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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 THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE FAA DOES NOT PREEMPT CALIFORNIA UNCONSCIONABILITY DOCTRINE	10
II. THE CLASS ARBITRATION WAIVER HERE IS NOT FAIR TO CONSUMERS	12
III. THE ROLE OF CLASS ACTIONS IN AIDING PUBLIC ENFORCEMENT CANNOT BE IGNORED	21
A. Class Actions Are Critical to the Enforcement of the Antitrust Laws	22
B. Class Actions Are Critical to the Enforcement of the California Unfair and Deceptive Practices Statutes	30
IV. THE ARGUMENT THAT CLASS ACTIONS DO NOT DETER MISCONDUCT IS UNFOUNDED	32
CONCLUSION	38

TABLE OF AUTHORITIES

Page

CASES

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987) 23

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 11

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) 29

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 29

America Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) 31

Associated Gen. Contractors v. Carpenters, 459 U.S. 519 (1983) 23

Booker v. Robert Half Int'l, Inc., 413 F.3d 77 (D.C. Cir. 2005) 6

Broughton v. Cigna Healthplans of California, 988 P.2d 67 (Cal. 1999) 31

California v. American Stores Co., 495 U.S. 271 (1990) 22

California v. ARC America Corp., 490 U.S. 93 (1989) 11

City of Burlington v. Dague, 505 U.S. 557 (1992) 30

TABLE OF AUTHORITIES – Continued

Page

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980)....................22, 29

Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005)....................2, 11, 20

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)....................29

Gentry v. Superior Court, 165 P.3d 556 (2007)....................3

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)....................4

Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000)....................4, 7

Gregory v. Ashcroft, 501 U.S. 452 (1991)....................11

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)....................23, 27

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)....................22

In re American Express Merchants' Antitrust Litig., 554 F.3d 300 (2d Cir. 2009), *vacated and remanded sub nom., American Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010)....................5, 16, 30

In re Electrical Carbon Prods. Antitrust Litig., 447 F. Supp. 2d 389 (D.N.J. 2006)....................28

In re Lorazepan & Clorazepate Antitrust Litig., 202 F.R.D. 12 (D.D.C. 2001)....................27

TABLE OF AUTHORITIES – Continued

Page

In re Tobacco II Cases, 207 P.3d 20 (Cal. 2009) 31

In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003) 25, 37

In re Vitamins Antitrust Litig., 398 F. Supp. 2d 209 (D. D.C. 2005) 25

Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006) ....*passim*

Kraus v. Trinity Mgmt. Servs., Inc., 999 P.2d 718 (Cal. 2000) 31

Lawlor v. Nat'l Screen Service Corp., 349 U.S. 322 (1955) 5

Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997) 29

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 11

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006) 33

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) ....*passim*

Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) 23

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 14, 29

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 23, 24, 27

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) 34

TABLE OF AUTHORITIES – Continued

Page

Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976 (9th Cir. 2007) 2, 7

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) 20

Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002) 19

Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 12

Walter v. Hughes Comm'ns, Inc., 682 F. Supp. 2d 1031 (N.D. Cal. 2010)..6

Wyeth v. Levine, 129 S. Ct. 1187 (2009) 11

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)..23

STATUTES

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. 1

Cal. Bus. & Prof. Code §§ 17200 *et seq*. 30

Cal. Bus. & Prof. Code § 17203 ....16, 17

Cal. Civ. Code §§ 1750 *et seq*. 30

Cal. Civ. Code § 1780(a)(2) 17

Cal. Civ. Code § 1781 16

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) 36

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Civ. P. 23(b)(3) 19, 27

American Arbitration Ass'n, Supplementary Rules for Class Arbitration 19

OTHER AUTHORITIES

Advisory Committee's Notes on 1993 Amendments, Fed. R. Civ. P. 11, subdvs. (b), (c) 34

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Antitrust Modernization Commission, *Report and Recommendations* (2007)..........................27, 35

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John M. Connor, *The Great Global Vitamins Conspiracies, 1985-1999* (Apr. 9, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120936...25

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TABLE OF AUTHORITIES – Continued

Page

Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empir. Leg. Stud. (forthcoming 2010), *available at* http://ssrn.com/abstract=1442108 36

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Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879 (2008)....................24, 25, 26, 28, 37

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. These goals would be seriously undermined if, as petitioner claims, the Federal Arbitration Act (FAA) precludes states from applying their ordinary tools for policing unconscionable contracts to protect consumers from waiving their rights to bring class actions or class arbitrations, which are essential to the enforcement of antitrust and other consumer protection laws.[1]

[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* has made a monetary contribution to its preparation or submission.

AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 100 prominent antitrust lawyers, law professors, economists, and business leaders. AAI's Board of Directors alone has approved of this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions.

INTRODUCTION

The Supreme Court of California, recognizing that "class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights," adopted an unremarkable rule that waivers of class arbitration or class actions that "operate effectively as exculpatory contract clauses" in consumer adhesion contracts are unconscionable. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108-09 (Cal. 2005). Applying *Discover Bank* to respondents' false advertising claims here, the Ninth Circuit found that petitioner's class arbitration waiver was "in effect an exculpatory clause," Pet. App. 11a, because "aggrieved customers will predictably not file claims . . . thereby 'greatly reduc[ing] the aggregate liability' AT&T faces for allegedly mulcting small sums of money from many consumers," *id.* 10a-11a (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986 (9th Cir. 2007)). Similarly, the district court concluded that petitioner's dispute-resolution mechanism would "vitiate the therapeutic effect of class actions in halting fraudulent conduct," primarily because it would allow petitioner to "avoid potential liability to thousands of . . . customers who have no knowledge of the alleged wrongdoing." *Id.* 43a, 45a (internal quotation marks omitted).

California's treatment of class action waivers, as applied by the Ninth Circuit in this case, is entirely consistent with this Court's rule, first articulated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

Inc., 473 U.S. 614 (1985), that an arbitration agreement is not enforceable when arbitration would not permit litigants to vindicate their statutory rights. *See Kristian v. Comcast Corp., Inc.*, 446 F.3d 25, 63 (1st Cir. 2006) ("As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis."). As petitioner's expert, Professor Nagareda, has written, "the court's analysis [in *Discover Bank*] ultimately speaks to the distortion that a foreclosure of aggregation might work, in a given instance, upon underlying substantive law." Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Presssure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1901 (2006); *see also Gentry v. Superior Court*, 165 P.3d 556 (2007) (applying *Discover Bank*'s "exculpatory effect" analysis to hold that class action waiver is not enforceable when it undermines the enforcement of non-waivable statutory rights).

In *Mitsubishi Motors,* this Court, while recognizing the importance of the private damages remedy to the enforcement of the antitrust laws, and that a "claim under the antitrust laws is not merely a private matter," overturned the then-uniform rule of the courts of appeals that federal antitrust claims were not arbitrable under the *American Safety* doctrine. *Mitsubishi Motors,* 473 U.S. at 635 (internal quotation marks omitted). The Court held that an agreement between businesses to arbitrate future antitrust claims could be enforced, "at least where the

international cast of a transaction would otherwise add an element of uncertainty to dispute resolution. . . ." *Id.* at 636. Importantly, however, the Court made clear that such an agreement would not be enforceable if arbitration would not permit the vindication of the litigant's statutory rights. The Court declared that "so long as the prospective litigant *effectively* may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function," *id.* at 637 (emphasis added), but "in the event the choice-of-forum [*i.e.*, arbitration] and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy," *id.* at 637 n.19.

In *Randolph,* this Court reaffirmed that "claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions." *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 90 (2000) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (brackets in original). Under this line of cases, several courts of appeals have struck down class action (or arbitration) waivers that effectively would have insulated the defendant from plaintiffs' statutory claims. *See, e.g., Kristian*, 446 F.3d at 61 (holding class action waiver unenforceable

on the ground that "the social goals of federal and state antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield"); *In re American Express Antitrust Merchants' Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) (holding class action waiver could not be enforced "because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery"), *vacated and remanded sub nom., American Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

The rationale for the vindication-of-statutory-rights exception to the enforceability of arbitration agreements is not merely, or even primarily, to protect the particular litigant before the court. If that were the case, then a knowing prospective waiver of statutory rights would be eminently enforceable. But such express waivers, even when negotiated between businesses, frequently are not enforceable, as is the case with claims under the antitrust laws. *See Mitsubishi Motors*, 473 U.S. at 637 n.19 (citing cases); *Kristian*, 446 F.3d at 48 (prospective waiver of treble damages is not enforceable); *American Express,* 554 F.3d at 319 ("an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy"). Rather, the rationale for non-waivability is largely to protect the *public's* interest in the private enforcement of the statute. *See Lawlor v. Nat'l Screen Serv. Corp.,* 349 U.S. 322, 329 (1955) ("in view of the public interest in vigilant enforcement of the antitrust laws through

the instrumentality of the private treble-damage action," an agreement that confers even "a partial immunity from civil liability for future violations" is inconsistent with the antitrust laws). A private right of action under the antitrust laws protects the public because it serves "both [a] remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637. So, too, private remedies under many other statutes, including respondents' statutory claims for deception in this case, are non-waivable and serve "as a deterrent and check on public harm." *Walter v. Hughes Comm'ns, Inc.*, 682 F. Supp. 2d 1031, 1041 (N.D. Cal. 2010) (discussing California's Consumers Legal Remedies Act).

