IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-10420

CATHRYN ELAINE HARRIS, on behalf of herself and all others similarly situated; MARIO HERRERA, on behalf of himself and all others similarly situated; AND MARYAM HOSSEINY, on behalf of herself and all others similarly situated,
Plaintiffs-Appellees,

vs.

BLOCKBUSTER INC.,

Defendant-Appellant.

AMICUS CURIAE BRIEF OF ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
No. 3:09-cv-217-M, Hon. Barbara M.G. Lynn, Judge Presiding

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1 & 29.2, the cause number and style number are as follows: *Cathryn Harris, on behalf of herself and all others similarly situated; Mario Herrera, on behalf of himself and all others similarly situated; and Maryam Hosseiny, on behalf of herself and all others similarly situated* v. *Blockbuster Inc.,* No. 09-10420 in the United States Court of Appeals for the Fifth Circuit. Amicus Curiae, Electronic Privacy Information Center ("EPIC"), is a District of Columbia corporation with no parent corporation. No publicly held company owns 10% or more of the stock of EPIC. EPIC does not have a financial interest in the outcome of this case. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

- Appellant Blockbuster Inc. is a Delaware corporation headquartered in Dallas, Texas. Blockbuster Inc. does not have a parent corporation, and no publicly-held corporation owns 10% or more of its own stock.
- The following attorneys have appeared on behalf of Appellant either before this Court or in the district court:

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- Appellees Cathryn Harris, Mario Herrera, and Maryam Hosseiny are individuals residing in Dallas, Texas.
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INTEREST OF THE *AMICUS CURIAE*[1]

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC has participated as *amicus curiae* in several cases before the U.S. Supreme Court and other courts concerning privacy issues, new technologies, and Constitutional interests, including *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *National Cable and Telecommunications Association v. Federal Communications Commission*, 555 F.3d 996 (D.C. Cir. 2009); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a strong interest in protecting consumer privacy and ensuring the full protections set out in federal privacy law. Mandatory arbitration clauses, such

[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

as Blockbuster's provision at issue in this case, prevent consumers from seeking remedies set out in federal law. With respect to the Video Privacy Protection Act, it is clear that Congress intended to ensure that a private right of action be available to consumers. To permit companies to substitute unilaterally mandatory arbitration clauses for the express language set out in federal statute will undermine privacy safeguards, contribute to further privacy harms, and frustrate the intent of Congress.

SUMMARY OF THE ARGUMENT

Congress passed the Video Privacy Protection Act of 1988 to prevent the wrongful disclosure of video rental information by companies that collect detailed personal information from customers. To achieve this goal, Congress established a private right of action to ensure that there would be a meaningful remedy when companies failed to safeguard the data they collected. The Congress recognized that absent a private right of action, there would be no effective enforcement, no remedy for violations, and no way to ensure that companies complied with the intent of the Act.

Private rights of action are routinely found in federal and state privacy laws because they help ensure that the legislative intent to safeguard privacy is fulfilled. Congress, courts, and scholars have recognized the importance of private rights of action in enforcing privacy laws. Indeed, in the absence of a private right of action, it is doubtful that Congress would even legislate to safeguard privacy, as there would be little purpose to a law that regulated business practices but lacked a means of enforcement.

Mandating arbitration of violations of federal privacy laws through consumer contracts is especially problematic. Courts have held that Congress may make claims nonarbitrable; permitting mandatory arbitration agreements in this context would violate Congress' intent to provide a private right of action as the

exclusive remedy for violations of the Act. Moreover, mandatory arbitration would prevent aggrieved parties from effectively vindicating their statutory rights. Finally, mandatory arbitration agreements in consumer contracts implicate serious public policy concerns, many of which are especially compelling in this context. Given the growing risk of identity theft and security breaches, and American consumers' ongoing concerns of about the protection of their personal information, the attempt to undo a clear congressional intent to establish meaningful enforcement for violations of federal law by an mandatory arbitration provision is both unconscionable and unlawful.

