No. 09-893

In the Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

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

BRIEF OF *AMICI CURIAE* DIRECTV, INC., COMCAST CORP., AND DELL INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

DIRECTV, Inc.[1] is the leading provider of satellite television programming services in the United States, with over 18 million customers nationwide. Since June 1994, when DIRECTV premiered the nation's first direct broadcast satellite service, DIRECTV has always had an individual arbitration agreement in its Customer Agreement. DIRECTV supports the arguments favoring individual arbitration.

Comcast Corporation is a leading provider of entertainment, information and communication products and services. As of June 30, 2010, Comcast's cable systems served approximately 23.6 million video customers, 16.4 million high-speed Internet customers and 8.1 million phone customers in 39 states and the District of Columbia. Comcast has provided wired communications service to consumers since 1963, and Comcast has relied on arbitration provisions to facilitate the resolution of disputes with its customers for more than a decade. Comcast Corporation supports the arguments favoring individual arbitration.

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[1] Through correspondence filed with the Clerk of the Court, the parties have granted blanket consent to the filing of *amicus curiae* briefs in this case. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* affirm that no counsel for any party wrote this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Dell Inc. delivers innovative technology and services that customers trust and value. As a leading technology company, Dell offers a broad range of product categories, including mobility products, desktop PCs, software and peripherals, servers and networking, and storage. For more than a decade, Dell has relied on arbitration provisions in its consumer terms and conditions to provide for inexpensive and expeditious dispute resolution. These arbitration agreements apply to millions of customers in the United States. Dell Inc. supports the arguments favoring individual arbitration.

SUMMARY OF *AMICI CURIAE*'S ARGUMENT

Ignoring this Court's admonition that arbitration "is a matter of consent, not coercion" (*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)), California courts and the Ninth Circuit have presented companies doing business in California with a stark choice: class arbitration or no arbitration. These courts have held that it is unconscionable for businesses and their customers to agree to resolve disputes on an individual basis in arbitration, even where arbitration provides a quick, convenient, low-cost method of pursuing claims. But in striking down individual arbitration agreements as unconscionable, California courts and the Ninth Circuit have not been applying unconscionability doctrine in the way that they traditionally apply it to non-arbitration contracts. Instead, they have been applying a new, arbitration-specific unconscionability test, which invalidates individual arbitration agreements not because the terms "shock the conscience," but because they do not comport with California courts' paternalistic policy judgment

that the only good way for consumers to resolve their disputes is on a classwide basis.

Businesses have responded to California's hostility to individual arbitration agreements largely by abandoning arbitration as a method of dispute resolution with their California customers. Some have removed arbitration clauses entirely from their customer agreements. Others have elected not to enforce their arbitration provisions with California customers (or customers from other states that have imposed similar bans on individual consumer arbitration). These businesses have few other options. Individual arbitration is attractive to companies because it is, by definition, quick, inexpensive, and final. Class arbitration eliminates many of these benefits by transporting class action apparatus, which courts are uniquely qualified to manage, into an arbitral forum. The result is a slow, multi-phase arbitration that can cost businesses millions of dollars. And while finality is a virtue in individual arbitration, it is too great a risk to bear in classwide arbitration. When potential multimillion dollar class judgments are at issue, businesses must have a way to appeal erroneous rulings.

Businesses' forced retreat from arbitration harms both consumers and businesses. While one of the assumptions underlying California courts' and the Ninth Circuit's decisions is that class proceedings are the best way for consumers to pursue claims, the assumption is questionable. Consumers who want a fast, straightforward resolution to their individual disputes can obtain that in arbitration, while in class actions, they will often wait years for little individual reward. Indeed, many consumers, according to empirical evidence ignored by California

courts, are happy with the outcomes when they individually arbitrate, and have more favorable views of arbitration than they do of court. In addition, businesses that have structured transactions with their customers in reliance on the FAA and consistent rulings from this Court favoring arbitration will now either have to absorb the increased costs of class action litigation or pass them onto their customers through increased prices for goods and services.

