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 FOR *AMICI CURIAE* THE STATES OF SOUTH CAROLINA AND UTAH IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The *Amici* States, each of which appears in this Court through their respective Attorney General, have a vital interest in encouraging the widespread use of alternative dispute resolution programs that facilitate fair and prompt resolution of consumer complaints against companies. In the *Amici* States' view, the judgment below, if left undisturbed, could make that task far more difficult and discourage companies that operate in multiple States from implementing innovative, pro-consumer arbitration programs.

ARGUMENT

I. THE *AMICI* STATES FAVOR ARBITRATION AS A MECHANISM FOR THEIR CITIZENS TO RESOLVE CONSUMER DISPUTES

Congress and this Court have long recognized the importance and value of arbitration as an alternative dispute resolution mechanism. Given the Court's familiarity with the text and purpose of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and recognition of the virtues of arbitration in numerous decisions over the past three decades, the *Amici* States need only recite the Court's core observations in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *Inc.*, 473 U.S. 614 (1985). In that case, the Court emphasized that "adaptability and access to expertise are hallmarks of arbitration." *Id.* at 633. For that reason, an agreement to arbitrate often reflects "a judgment that streamlined proceedings and expeditious results will best serve [the parties'] needs," and "a desire to keep the effort and expense required to resolve a dispute within manageable bounds." *Id*.

II. A CLASS-BASED APPROACH TO RESOLVING CLAIMS HAS NOT BENEFITTED CONSUMERS

Class-wide arbitrations are not inherently the best means to ensure prompt and fair recovery for consumers or to deter corporate wrongdoing. Nor are they necessary to vindicate consumer claims when consumers have the incentive and a full and fair opportunity to resolve their claims on an individual basis. Consumer class members typically receive only a fraction of the amount of their claim, often

pennies on the dollar.[1] Consequently, few class members—generally less than five percent—even bother to file a claim.[2] Furthermore, class-wide arbitrations are apt to be as expensive and time-consuming as judicial class actions, while lacking many of the procedural safeguards afforded in judicial actions, such as appellate review.[3] Class-wide arbitration procedures, therefore, frequently defeat the fundamental purpose of alternative dispute resolution—prompt and efficient disposition of claims.

Individual arbitrations, on the other hand, are far more likely to result in a prompt and fair recovery for

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[1] *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3)(A), 119 Stat. 4, 4 (2005) (congressional finding that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . class members [are left] with coupons or other awards of little or no value").

[2] *See, e.g.*, *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 649-50 (7th Cir. 2006) (noting only "a paltry three percent" of class members had filed claims under the settlement); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005) (noting a redemption rate of class action coupons in the range of one to three percent); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. Rev. 991, 1035 (2002) (reporting consumer class action settlements with redemption rates as low as three percent).

[3] *See, e.g.*, *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) ("Judicial review of arbitration panel decisions is extremely limited; indeed, it has been described as 'among the narrowest known to law.'" (citation omitted)); Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, Harv. Bus. Rev. 120 (May-June 1994) (In complex cases, arbitration frequently "costs like the litigation it's supposed to prevent.").

consumers, provided that consumers are properly incentivized, and the arbitration provisions contain safeguards necessary to protect consumers. The *Amici* States believe that a valid, enforceable arbitration mechanism should satisfy the following criteria, which would benefit consumers and businesses alike:

(1) simple filing requirements;

(2) a convenient, prompt, and inexpensive arbitration process;

(3) an independent, non-biased, and neutral arbitrator;

(4) the availability of all forms of individual relief (including punitive damages and injunctions) that a court could award; and

(5) adequate incentives for consumers to file claims, even small claims, such as a meaningful premium on the award, as well as attorneys' fees, if the amount awarded by the arbitrator exceeds the company's settlement offer.[4]

An arbitration program that satisfies these criteria should be encouraged by the law, not discouraged.

III. DETERRENCE OF CORPORATE WRONGDOING DOES NOT REQUIRE A CLASSWIDE ARBITRATION PROCEDURE

The premise of the California Supreme Court's holding that agreements that require individual arbi-

[4] This case itself has an example of such a meaningful premium. As the Ninth Circuit noted, the AT&T Mobility premium payment provision in this case "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim." *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009).

tration are unconscionable exculpatory clauses is that public enforcement is inadequate, and that private enforcement in the guise of class actions is indispensable for deterring corporate wrongdoing. That premise is offensive to a co-equal branch of government. It also is entirely lacking in empirical support. There is no evidence that class-based procedures are the most effective and efficient method to deter corporate wrongdoing. More to the point, the *Amici* States have concluded that class proceedings are not necessary for there to be such deterrence. The Attorneys General of the *Amici* States have no compunction about investigating and prosecuting companies civilly and criminally to the fullest extent of the law whenever the Attorneys General have reason to believe that there has been systemic fraud, misrepresentation, or other serious wrongdoing committed against consumers. The Attorneys General of the *Amici* States have always carried out those responsibilities by every available means—and will continue to do so.

