policies regarding the enforcement of arbitration clauses, conflicts with the Court's jurisprudence, and extends a lingering split between the Circuits. This case presents an opportunity for the Court to resolve a matter of deep concern to the consumer and commercial finance industries and to provide a uniform national standard regarding the claims that are subject to arbitration provisions. A decision from the Court would provide guidance to *Amici* and other contracting parties on their legal rights under standard arbitration agreements.

Amici seek to file this brief to explain their views about why the Court should accept this case for review.

Respectfully submitted,

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The California Bankers Association ("CBA"), the American Financial Services Association ("AFSA"), the Mortgage Bankers Association ("MBA"), and the Consumer Mortgage Coalition ("CMC") (collectively, the "*Amici*") submit this brief *amici curiae* in support of the Petition for a Writ of Certiorari.[1]

[1] Pursuant to Supreme Court Rule 37.3, *Amici* state that Petitioner has consented to the filing of this brief; Respondent did not consent. Petitioner and Respondent were timely notified of the intent of *Amici* to file this brief. Pursuant to Supreme

INTEREST OF *AMICI*

Amici are four of the largest national and state trade associations that represent members in the banking and financial services industries.

The CBA is a nonprofit organization established in 1891 that represents most of the Federal Deposit Insurance Corporation ("FDIC") depository financial institutions that do business in California, including nearly 200 commercial banks, industrial loan companies, and savings institutions.

The AFSA is the national trade association for the consumer credit industry. The AFSA's 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks, and industry suppliers.

The MBA is a national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. The MBA works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. Its membership of over 2200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

Court Rule 37.6, *Amici* further state that no counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici,* its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The CMC is a trade association of national mortgage lenders, servicers, and service providers.

Amici frequently file *amicus* letters and briefs in state and federal courts on matters that significantly affect the banking and consumer finance industries. This case is such a matter – the Ninth Circuit's interpretation of boilerplate commercial arbitration language used throughout the banking and finance industries undermines the Federal Arbitration Act ("FAA," 9 U.S.C. § 1 *et seq*.), conflicts with the Court's jurisprudence, and extends a lingering split between the Circuits. If left alone, it could upset reasonable expectations regarding the interpretation of countless arbitration clauses in banking and financial services agreements, promising to increase litigation and related costs.

Accordingly, *Amici* have a significant interest in the further disposition of this case. *Amici* express no views on the disposition of issues other than those addressed in this brief.

ARGUMENT

This case presents an opportunity for the Court to resolve a lingering, and enduring, split in the Circuits that undermines this Court's recent jurisprudence favoring arbitration of disputes, and to provide clear guidance to contracting parties across the nation as to their legal rights under standard arbitration agreements.

Section 2 of the FAA provides that: "A written provision . . . evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2. The FAA, which establishes a "liberal

federal policy favoring arbitration agreements," was enacted in response to perceived judicial hostility to arbitration. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (It is "beyond dispute that the FAA was designed to promote arbitration."). *See also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate.").

Since the FAA's passage in 1925, the Court has required the enforcement of arbitration provisions according to their terms, even where the claims at issue are federal statutory claims, unless arbitration is contrary to a clear congressional command. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). *See also CompuCredit Corp. v. Greenwood*, 565 U.S. ___, ___ (2012) (slip op., at 6) ("[W]e have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.") (internal citations omitted). The Court has instructed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The Ninth Circuit's approach to arbitrability contravenes the Court's clear pronouncements and conflicts with sister appellate Circuits favoring a broad interpretation of the scope of arbitration. The Court now has the opportunity to resolve this recognized split and further establish its position. A decision

from the Court would provide the banking and finance industries – and many other industries – with clear guidance on the arbitrability of disputes "arising under" standard commercial arbitration provisions, notwithstanding minor differences in drafting language. Absent this guidance, parties to contracts incorporating this boilerplate language will be uncertain of their legal rights.

I. THE BANKING AND FINANCIAL SERVICES INDUSTRIES RELY ON ARBITRATION.

Banking and financial services companies rely on arbitration agreements as a clear and efficient means of resolving disputes and managing legal exposure and litigation costs. The Ninth Circuit's decision directly impacts hundreds of banking and financial service companies that enter into thousands of commercial and consumer agreements each day containing boilerplate arbitration provisions. These provisions are routine in loan agreements, bank guarantee agreements, letters of credit, credit agreements, structured financing and project finance agreements, securities and derivatives agreements, credit card agreements, banking agreements, auto loans, and mortgage agreements, to name just a few. It is estimated that at least 90% of international contracts, including thousands of banking and financial services agreements, contain arbitration provisions. *See* Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 Am. Rev. Int'l Arb. 7, 37, & n.151 (2009).