Amici urge this Court to reaffirm the principles underlying the FAA, and to disapprove California courts' and the Ninth Circuit's use of arbitration-specific unconscionability standards to strike down reasonable consumer arbitration agreements.

I. ARBITRATION PROVISIONS HAVE BECOME INCREASINGLY CONSUMER-FRIENDLY.

Although the frequency with which California courts and the Ninth Circuit strike down arbitration provisions suggests otherwise, most arbitration provisions are not designed to discourage consumers from bringing claims. While consumer arbitration provisions in the late 1990s may have contained more onerous terms for consumers, such provisions are largely a thing of the past. *See* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring The Recent Judicial Skepticism Of The Class Arbitration Waiver And Innovative Solutions To The Unsettled Legal Landscape*, 18 Cornell J.L. & Pub. Pol'y 477, 503-04 (Spring 2009) (noting that while "some avaricious drafters" formerly included terms prohibiting punitive damages and attorneys fees, requiring the arbitration to proceed in a remote

location, requiring the consumer to pay half or all of the arbitration fees, or giving the company the sole authority to select the arbitrator, such terms have given way to a guiding principle of "fairness to the consumer").

Thus, AT&T's arbitration provision in this case, which uses innovative incentive schemes to guarantee that consumers can fully vindicate their claims, is by no means unique in its effort to ensure that consumers have meaningful access to a fair arbitration process. For example, *amici* include a number of consumer-friendly provisions in their agreements to ensure that arbitration is an accessible forum. Under these agreements, the company bears all or nearly all of the costs of arbitration, and the arbitration takes place in a convenient location in the customer's home state. *See, e.g.,* DIRECTV Customer Agreement §§ 9(b), 10(b) (effective Apr. 24, 2010), http://www.directv.com/DTVAPP/content/legal/customer_agreement (providing for arbitration "at a location in [customer's] hometown area", governed by the FAA, in which DIRECTV pays all arbitration costs, with the possible exception of "an arbitration initiation fee equal to [customer's home state's] court filing fee, not to exceed $125"); Comcast Agreement for Residential Services §§ 13(e), (f), (g), *at* http://www.comcast.net/terms/subscriber/ (providing for an arbitration "at a location, convenient to you, in the area where you receive the service from us", governed by the FAA, in which Comcast advances all costs of the arbitration).

Indeed, whether or not companies voluntarily include such consumer-friendly measures in their arbitration provisions, most arbitration providers

will now impose them as a condition of administering a consumer arbitration. The Judicial Arbitration and Mediation Service (JAMS), for example, has adopted a policy that guarantees certain standards of fairness in consumer arbitrations. *See JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness* (effective July 15, 2009), available at http://www.jamsadr.com/rules-consumer-minimum-standards/. The policy requires, among other things, that the consumer's fee to participate in arbitration be capped at $250, that both parties have access to small claims court, that all remedies available in court remain available in arbitration, that the consumer have a right to a hearing in his or her hometown area, that there is a right to at least limited discovery, and that the consumer gets to participate in arbitrator selection. *Id.* JAMS will administer arbitrations between consumers and businesses only if they comply with these minimum standards. *Id.* The American Arbitration Association (AAA) has also adopted a set of guidelines for consumer arbitrations, called the Consumer Due Process Protocol, which contains similar minimum requirements. *See* American Arbitration Association (AAA), *Consumer Due Process Protocol*, available at http://www.adr.org/sp.asp?id=22019.

When consumers use arbitration to resolve their disputes, they are happy with the results. Empirical studies have shown, for example, that arbitrations are resolved in favor of consumers at least half the time. *See* U.S. Chamber Institute for Legal Reform, *Arbitration - A Good Deal for Consumers* (2008), available at www.instituteforlegalreform.com/

get_ilr_doc.php?docId=1091 (stating that approximately 60% of AAA's consumer arbitration cases are settled by mutual agreement, and that consumers prevail approximately half the time when they are proceeding as claimants); *see also* Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association* (2009), available at http://www.searlearbitration.org/p/full_report.pdf (providing that in consumer arbitrations before the AAA, consumer-claimants prevailed 53.3% of the time).