ARGUMENT

I. The Video Privacy Protection Act Purposefully Provides a Private Right of Action

Congress made clear its intent to enact a robust privacy law. As the Senate Judiciary Committee report explained, "The Video Privacy Protection Act follows a long line of statutes passed by the Congress to extend privacy protection to records that contain information about individuals." S. Rep. No. 100-599, at 2 (1988) [hereinafter *Committee Report*]; *see* Video Privacy Protection Act of 1988 (VPPA), 18 U.S.C. § 2710 (2008). Congress passed the act in the wake of the well-publicized scandal in which Supreme Court nominee Robert H. Bork's video rental records were published by a Washington, D.C newspaper the year before. 134 Cong. Rec. S16312, 16313–14 (1988); *see also* Michael Dolan, *The Bork Tapes Saga*[2] (last visited October 26, 2009). Describing the purpose of the bill, Representative McCandless testified that "[a]t the heart of the legislation is the notion that all citizens have a right to privacy—the right to be let alone—from their Government and from their neighbor." *Video and Library Privacy Protection Act of 1988: Joint Hearing on H.R. 4947 and S.2361 Before the H. Comm. on the Judiciary and the S. Comm. on the Judiciary*, 100th Cong. 27 (1988) [hereinafter *Hearing Record*] (statement of Rep. McCandless). Thus, the bill was intended to

[2] *Available at* http://www.theamericanporch.com/bork2.htm

"protect[] the privacy of consumers of content-based materials," by building "a brick wall—a Federal privacy right—around the individual." *Id.*

The Congress recognized the paramount importance of the privacy right protected by the Act: "Every day Americans are forced to provide to businesses and others personal information without having any control over where that information goes. These records are a window into our loves, likes, and dislikes." *Committee Report*, at 6–7 (quoting Sen. Paul Simon, 134 Cong. Rec. S5400-01 (May 10, 1988)). Indeed, our legal system has long recognized and protected the right of personal privacy. The Constitution's drafters "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation" of constitutional principles. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

As the Supreme Court noted, "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989); *see also* A. Westin, Privacy and Freedom 7 (1967) ("Privacy is the claim of individuals . . . to determine for

themselves when, how, and to what extent information about them is communicated to others").

Recognizing the important privacy rights at issue, the VPPA provides a private right of action that is integral to fulfilling Congress's intent in passing the bill. The relevant portion of the Act reads as follows:

> (1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.
> (2) The court may award—
> (A) actual damages but not less than liquidated damages in an amount of $2,500;
> (B) punitive damages;
> (C) reasonable attorneys' fees and other litigation costs reasonably incurred; and
> (D) such other preliminary and equitable relief as the court determines to be appropriate.
> (3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.
> (4) No liability shall result from lawful disclosure permitted by this section.

18 U.S.C. § 2710(c) (2008).

The civil action described in subsection (c) is the only enforcement mechanism provided by Congress in the statute. The Senate Committee Report emphasized the importance of the civil remedy section:

> *The civil remedies section puts teeth into the legislation, ensuring that the law will be enforced by individuals who suffer as the result of unauthorized disclosures.* It provides that an individual harmed by a violation of the Act may seek compensation in the form of actual and punitive damages, equitable and declaratory relief and attorneys' fees and costs.

> Statutory damages are necessary to remedy the intangible harm caused by privacy intrusions. Similar remedies exist in the federal wiretap statute as revised by this committee in 1986. The absence of such a remedy in the Privacy Act of 1974 is often cited as a significant weakness.

Committee Report at 8 (emphasis added).

Testimony during a joint congressional hearing on the bill also made clear the importance of the enforcement mechanism. Senator Paul Simon, a co-sponsor of the Act, stated about the original bill, which also contained provisions to safeguard library record information:

> The Video and Library Privacy Act of 1988 takes an important step in ensuring that individuals will maintain control over their personal information when renting or purchasing a move or when borrowing a library book. *The bill specifically provides for a federal cause of action* in the event a list which identifies the books we read or the movies we watch is released.

Hearing Record at 131–32 (statement of Sen. Paul Simon) (emphasis added).

Senator Simpson, another cosponsor of the Act, stated:

> It is that cherished American right of privacy that we are protecting with this legislation. People in the country may not even be able to read or understand the Constitution, but they surely can understand the concept of privacy in their personal lives. Plain old unmitigated unvarnished privacy. The right to be left alone. That is why such diverse groups are working on this bill in order to ensure its passage.

Id. at 134 (statement of Sen. Alan K. Simpson).