The use of arbitration to resolve disputes has increased dramatically in recent years. Between 1993 and 2003 alone, the number of international arbitra-

tion proceedings administered by leading institutions nearly doubled. Christopher R. Drahozal & Richard W. Naimark, *Towards a Science of International Arbitration: Collected Empirical Research* at 341 (Kluwer Books Int'l, 2005). In 2009 and 2010, the media reported more than 100 active disputes pending in arbitration with stakes of at least $1 billion. Michael Goldhaber, *High Stakes: Arbitration Scorecard 2011*, The American Lawyer (July 1, 2011).

Moreover, as the Court has recognized, the benefits of arbitration are numerous for the interested parties. Arbitration reduces the cost and time involved in resolving disputes. *See Allied-Bruce*, 513 U.S. at 280-281; Douglas Shontz, Fred Kipperman, Vanessa Soma, *Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel*, at 7 (RAND Institute for Civil Justice 2011). It minimizes the risks associated with litigation in foreign courts, preserves confidentiality and the privacy of the parties, and gives parties flexibility in structuring dispute resolution. Shontz et al., *supra*, at 7-18. Moreover, for parties involved in international commerce, there is little doubt that arbitration awards are easier to enforce in the United States than foreign judgments. *See* Loukas Mistelis, *International Arbitration – Corporate Attitudes and Practices – 12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 Am. Rev. Int'l Arb. 525, 548 (2004). Arbitration may also better protect confidential information from disclosure. *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. Kan. L. Rev. 1211, 1222-26 (2006). And arbitration may result in more accurate outcomes because of arbitrator expertise and incentives. *See* Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and*

Arbitration: An Application to Franchise Contracts, 32 J. Legal Stud. 549, 558-61, 575 (2003).

Perhaps most importantly, arbitration provides a degree of comfort that resolution of a dispute will not turn on the location of contract formation, performance, or the peculiarities of a legal jurisdiction. Put simply, arbitration allows the parties to an agreement to minimize "uncertainties by agreeing in advance on a forum acceptable to both parties," and limits concerns about a particular provision's "uniform meaning." *Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972); *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28 (2004).

II. THE NINTH CIRCUIT'S APPROACH RUNS CONTRARY TO MODERN COMMERCIAL PRACTICES AND JUDICIAL PRECEDENT.

The Ninth Circuit's outdated interpretation of the term "arising under" in arbitration agreements undermines the FAA's core purpose of ensuring that arbitration provisions are judicially enforceable. In this regard, the courts are divided, with five Circuits interpreting the term "arising under" broadly, and two – the Second and Ninth Circuits – adopting what the courts have acknowledged is a "narrow" interpretation. Contrary to the FAA's stated goal of encouraging arbitration and uniform, national standards, the Ninth Circuit's decision solidifies this split between the Circuits.

First, the FAA itself provides for a substantive right to arbitration of controversies "arising out of such contract or transaction." 9 U.S.C. § 2. The plain meaning of this statement, like the plain meaning of the term "arising under," is that the parties to an arbitration agreement, absent contrary language, agree

to resolve all disputes in arbitration involving the *contract* or the *transaction* contemplated by the contract. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517, 519-20 (1974) (interpreting the term "arise out of" in an arbitration provision as including statutory claims); *C.F. Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004) (interpreting a statute of limitations for actions "arising under" federal statutes broadly, and rejecting the view that "arising under" means "based solely upon.").

For *Amici* and the millions of companies and consumers that enter into banking or financial services agreements, the terms "arising under" and "transaction" cover more than just those disputes "relating to the interpretation and performance of the contract itself." *Cape Flattery Ltd. v. Titan Maritime LLC*, 647 F.3d 914, 922 (9th Cir. 2011). To find otherwise would limit the use of arbitration to the interpretation of the contract, rather than the transaction at issue, which runs contrary to the reasonable, settled expectations of parties and the Court's prior pronouncements on the scope of arbitration.