In addition, arbitration is faster and often less expensive for consumers than litigation. *See* U.S. Chamber Institute for Legal Reform, *Arbitration - A Good Deal for Consumers* at 7-8, 22-24 (2008), available at www.instituteforlegalreform.com/get_ilr_doc.php?docId=1091 (summarizing evidence that arbitration offers consumers a faster method of dispute resolution than litigation and that it is often less expensive). In a national survey of adults who had participated in a binding arbitration that reached decision, the arbitration participants perceived the arbitration as faster (74%), simpler (63%), and less expensive (51%) than litigation. Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster than Litigation* (2005), available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf.[2] 66% of

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[2] The results are similar in the employment context. In *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777 (2003), Elizabeth Hill provides a detailed empirical analysis of the cost-

(Continued...)

participants surveyed said they were likely to use arbitration again. *Id.*

II. CALIFORNIA COURTS AND THE NINTH CIRCUIT HAVE BEEN STRIKING DOWN CONSUMER-FRIENDLY AGREEMENTS UNDER A NEW, ARBITRATION-SPECIFIC "UNCONSCIONABILITY" TEST.

In recent years, California courts have grown increasingly hostile to individual arbitration provisions in consumer contracts. Overlooking the many features of arbitration that make it attractive for both businesses and consumers, courts have routinely invalidated arbitration agreements solely on the basis that they do not allow consumers to pursue claims on behalf of a class. Courts strike down these arbitration provisions as "unconscionable," but the unconscionability analysis they use is tailored to arbitration agreements, and differs from the unconscionability test applied to other contracts.

In California, an unconscionable contract has been variously described as a contract where "the inequality amounting to fraud [is] so strong and manifest as to *shock the conscience* and confound the judgment of any man of common sense" or one that "[n]o man in his senses and not under delusion

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effectiveness of arbitration in employment disputes. Hill ultimately concludes that arbitration is often the only method by which middle- and lower-income employees can resolve their disputes with employers, because of the prohibitive costs of litigation. *Id.* at 782-83.

would make on the one hand, and as no honest and fair man would accept on the other." *Cal. Grocers Ass'n v. Bank of Am.*, 22 Cal. App. 4th 205, 214-15 (1994) (citations and internal quotations omitted). California courts, at least outside of the arbitration context, have made clear that the determination that contract terms are unconscionable is not one that should be made lightly:

> With a concept as nebulous as 'unconscionability' it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience.

Am. Software, Inc. v. Ali, 46 Cal. App. 4th 1386, 1391 (1996).

Failing to heed these warnings about paternalistic intervention, both the Ninth Circuit and California courts have imposed their own judgment as to what is best for consumers in California (and across the nation) by striking down arbitration provisions as unconscionable when they do not, to any reasonable mind, "shock the conscience." Instead, these courts have invalidated arbitration provisions under a new arbitration-specific "unconscionability" test, which provides that an arbitration agreement containing a class waiver is "unconscionable" where it is:

> found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining

> power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.

Discover Bank v. Super. Ct., 36 Cal. 4th 148, 162-63 (2005).

Since the California Supreme Court articulated this standard in 2005, virtually no arbitration agreement with a class action waiver that has been reviewed under California law has survived. It has become an effective across-the-board ban on individual consumer arbitration agreements.[3] But it