Even the Video Software Dealers Association, an industry group representing companies that would be subject to the law, endorsed the version of the bill that included the civil remedy:

> We support H.R. 4947 and S. 2361, which would prohibit the disclosure of individual customer rental or sales records, except in very limited circumstances. In our view, rental and sales records are privileged matters between the retailer and the customer. That is the firm policy of VSDA and its members.

Id. at 81 (statement of Vans Stevenson, for the Video Software Dealers Ass'n and Erol's Inc.). Mr. Stevenson went on to state "We applaud the proposed bills to formally protect a reasonable right of privacy for the video customer. We believe that the legislation will help to strengthen our company's policy as well as other similar policies practiced by the other video retailers in VSDA." *Id.* at 86. By implication, Mr. Stevenson made clear that substituting a weaker privacy mechanism would lead companies to establish weaker privacy policies.

When Senator Leahy, the bill's original sponsor, introduced the bill, he denounced the revelation of Bork's records as "outrageous" and described the Act as "a bill that will extend privacy protection to all Americans." 134 Cong. Rec. S16312, 16313 (1988) (statement of Sen. Leahy). Senator Grassley, another member of the Committee on the Judiciary and a co-sponsor of the bill, also spoke in favor of the bill, discussing how civil liability was intended to shape the behavior of video stores and their employees:

> This bill imposes liability on the video store where the information is knowingly disclosed in violation of the bill's requirements. And under the common law of agency, an employer may be liable for the actions of its employees where the employee acts within the scope of his employment. A video store would, therefore, be best advised to educate its employees about the bill's provisions and discipline employees for unauthorized disclosures. A court would, no doubt, take such employers' actions into account in determining whether the employee was acting within the scope of his job in the event of a prohibited disclosure.

Id. at 16314 (statement of Sen. Grassley).

The text and the legislative history make Congressional intent abundantly clear: the private right of action called for in subsection (c) is the exclusive method chosen by the legislature for enforcement of the VPPA.

Indeed, Congress took an additional step to protect the judicial remedies set out in the bill when it chose to codify the Act at 18 U.S.C. § 2710 (2008). This section falls within Chapter 121 of Title 18 and therefore makes the Act subject to the "Exclusivity of remedies" provision set out in 18 U.S.C. § 2708 (2008). Section 2708 states that, "The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for non-constitutional violations of this chapter." *Id.* It is difficult to imagine that Congress could have done anything more to safeguard the private right of action established by the Video Privacy Protection Act.

II. Privacy Laws Routinely Provide Private Rights of Action

Private rights of action are a central feature in privacy statutes because they help ensure enforcement of privacy rights. This is particularly important in privacy law, as it may be difficult to otherwise vindicate privacy claims.

Private rights of action have traditionally been a key component in privacy statutes. Aside from the Video Privacy Protection Act, many other privacy laws provide a right of action or civil remedy component, which allow victims to seek remedies in court.

The Telephone Consumer Protection Act ("TCPA"), which was enacted to combat problems associated with telemarketing, auto-dialers and junk faxes, states that "[a] person or entity may . . . bring in an appropriate court of that State . . . an action based on a violation of this subsection or the regulations prescribed under this subsection." 47 U.S.C. § 227(b)(3) (2008). Plaintiffs can recover their actual monetary loss from such a violation or receive $500 in damages for each such violation, whichever is greater. *Id.* Moreover, if the court finds that the defendant willfully or knowingly violated the statute, the court is authorized to triple the amount of the award. *Id.* Actions brought under the TCPA allow consumers to vindicate privacy claims and led to the creation of the very successful Do Not Call list. *See* Telemarketing Sales Rule, 67 Fed. Reg. 4491 (proposed Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310).

The Federal Wiretap Act allows "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the statute to pursue "a civil action [to] recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a) (2008). Complainants may then recover appropriate preliminary and other equitable or declaratory relief, damages (including punitive damages in appropriate cases), and reasonable attorney's fees and litigation costs. *Id.*

Similarly, the Electronic Communications Privacy Act ("ECPA"), which prohibits providers of electronic communications services from disclosing the contents of stored communications, states that aggrieved individuals or entities "may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2707, (a) (2008). The ECPA allows complainants to collect appropriate preliminary and other equitable or declaratory relief, damages (not including punitive damages), and reasonable attorney's fees and litigation costs. *Id.*