To take only a few recent examples, in 2009, the South Carolina Attorney General recovered $45 million from Eli Lilly & Co. regarding the marketing of the company's antipsychotic medications and $1.5 million from Dell, Inc. to resolve issues South Carolina customers alleged in connection with Dell's customer service department and in 2006, $1.2 million from Ameriquest Mortgage Company on behalf of more than 3,000 South Carolina customers subject to alleged predatory lending practices.[5] Similarly, in

[5] Press Release, S.C. Attorney General, $45 Million Eli Lilly Settlement Nation's Largest (Oct. 23, 2009); Press Release, S.C. Attorney General, Attorneys General Work Deal to Debug Dell's Customer Service (Jan. 12, 2009); Press Release, S.C. Attorney

2007, the Utah Attorney General recovered $1.8 million from Ameriquest on behalf of more than 1,700 Utah consumers subject to predatory lending practices and in 2005, reached a settlement with Blockbuster Inc. that allowed Utah consumers who had been misled by Blockbuster's advertising campaign to receive restitution.[6]

IV. CALIFORNIA'S POLICY OF FAVORING CLASS-BASED PROCEDURES SHOULD NOT BE PERMITTED TO DISCOURAGE ARBITRATION IN OTHER STATES

California courts have used the unconscionability doctrine to favor class-action litigation and arbitrations, particularly in cases involving a large number of consumers with small amounts of damages. *See, e.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100, 1105-06 (Cal. 2005). Many other States have declined to adopt this policy.

In *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 198-202 (Tex. App. 2003), the Texas Court of Appeals conducted a thorough analysis of—and ultimately rejected—the contention that a prohibition on class actions renders an arbitration agreement fundamentally unfair. The court rebuffed as purely speculative the argument that, without class actions, individual plaintiffs would refrain from seeking potentially small recoveries. *Id.* at 199-200. The court found that inasmuch as a class action is a procedural

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General, Ameriquest to Pay $1.2 Million to 3,000+ S.C. Customers (Jan. 23, 2006).

[6] Press Release, Utah Attorney General, Utahns Receive $1.8 Million from Ameriquest Mortgage Settlement (Dec. 14, 2007); Press Release, Utah Attorney General, Shurtleff Joins Settlement over Blockbuster's "No Late Fees" Claims (Apr. 7, 2005).

mechanism, not a substantive right, prohibiting class actions would not by itself deprive potential plaintiffs of the substantive ability to pursue their legal interests. *Id.* at 200.

The court accordingly held that so long as an arbitration agreement does not limit or impair a plaintiff's underlying substantive rights, the fact that a plaintiff could also have the procedural option of proceeding on a class basis could not outweigh the policy interest in enforcing private agreements to arbitrate according to their terms. *Id*. In the court's words, even assuming that "individual arbitrations, lawsuits, or trials . . . in which each consumer seeks a small damages amount [might] drain consumer and judicial resources," the policy and benefits of encouraging arbitration nonetheless "'*require*[]'" overriding such concerns, regardless of the benefits of class actions. *Id.* at 201 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)).[7]

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[7] A number of other state courts have reached the same conclusion after similar analyses. *See, e.g.*, *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable."); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001) ("The Court finds nothing unconscionable about [an arbitration clause barring class-wide arbitrations] and finds [it] enforceable."); *Walther v. Sovereign Bank*, 872 A.2d 735, 751 (Md. 2005) ("[W]e do not find the no-class-action provision to be so one-sided or oppressive to petitioners as to render the arbitration agreement at issue unconscionable."); *Hayes v. County Bank*, 811 N.Y.S.2d 741, 743 (App. Div. 2006) ("[T]he fact that the arbitration agreements effectively preclude her from pursuing a class action does not alone render them substantively unconscionable."); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (holding that a no class action provision in credit card

California's policy preference should not be imposed on the *Amici* States or, for that matter, on any other State. Yet, the Ninth Circuit has held that California law governs the enforceability of such arbitration provisions in the contracts of out-of-state customers of California-based businesses ***even when those contracts choose the law of the customer's home state***. *Masters v. DirecTV, Inc.*, Nos. 08-55825, 08-55830, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009). Taken together, the decision below and *Masters* effectively preclude enforcement of any arbitration provision between a California-based company and any of its customers who live in any other State when the arbitration provision does not provide for class-wide arbitration.

Non-California consumers should not be denied the benefits of consumer-friendly arbitration provisions when dealing with a California-based company. Even putting aside the Ninth Circuit's aggressive use of choice-of-law principles, because businesses tend to prefer uniformity in their operations, there is every reason to be concerned that, if California's across-the-board ban on individual arbitration survives, many companies will drop their arbitration provisions nationwide. Indeed, it is the *Amici* States' understanding that Amazon.com did so after the

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agreement was not unconscionable because plaintiff "retain[ed] all substantive remedies he would otherwise have without" the provision).

The above decisions, like the case before this Court and the *Amici* States' position here, do not involve state statutes requiring or authorizing class procedures in a specific type of case. *See, e.g.*, *Herron v. Century BMW*, 693 S.E.2d 394, 399-400 (S.C. 2010) (the South Carolina Legislature's Dealers Act made class actions non-waivable in suits against car dealers).

Washington Supreme Court adopted a rule similar to California's. The small minority of States that refuse to enforce incentive-laden arbitration provisions like the one at issue here should not be permitted to discourage companies that operate around the country from creating and maintaining arbitration programs that enable customers to resolve claims speedily and inexpensively.

CONCLUSION

In the *Amici* States' view, the enforceability of a particular arbitration provision should depend upon whether it provides consumers with sufficient incentives to pursue their rights, and a full and fair opportunity to vindicate their rights quickly and efficiently. Because the arbitration clause in this case does just that, the judgment below should be reversed.

Respectfully submitted,

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