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[3] While arbitration agreements were only supposed to be unconscionable where there were "small amounts of damages" at stake, what constitutes a "small amount" has crept ever-higher. *See, e.g., Cohen v. DIRECTV, Inc.*, 142 Cal. App. 4th 1442, 1452 (2006) (striking down DIRECTV's arbitration provision, holding that "[d]amages that may or may not exceed $1,000 do not take DirecTV's class action waiver outside 'a setting in which disputes between the contracting parties predictably involve small amounts of damages . . . .'"); *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1067-68 (N.D. Cal. 2007) (where plaintiff had more than $4,000 at stake individually, determining that the amount at issue was "not substantial" and invalidating arbitration agreement as unconscionable); *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1083, 1086 (9th Cir. 2010) (finding arbitration provision with class action waiver unconscionable under California law where customer's damages ranged from $1,200 to $1,500). In the employment arbitration context, California courts have reached similar conclusions with even higher amounts at stake. *See, e.g, Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277, 1295 (2009) (deeming arbitration provision with class waiver invalid where a meal and rest period violations claim against an employer totaled $10,250, an amount the court found was "too low, as a practical matter, to be pursued as an individual claim, either in court or through arbitration").

does not "shock the conscience" (*Cal. Grocers Ass'n*, 22 Cal. App. 4th at 214-15) for consumer agreements to require pursuing claims on an individual basis in a no-cost arbitration, where the consumer has hundreds or thousands of dollars at stake or is guaranteed to be able to vindicate his claims. Nor is someone who would agree to pursue such a claim on an individual basis in arbitration acting "under delusion." *Id.* Were it actually true that no rational consumer would consider it worth his while to pursue an individual claim for relatively small amounts of actual damages, small claims courts in California (which only adjudicate claims of $7,500 or less) would have to close their doors. People who believe they are owed money may rationally pursue those claims on an individual basis and, in many cases, would actually *prefer* to do so. Rather than pursue a time-consuming class action where the individual rewards are likely to be minimal, a consumer with a relatively small claim may benefit from the quick, informal, low-cost resolution that arbitration provides.

Indeed, this Court has endorsed the use of individual arbitration in such cases. In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), a seven-Justice majority rejected the argument that consumers would benefit from increased state regulation of arbitration. The Court explained:

> We agree that Congress, when enacting [the FAA], had the needs of consumers, as well as others in mind. Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. . . . We are uncertain, however,

> [that plaintiff's proposed test would help consumers]. . . . [I]t would permit, say, local business entities to disavow a contract's arbitration provisions, thereby leaving the typical consumer who has only a small damages claim (*who seeks, say, the value of only a defective refrigerator or television set*) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.

Id. at 280-81 (citation and internal quotation omitted, emphasis added).

Nevertheless, the contrary reasoning of the courts applying *Discover Bank* has gained traction beyond California. While it remains the minority view that courts can, consistent with the FAA, invalidate arbitration agreements based purely on the presence of a class waiver, several states have adopted some form of new unconscionability standard to do just that. *See, e.g., Feeney v. Dell Inc.*, 908 N.E.2d 753, 764 (Mass. 2009); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006-07 (Wash. 2007); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007). Plaintiffs' lawyers have already begun to manipulate these tests in an attempt to render otherwise valid arbitration agreements "unconscionable."

In *Dale*, for example, the Eleventh Circuit, applying Georgia law, determined that a class action waiver may render an arbitration provision unconscionable if, among other factors, a consumer has only low-value claims that do not give rise to an automatic award of attorneys' fees. *Dale*, 498 F.3d at 1224. Plaintiffs immediately took advantage of this standard by filing a lawsuit against DIRECTV,

pleading only causes of action that would not entitle them to recover statutory attorneys' fees, and refusing to plead available causes of action that do provide for such relief. *See Jones v. DIRECTV, Inc.*, 2010 WL 2232265, at *2 (11th Cir. June 3, 2010) (petition for rehearing pending). Plaintiffs then argued that because the claims they chose to plead on a classwide basis provided for such minimal recovery, the plaintiffs had so little incentive to arbitrate individually that the arbitration provision must be unconscionable. *Id.* The Eleventh Circuit recently accepted the plaintiffs' argument, permitting plaintiffs to unilaterally render their arbitration agreements "unconscionable" through a later-filed, artful court pleading. *Id.*

Courts in California and elsewhere have been imposing their own judgments that class procedures are better for consumers than individual arbitration, no matter the amount at stake, and no matter how consumer-friendly the arbitration process. Not only are courts ill-equipped to be making a policy decision that the concept of individual consumer arbitration is almost always unconscionable, but they are not permitted to do so consistent with the FAA.