Second, the modern trend – as demonstrated and encouraged by this Court's recent decisions – is for the judiciary to apply a broad construction of arbitration provisions. *See, e.g., AT&T Mobility,* 131 S. Ct. at 1753 (upholding the enforceability of an arbitration provision in a consumer contract); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2781 (2010) (upholding the enforceability of an arbitration agreement against a claim that certain provisions were unconscionable); *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1461 (2009) (upholding the enforceability of a collective bargaining provision requiring that employment discrimination claims be resolved through

binding arbitration). *See also KPMG LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011) (per curiam) ("[The FAA] reflects an emphatic federal policy in favor of arbitral dispute resolution." (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (internal quotation marks omitted)).

In line with the Court's guidance and the FAA's mandate, the First, Third, Fourth, Fifth, and Eleventh Circuits have interpreted the term "arising under" broadly. *See* Petitioner's Brief at 5. And in an international forum, the English House of Lords reached the same conclusion, arguing against hypertechnical distinctions between terms such as "arising under," "arising out of," or "arising in relation to" in light of modern commercial practices. *See Premium Nafta Prod. Ltd. v. Fili Shipping Co. Ltd*. [2007] A.C. 40 at ¶ 2 (H.L.) (appeal taken from E.W.C.A.) (U.K.).

Notwithstanding the modern approach to determining arbitrability, the Ninth and Second Circuits have clung to an outdated interpretation of the term "arising under" in arbitration agreements. But even these two Circuits appear to be going in different directions on the issue. While both courts rely on *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961), the Second Circuit has limited the application of its 50-year-old case so as to render the decision effectively meaningless. *See, e.g.,* Petitioner's Brief at 36. However, as demonstrated here, the Ninth Circuit will not relent on the issue, continuing to rely on *Kinoshita*, even in the face of this Court's recent arbitration rulings.

Finally, the Ninth Circuit's opinion acknowledged that there is no material difference among the various similar phrases used to describe the disputes at

issue. *Cape Flattery*, 647 F.3d at 922 ("The language discussed in these cases – 'arising hereunder,' 'arising under,' and 'arising out of' – is the same as that at issue in this case.").

In light of the FAA and the Court's guidance on arbitration, *Amici* respectfully suggest that arbitration provisions such as the one at issue be enforced "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue." *Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 636 (5th Cir. 1985) (quoting *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979) (internal quotation marks omitted)); *accord Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)); *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 379 (1st Cir. 2011); *Battaglia v. McKendry*, 233 F.3d 720, 727 (3d Cir. 2000).

Adoption of a uniform, modern, and commercially reasonable interpretation of the phrase "arising under" and similar variations will preserve the benefits of arbitration for *Amici*'s members, further the FAA's statutory mandate that the judiciary support the use of arbitration, and resolve the split among the appellate Circuits.

III. THE NINTH CIRCUIT'S HOLDING THREATENS THE BENEFITS OFFERED BY ARBITRATION.

To realize the benefits of arbitration, parties to an arbitration agreement must be able to rely on uniform interpretation and enforcement of standard

terms and provisions by the courts. Whether a dispute is subject to arbitration should not depend on the location of the court interpreting the agreement.

Here, the Ninth Circuit's decision leaves banks and financial institutions, particularly those with national or international operations, uncertain regarding the enforceability of countless arbitration agreements. Banks that operate in multiple jurisdictions face the unsettling prospect that their agreements will be honored in some Circuits but not others, raising forum shopping issues. This risk in particular is amply demonstrated by this case. Had Respondent sought to file this case in a different available jurisdiction, this case would likely have been assigned to arbitration and resolved long ago.

Under the Ninth Circuit's interpretation of arbitrability, members of *Amici* face the prospect of having to participate in court-based litigation to resolve disputes that were intended by the parties to be addressed through arbitration. Under the Ninth Circuit's precedent, a contracting party can avoid arbitration through creative pleading, even where resort to the contract is necessary to resolve the dispute. In this regard, members of *Amici* have no way of knowing what types of legal claims – be they tort or statutory – may be subject to litigation rather than arbitration. *Cf. CompuCredit, supra,* 565 U.S. at ___ (slip op., at 8-10) (applying the reasonable view that federal statutory claims brought against a bank and credit card marketer were subject to the credit card agreement's arbitration clause).

Given this Court's recent pronouncements, *Amici* would have expected the Ninth Circuit to conform to the approach taken by its sister Circuits in more broadly construing the scope of the "arising under"

language. Because it did not, in order to preserve the benefits of arbitration, *Amici* urge the Court to grant the Petition for a Writ of Certiorari so that the Court can consider whether it should adopt a uniform approach that gives all interested parties guidance on what types of claims are subject to standard arbitration provisions.

CONCLUSION

For the reasons above, *Amici* respectfully ask the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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