The Privacy Act, which limits the collection, disclosure, and use of personal information by government agencies, creates a private right of action against agencies that violate the Act. 5 U.S.C. § 552a(g)(1) (2008). If any agency violates the Privacy Act, "an individual may bring a civil action against the agency, and the

district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection." *Id.* The Act allows for remedies in three situations: when the agency refuses to correct records, when the agency refuses to disclose records to an individual who is entitled to them, and when the agency willfully or intentionally discloses records in violation of the statute. *Id.* In all three situations, the Act allows for courts to compel the agency to act in accordance with the statute and allows for aggrieved parties to recover reasonable attorney's fees and litigation costs. *Id.* In the case of a wrongful disclosure that is willful or intentional, the statute authorizes recovery of "actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000." *Id. See generally, Doe v. Chao,* 540 U.S. 640 (2004) (holding that actual damages are necessary to recover under the Privacy Act but affirming the civil damages provision.).

The Cable Communications Policy Act prohibits cable television companies from using the cable system to collect personal information about its subscribers without their prior consent, and generally bars the cable operator from disclosing such data. 47 U.S.C. § 551(f) (2008). "Any person aggrieved by any act of a cable operator in violation of this section may bring a civil action in a United States district court." *Id.* The court may award actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000,

whichever is higher. The court may also award punitive damages and reasonable attorney's fees and litigation costs. *Id.* The Act notes that "[t]he remedy provided by this section shall be in addition to any other lawful remedy available to a cable subscriber." *Id.*

State laws protect individuals' privacy regarding library records, medical records, employment records, genetic information records, and many other kinds of records. The statutes often contain private rights of action, along with liquidated damages. The Texas Medical Privacy Act,[3] Tex. Health & Safety Code Ann. § 181 (2008), for example, protects sensitive, personal information from improper use or disclosure. The Act also provides civil penalties to help ensure that the Act's provisions are enforced. *Id.* § 181.201.

III. Privacy Scholars Have Routinely Noted the Importance of a Private Right of Action in Privacy Laws

Privacy scholars have routinely noted the private right of action in the Video Privacy Protection Act. *See, e.g.,* Anita L. Allen, Privacy Law and Society 628 (2009) ("The Act contains a civil remedy provision that allows an aggrieved party to bring an action in the United States District Court within two years of the date of discovery of an alleged violation."); *see also,* Daniel J. Solove, Marc Rotenberg, & Paul M. Schwartz, Information Privacy Law 661 (2006) ("The VPPA's private

[3] http://www.law.uh.edu/healthlaw/perspectives/privacy/010830texas.html

right of action permits recovery of actual damages and provides for liquidated damages in the amount of $2,500.").

Scholars have also stressed the importance of private rights of action in privacy statutes generally. *See, e.g.*, Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection,* 2006 U. Ill. L. Rev. 357, 382 (2006) ("There should be minimum liquidated damages provisions for companies that violate their privacy policies or that suffer a security breach due to negligence. Statutes must provide for individual redress"). Scholars have cited a variety of reasons for supporting private rights of action. Two of the most commonly cited reasons for supporting private rights of actions are that private rights of action place enforcement in victims' hands and that private rights of action deter would-be violators. Frank P. Anderano, *The Evolution of Federal Computer Crime Policy*, 27 Am. J.Crim. L. 81, 98 (1999).

Concerning the federal Privacy Act, scholars have argued that private rights of action are important because "federal agencies have little incentives to enforce the Privacy Act." Haeji Hong, Esq., *Dismantling the Private Enforcement of the Privacy Act of 1974: Doe v. Chao*, 38 Akron L. Rev. 71, 102 (2005) (citing 120 Cong. Rec. 36,645 (remarks of Rep. Abzug), *reprinted in* Joint Comm. on Gov't Operations, Legislative History of the Privacy Act of 1974: Source Book on Privacy 887 (1976) [*hereinafter Source Book*]). Thus, Congress provided the civil

remedy in that Act in order to "encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83 (1974), *reprinted in Source Book* at 236. One Congressman described the "constant vigilance of individual citizens backed by legal redress" as the "best means" to enforce the Act. H.R. Rep. No. 93-1416, at 15 (1974), *reprinted in Source Book*, at 308. *See generally* Frederick Z. Lodge, Note, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 Fordham L. Rev. 611, 613 (1984) (arguing that "Congress repeatedly emphasized the overwhelming importance of privacy, and that "[t]hrough its civil remedy, the Act is aimed at deterring future intrusions on this critical right and at compensating the victims of illegal invasions of privacy"). Professor Jay Weiser has written that federal privacy statutes attempt to resolve the difficulty in calculating damages through liquidated damages provisions, which in turn saves enforcement costs. Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality*, 9 U. Chi. L. Sch. Roundtable 75, 100 (2002).