III. IF CLASS ARBITRATION MUST BE USED TO RESOLVE CONSUMER DISPUTES, BUSINESSES WILL NO LONGER ARBITRATE SUCH DISPUTES.

This Court has repeatedly recognized that, by enacting the FAA, "Congress declared a national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also Preston v. Ferre*, 552 U.S. 346, 353 (2008) (same); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477,

481 (1989) (acknowledging "our current strong endorsement" of arbitration as a method of dispute resolution). But by conditioning the enforceability of arbitration agreements on the availability of class procedures, California has in effect put an end to arbitration in the consumer context.

In selecting arbitration, parties agree to a trade-off: they "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) ("[R]ecognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration."). But in class arbitration, the "simplicity, informality, and expedition" (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) that are the hallmarks of traditional arbitration are lost.

Class arbitration proceedings are far from simple, because all of the procedures attendant to class litigation are imported into the arbitral forum. *See* Alan Kaplinsky & Mark Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 Bus. Lawyer 1289, 1299 (2003) (noting that because class arbitration "require[s] extensive adjudication to ascertain and protect the rights of absent class members . . . [it] thereby [forfeits] the speed and efficiency that

individual arbitration offers"); *see also generally* Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1712-13 (2005) (describing class arbitration as "a complex hybrid of arbitration and litigation in which the judge and arbitrator are constantly trading off responsibility for different aspects of the case"). And class arbitrations are far more expensive than individual arbitrations, because they get bogged down in the same costly discovery and class certification processes that would occur in court, but with the additional cost of arbitrators' fees. *See* David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Acts' Legislative History*, 63 Bus. Lawyer 55, 72-73 (2007) (noting that class arbitrations require payment of substantial arbitrator fees because "parties could want multiple arbitrators for a class arbitration, to avoid staking such a substantial [unappealable] matter on the judgments of a single person" and that "securing a panel of arbitrators could potentially triple the overall hourly arbitrator fee").

Moreover, the finality of arbitration that is normally considered a benefit becomes too much of a risk, with arbitrators having the power to issue multi-hundred-million dollar awards. Even if parties wished to hedge against some of that risk, and prolong the process even further by agreeing to appellate review of any class arbitration award, they are powerless to do so. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) (holding that limited statutory grounds for vacatur

and modification of arbitration awards may not be supplemented by contract).

Faced with the choice of an expensive, drawn-out arbitration with an unappealable ruling, or no arbitration at all, businesses, including *amici*, are choosing no arbitration at all. In response to California and other states' hostility to arbitration, DIRECTV and Comcast no longer seek to enforce their arbitration provisions in states like California that seek to require classwide procedures in arbitration. *See, e.g.,* DIRECTV Customer Agreement § 9(c), at http://www.directv.com/DTVAPP/content/legal/customer_agreement (providing that "[i]f . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable"); Comcast Agreement for Residential Services § 13, at www.comcast.net/terms/subscriber/ ("SPECIAL NOTE REGARDING ARBITRATION FOR CALIFORNIA CUSTOMERS: IF YOU ARE A COMCAST CUSTOMER IN CALIFORNIA, COMCAST WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE."). Another company, Amazon.com, removed the arbitration provision from its customer agreements for all customers nationwide in direct response to *Scott*, 161 P.3d 1000, which effectively adopted the *Discover Bank* test in Washington.

Even where parties have arbitration provisions that may arguably pass muster under the *Discover Bank* approach, they are chilled from trying to enforce the provisions for fear of potential liability. California's Consumers Legal Remedies Act, Cal.