More generally, scholars have argued that statutory private rights of action are essential to protecting privacy rights through deterrence. "Private rights of action, including class actions . . . can be highly effective in increasing compliance with statutory standards. . . . In addition, it overcomes the weaknesses of the privacy tort, which generally has not proved useful in responding to violations of

information privacy." Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 Harv. L. Rev. 2055, 2112–15 (2004) (advocating for the formation of a statute regulating data trading that "should track language found in statutes such as the Video Privacy Protection Act, Driver's Privacy Protection Act, and Cable Communications Act, and should permit liquidated damages"). A private right of action "encourages litigation, the specter of which may deter infringements of privacy. It will also allow others who are not parties to the litigation to benefit from improved privacy practices that follow successful litigation." *Id.* at 2083*; see also* Jerry Kang, *Information Privacy Transactions in Cyberspace*, 50 Stan. L. Rev. 1193, 1272 (1998) ("[T]he information collector must be subject to sanction through civil action in federal court and administrative enforcement by the Federal Trade Commission.").

Scholars have observed that private rights of action "encourage companies to keep privacy promises by setting damages high enough to deter potential violators and encourage litigation to defend privacy entitlements. In addition, damages support a privacy commons by promoting social investment in privacy protection." *Schwartz, supra* at 2109.

Other scholars have recommended that charitable donors' privacy rights should be protected by a private right of action due to "important concerns" such as "the scarce resources of state attorneys general to enforce, the principal

incentives to share information notwithstanding the express wishes of donors, and the overarching risk that disregarding donor privacy rights could undermine confidence in the nonprofit sector. . . .” Ely R. Levy & Norman I. Silber, *Nonprofit Fundraising and Consumer Protection: A Donor’s Right to Privacy*, 15 Stan. L. & Pol’y Rev 519, 570–71 (2004).

Other scholars have persuasively argued that privacy rights require *more* protection than private rights of action and other market forces provide. *See* James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 Wash L. Rev. 1, 8 (2003) (arguing for “regulation similar to the European model of privacy protection, in which the issue is framed as a foundation of social protection”); Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 San Diego L. Rev. 843, 890–909 (2002) (arguing for “broad structural measures empowering individuals to claim their own privacy”).

In the context of private rights of action, liquidated damages provisions, such as the one provided for by the VPPA, are essential:

> Schemes providing for liquidated damages will assist the operation of the privacy market and the construction and maintenance of a privacy commons. It will encourage companies to keep privacy promises by setting damages high enough to deter potential violators and encourage litigation to defend privacy entitlements. In addition, damages support a privacy commons by promoting social investment in privacy protection. Such damages may also reduce the adverse impact of collective action problems in the privacy market by allowing consumers who do not litigate to benefit from the improved privacy practices that follow from successful litigation.

Id. at 2109. One central problem in privacy cases is the difficulty for the aggrieved party to establish quantifiable damages in the absence of a statute containing a liquidated damages provision. *See* William McGeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. Ill. L. Rev. 1105, 1141 (2009) (discussing the privacy problems inherent in social marketing and noting that "the emotional or psychic harms caused by disclosures in social marketing are difficult to quantify and, in any case, are likely small. Injured parties who file lawsuits to enforce their rights under privacy law often encounter great difficulty proving damages"); Lodge, *supra*, at 612. This problem was well understood by Samuel Warren and Louis Brandeis, the authors of the famous article that provided the basis for the privacy tort and that led to the statutory formulation of privacy claims. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 219 (1890) ("Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel."); N.Y. Civ. Rights Law § 51 (Consol. 2009).

The private right of action is particularly important as technology continues to progress, allowing for the easier dissemination of personal information. *See, e.g.*, Hearing on H.R. 2221, the Data Accountability and Trust Act; H.R. 1319, the Informed P2P User Act Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce, 111th Cong. 5–6 (2009)

(statement of Marc Rotenberg, Executive Director, EPIC) (". . . the Committee [should] add a private right of action to the bill with a stipulated damage award, as is found in many other privacy laws. Not only would this provide the opportunity for individuals who have been harmed by security breaches to have their day in court, it would also provide a necessary backstop to the current enforcement scheme which relies almost entirely on the Federal Trade Commission, acting on its own discretion and without any form of judicial review, to enforce private rights.").

IV. Mandatory Arbitration Clauses Undercut the Video Privacy Protection Act's Consumer Privacy Safeguards

A. Mandatory Arbitration Clauses in Consumer Contracts Can Be Invalidated for a Variety of Reasons

Voluntary binding arbitration between parties with similar bargaining power has a long history, and courts have historically supported such agreements. Accordingly, the Federal Arbitration Act (FAA) in 1925, provides that arbitration agreements in contracts involving interstate commerce "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and requires courts to grant motions to compel arbitration pursuant to such agreements. 9 U.S.C. § 2 (2008). However, voluntary binding arbitration agreements were historically entered into by parties with similar bargaining power—for example, contracts between businesses or between

management and unions. *See generally* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, 1643–44 (2005) (discussing history of arbitration generally) [hereinafter "*Creeping Mandatory Arbitration*"]; William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 Wash. U. L.Q. 193, 219 (1956) (reviewing uses of arbitration in New York beginning in the 1600s and concluding that "[t]he primary function of arbitration is to provide for merchants fora where mercantile disputes will be settled by merchants"). In contrast, Congress did not appear to intend mandatory arbitration clauses in consumer contracts to fall under the rubric of the FAA when it was passed, *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 412–15 (1967) (Black, J., dissenting) (discussing legislative history of the FAA), and an early Supreme Court decision held that such clauses were impermissible in the context of securities fraud claims. *See Wilko v. Swan*, 346 U.S. 427, 435–36 (1953).

More recently, however, the Supreme Court reversed its previous position, holding that federal policy favors arbitration of commercial disputes, even in consumer contracts. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24–25 (1983); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991). Nonetheless, the Court has made clear that Congress has the power to make claims nonarbitrable if it "has evinced an

intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (citing *Gilmer*, 500 U.S. at 26; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

Moreover, the Court has held that an arbitration clause should not be enforced if the challenger can show that it was written in a way that "preclude[s] a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin.*, 531 U.S. at 90; *see Mitsubishi Motors Corp.*, 473 U.S. at 637. *See generally Creeping Mandatory Arbitration*, *supra*, at 1643–44 (reviewing successful federal statutory challenges to arbitration agreements). For instance, in *Green Tree Fin. Corporation-Alabama v. Randolph*, the Court held that "the existence of large arbitration costs" could prevent a litigant from effectively vindicating her statutory rights. *Green Tree Fin*., 531 U.S. at 90–91.

Similarly, "[g]enerally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 682 (1996); *see also, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (finding unconscionable an arbitration provision that, inter alia, limited discovery and available remedies and bound only the employee). *See generally Creeping Mandatory Arbitration*, *supra*, at 1644–45 ("as the Supreme Court has frequently stated, arbitration clauses can be

invalidated on standard common law grounds"); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 SPG L. & Contemp. Probs. 75, 77–78 (2004) ("While the Supreme Court views arbitration favorably, it has always made clear that unconscionable arbitration clauses should not be enforced."). Thus, several courts have held that arbitration agreements which preclude class actions are unconscionable under certain circumstances. *See Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) ("based on the totality of circumstances, we conclude the Comcast class action waiver is unconscionable to the extent it prohibits the subscribers from bringing a class action"); *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 (1st Cir. 2006) ("Because of the presence of the bar on class mechanisms in arbitration, Plaintiffs cannot be compelled to arbitrate their antitrust claims, both state and federal, if that bar remains in place."). *See generally* Sternlight & Jensen, *supra* at 85–92 (arguing that courts are more likely to invalidate clauses as unconscionable where individual claims would not be feasible either financially or due to lack of information as to the merits of the claim or the nature of arbitration; where individual suits "would not result in full enforcement of the law;" or where "administrative enforcement would not be an adequate substitute for the class action.").

Public policy also weighs against mandatory arbitration in consumer contracts where it would prevent the consumer from effectively vindicating statutory rights. *See generally Creeping Mandatory Arbitration*, *supra*, at 1648–53 (reviewing criticisms of mandatory arbitration from the individual perspective).