Civ. Code § 1770(a)(19), makes it a violation of California law to "[i]nsert[] an unconscionable provision in [a] contract" and thus a failed attempt to enforce an arbitration provision could potentially lead to subsequent lawsuits by aggressive plaintiffs' lawyers. For example, after DIRECTV moved unsuccessfully to enforce its individual arbitration provision with one customer who sought more than $1,000 in damages, the customer filed a second lawsuit for damages arising out of DIRECTV's attempt to enforce an "unconscionable" arbitration provision. *See Cohen v. DIRECTV, Inc.*, 2008 WL 5393181 (Cal. Ct. App. Dec. 1, 2008). While such lawsuits are highly questionable both under state law and the FAA, the risk of them has further interfered with businesses' ability to enforce their arbitration agreements. Consequently, Comcast, which allows its customers to opt out of arbitration (Comcast Agreement for Residential Services § 13(c)), still does not try to enforce its arbitration provision in California, where there is law suggesting that even the ability to opt out does not save an individual arbitration agreement. *See Gentry v. Super. Ct.*, 42 Cal. 4th 443, 450-51 (2007) (concluding that "notwithstanding [an] opt-out provision" an arbitration provision had an element of procedural unconscionability, thus subjecting it to review for substantive unconscionability).

While the avowed intention of courts invalidating arbitration clauses as unconscionable is to assist consumers, such action can produce the opposite result. First, as to those consumers who would prefer informal, individual resolution of disputes, it takes away an agreed-upon avenue of dispute resolution that has proven benefits for each of the parties. *See* Section I, *supra*.

Second, while California courts and the Ninth Circuit have assumed that classwide proceedings benefit consumers, that assumption is at least questionable. The individual putative class member, in fact, often fares poorly compared to the attorneys helming the class action. *See* John H. Beisner, et al., *Class Action "Cops": Public Servants Or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1447 (2005) (noting that some class actions "effectively amount to a transfer of wealth from a company to a class action lawyer, with no real work accomplished by the plaintiffs' lawyer and no real benefit to the consumers on whose behalf the suit was supposedly brought"); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 Geo. J. Legal Ethics 1343, 1346-48 (2005) (summarizing cases where putative class members received only low-value coupons in settlement, while attorneys received high fee awards); S. Rep. No. 109-14 at 15 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 16 (Senate Committee Report on the Class Action Fairness Act, noting the "numerous class action settlements approved by state courts in which most—if not all—of the monetary benefits went to the class counsel, rather than the class members those attorneys were supposed to be representing"); Thomas B. Leary, *The FTC and Class Actions*, Remarks at the Class Action Litigation Summit (June 26, 2003), available at http://www.ftc.gov/speeches/leary/classactionsummit.shtm (noting FTC's concern "about settlements that do not adequately compensate injured consumers, either because they only provide class members with largely worthless discount coupons or because the class action lawyers are awarded a too generous share of the proceeds").

And third, the shift away from individual arbitration to more costly class litigation may hurt all consumers financially. Increased litigation costs have to be borne by someone, and if the business itself does not absorb them, they will be passed along by way of price increases for goods and services. *See* Stephen J. Ware, *Paying The Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 89-90 (2001); *see also* John C. Coffee Jr., *Commentary on Joel Seligman, The Quiet Revolution: Securities Arbitration Confronts The Hard Questions*, 33 Hous. L. Rev. 376, 377 (1996) (arguing that "as transaction costs are reduced [from arbitration], firms in a competitive industry... will reduce their charges to customers").

IV. CONCLUSION

Businesses and their customers are supposed to be able to rely on courts enforcing their contracts as written. But deciding that they know what is best for consumers better than the consumers themselves, California courts and the Ninth Circuit have cast aside millions of agreements to arbitrate under an "unconscionability" test that is no more than thinly-disguised hostility towards individual arbitration agreements. California's approach violates the FAA. Unwilling to accept California's mandate that they submit to classwide procedures in arbitration to which they have not agreed, some businesses have simply stopped agreeing to arbitrate consumer disputes, and others will inevitably follow. Because, under the FAA, parties should be free to enter reasonable agreements to arbitrate, and because arbitration has long been a favored method

of dispute resolution, *amici* request that this Court reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted.

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