First, mandatory consumer arbitration agreements are inherently nonconsensual. *See id.* at 1648–49; Richard M. Alderman, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 Hous. L. Rev. 1237, 1249 (2001) ("as a general rule, it is safe to assume that pre-dispute mandatory arbitration has been imposed on the consumer with an absence of any meaningful choice"). Consumers rarely read, much less understand, boilerplate agreements. *See* Irwin S. Kirsch et al., U.S. Dep't of Education, Adult Literacy in America: A First Look at the Results of the National Adult Literacy Survey 17, fig. 1.1 (1993) (Only 3% of the American adult population has "documentary" literacy skills at the level necessary to, for example, compare the substantive differences between two contracts.); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 Stan. L. & Pol'y, Rev. 233 (2002) ("Most consumers cannot and do not understand the preprinted forms when they sign a consumer contract. Actual assent is not just a fiction because of voluntary choices by consumers; it is effectively impossible."). Moreover, behavioral research indicates that individuals may be largely incapable of properly balancing the costs and benefits of arbitration clauses and may

undervalue their right to sue. *See* Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1541–43 (1997) ("Overoptimism" and "salience" are problems arising from one's "insufficient ability to process accurately the information one possesses insofar as that information bears on one's own risks. . . . People sometimes do mispredict their utility at the time of decision, and on conventional grounds, this phenomenon raises serious problems for the idea of consumer sovereignty.").

Second, many arbitration agreements substantively favor companies rather than consumers through "arbitrator selection, imposition of high costs, and limitation of remedies." *Creeping Mandatory Arbitration*, *supra*, at 1650.

Finally, some arbitration clauses "limit plaintiffs' access to substantive relief" by, for example, shortening statutes of limitations, barring recovery of certain damages, or barring injunctive relief. *Creeping Mandatory Arbitration*, *supra*, at 1652–53; *see Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (arbitration agreement unconscionable where it shortened the applicable statute of limitations); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 142–43 (Ct. App. 1997) (arbitration agreement unconscionable where it precluded injunctive relief).

B. Courts Have Specifically Held That Mandatory Arbitration Is Not a Sufficient Substitute for Statutory Privacy Rights

Courts have specifically addressed whether arbitration is a sufficient alternate forum for privacy related disputes and have determined that it is not. In *Schmidt v. U.S. Dep't of Veterans Affairs*, 218 F.R.D. 619 (ED Wis. 2003), the court considered the case of several employees whose social security numbers were disclosed by their employers, the Veterans Administration, in violation of the Privacy Act. The disclosure in question had already been the topic of collective bargaining arbitration because privacy rights were protected under the employees' contract. *Id.* at 625. The plaintiffs argued that the arbitration decision should preclude the court from considering the matter de novo. *Id.* at 627. But the court determined that an arbitration decision did not provide a sufficient alternative to judicial proceedings, citing the following reasons:

> Collective-bargaining arbitration may be an efficient and effective way to settle contract disputes, but it is not an adequate or reliable substitute for judicial proceedings when it comes to determining whether the Privacy Act has been violated. First . . . the labor arbitrator's competence pertains to her knowledge of the law of the shop, not the law of the land . . . knowing the law of the shop does not require an arbitrator to be conversant with the legal considerations which underlie a complex public law like the Privacy Act. . . . Most labor arbitrators, who are not attorneys, are under pressure to pivide a quick turnaround with decisions, and, consequently, they cannot be expected to make fully-informed decisions about whether an agency violated the Privacy Act.
>
> Second, labor arbitrators derive their authority from the collective-bargaining agreement and are required to enforce the

> agreement. . . . The arbitrator has no authority to 'invoke public laws which conflict with bargain between the parties.' . . .
>
> Finally, arbitral fact-finding is not as complete as judicial fact-finding. Arbitrations typically do not follow rules of evidence, discovery, compulsory process, cross examination, and testimony under oath is severely curtailed.

Id. at 628–29.

C. Mandatory Arbitration of VPPA Claims Is Impermissible

Mandatory arbitration imposed by consumer contracts in the context of the VPPA is particularly pernicious, as it would countermand congressional intent, would prevent aggrieved parties from effectively vindicating their statutory rights, and would implicate many of the public policy concerns that weigh against enforcing such agreements.

The Court has repeatedly recognized that Congress can make claims nonarbitrable if it evinces the intent to do so. Here, Congress has made abundantly clear its intent to make a private right of action the exclusive method for enforcement of the VPPA. As Representative McCandless testified, the purpose of the Act was to build a "brick wall—a Federal privacy right—around the individual." *Hearing Record* at 27. Through the civil remedies section, Congress intended to "put[] teeth into the legislation, ensuring that the law will be enforced." *Committee Report* at 9. By empowering the victims of privacy violations, Congress protected the privacy rights that have long been recognized as paramount by courts and scholars. If consumers were instead forced to arbitrate these sensitive privacy

claims, the "brick wall" that Congress intended to create would be reduced to rubble.

Moreover, Congress expressly provided that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708 (2008) ("Exclusivity of remedies"). In that section, Congress plainly contemplates the potential remedies for a violation of the VPPA and provides that the exclusive remedy shall be the ones provided for by statute, which includes liquidated damages but which does not include arbitration. *See id.* Thus, this court should respect Congress' intent in enacting the VPPA and find that the arbitration of claims under it is unenforceable.

Moreover, the arbitration agreement at issue precludes class actions, a provision that several courts have found to be unconscionable. *See, e.g.*, *Dale v. Comcast Corp.*, 498 F.3d at 1224. In this case, class action preclusion is particularly problematic because even successful individual suits would not fully enforce the law. Individual suits, and especially individual arbitrations, are unlikely to lead to company-wide reform of policies that violate the VPPA. *See generally* Sternlight & Jenson, *supra*, at 90 ("A company may find it more worthwhile to pay off a few individual claims but keep its overall policy."). Furthermore, class actions provide a variety of benefits to plaintiffs, from protecting less-informed

consumers to making claims more financially viable. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617–18 (1997) (explaining financial viability justification). *See generally Creeping Mandatory Arbitration*, *supra*, at 1651–52 (discussing value of class actions).

Although Texas courts have found that class action waivers may not be unconscionable under certain circumstances, they admit the possibility that a waiver "may rise to the level of fundamental unfairness." *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. App. 2003). The fundamental unfairness of class action waivers is especially prominent in the context of privacy rights, as consumers forced into arbitration and out of class actions will be unable to achieve the ultimate goal that animates the VPPA—the protection of consumers' privacy.

Private rights of action, including class actions, are particularly crucial in the context of privacy rights. Because privacy rights are very sensitive, they are difficult to vindicate without statutory civil remedies. *See Parks v. IRS*, 618 F.2d 677, 685 (1980). Moreover, in the VPPA, as in the Privacy Act, the "best means" of enforcing the statutory remedies is through private rights of action because they are likely to increase compliance with statutory standards. The statutory liquidated damages provided for in the VPPA are also essential to deter companies from violating consumers' privacy rights. Indeed, private rights of action are arguably

the *bare minimum* that can be done to protect privacy rights, and more vigorous protection may be necessary to effectively protect individuals' privacy.

Finally, many of the public policy concerns that weigh against mandatory arbitration clauses in general are present in the VPPA context. The agreement containing the arbitration clause in this case was part of a "clickwrap" online agreement. Consumers who wished to sign up for Blockbuster's services were required to click a box on Blockbuster's website that appeared next to the following statement: "I have read and agree to the blockbuster.com (including Blockbuster Online Rental) Terms and Conditions and certify that I am at least 13 years of age." Appellant's Brief at 6. However, consumers were not required to actually read, much less understand, the terms and conditions, and could merely click the box and continue the sign-up process. Public policy concerns regarding the inherently nonconsensual nature of consumer arbitration agreements are exacerbated in this context, where consumers are not even required to examine the contents of the agreement. Moreover, as discussed, the arbitration agreement substantively favors Blockbuster by precluding the use of class actions, a provision which implicates serious public policy concerns. Thus, public policy concerns weigh heavily against arbitration of VPPA claims.

CONCLUSION

At issue in this case is the enforcement of statutory provision that is the cornerstone of an important federal privacy law. If that provision is removed, the statutory scheme collapses. *Amicus Curiae* respectfully request this Court to grant Appellee's motion to sustain the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(B)(i). This brief contains 6,750 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman style.

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