That the FAA is not intended to override substantive rights is equally applicable to state and federal law. *See, e.g., Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (Roberts, J.) (applying vindication-of-statutory-rights analysis to state statutory rights). Accordingly, if a class waiver is unenforceable under the FAA when it prevents a plaintiff from effectively vindicating a statutory right in arbitration, even if the waiver is freely negotiated, it follows that the Act is no bar to recognizing a state's policy of refusing to enforce class arbitration waivers that operate to insulate a defendant from statutory claims when the waiver is imposed by a business on consumers in a contract of adhesion.[2]

[2] While a plaintiff seeking to invalidate an arbitration agreement on the ground that it prevents the vindication of

(Continued on following page)

Indeed, petitioner conceded below that "arbitration provisions containing class-arbitration prohibitions may be substantively unconscionable when their enforcement would result in 'the effective elimination of consumers' private rights of action,'" but contended that "ATTM's arbitration provision is not of that ilk." Mem. of Points and Authorities in Support of Def. AT&T Mobility LLC's Mot. to Compel Arbitration 15 (Mar. 13, 2008) (quoting declaration of Professor Nagareda). Petitioner had contended that its dispute-resolution mechanism would "facilitate the development of a market for fair settlement of consumer claims," but the district court found that petitioner "provided no evidence" to support this contention, noting in particular that it was unclear "how such a market would apprise consumers of alleged wrongdoing. . . ." Pet. App. 44a (internal quotation marks omitted).

In this Court, petitioner does not directly challenge the lower courts' determination that aggrieved

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statutory rights bears the burden of proof, *see Randolph*, 531 U.S. at 92, the same level of evidence is not necessarily required of a plaintiff that seeks to invalidate a class arbitration waiver (not arbitration altogether) as unconscionable. *See Shroyer*, 498 F.3d at 981-82 ("California courts apply a sliding scale, so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.") (internal quotation marks omitted); *see also* Nagareda at 1907 ("If any types of [class action waivers] should be the subject of concern here, surely it should be those that are not the products of actual bargaining and compromise. . . .").

customers will predictably not file claims thereby greatly reducing AT&T's aggregate liability. Rather, petitioner maintains that it is inappropriate (and "discriminatory" under the FAA's savings clause) for courts to consider the effect of a class action or arbitration waiver on the broader enforcement goals of private rights of action, *i.e.*, "social policy concerns relating to deterrence," Pet. Br. 19, 37, or "public policy" considerations relating to "non-parties," *id.* 39-44. Petitioner argues that courts should consider only the "fairness" to the named representative in the putative class action, and contends that its dispute-resolution mechanism "undeniably is fair to the Concepcions" because if they invoked it they likely would have been made whole. *Id.* 36. Petitioner and its *amici* also argue that class actions are not necessary to deter misconduct because government enforcement is sufficient, *see id.* 45, and that class actions or class arbitrations in any event "do[ ] not deter misconduct" because they force a defendant to settle "*regardless* of whether it acts unlawfully." Br. of the Chamber of Commerce of the U.S. as *Amicus Curiae* in Support of Pet'r 7, 10; *see* Pet. Br. 46 n.14.

SUMMARY OF ARGUMENT

1. Petitioner's disagreement with California's determination that the ability of consumers to aggregate small claims is an essential component of the enforcement of its consumer protection laws provides no legal basis for preempting California law,

as respondents' brief demonstrates. California law on class waivers applies equally to arbitration and non-arbitration agreements and reflects no hostility toward arbitration.

2. The class arbitration waiver here is not fair to the Concepcions or other consumers because no reasonable consumer would knowingly trade the right of consumers to aggregate their claims – which benefits all consumers by deterring and uncovering all manner of wrongful conduct, enhancing consumers' litigation posture, and providing compensation without the need to be informed of potential claims or engage an attorney – in exchange for the arguable benefits of petitioner's contrived dispute-resolution mechanism in promoting the settlement of one-off small claims that consumers are aware of and do not require an attorney to uncover or pursue. And there is no good reason to believe that AT&T (and other businesses) will withdraw from consumers the ability to arbitrate claims that are not susceptible to class treatment, if arbitration is indeed a cost-effective dispute resolution mechanism for individual claims.

3. The role of class actions in deterring wrongful conduct is appropriately considered in California's unconscionability analysis if, as petitioner asserts, the appropriate perspective is *ex ante*, *i.e.*, when a contract is entered and before any claims have arisen. Moreover, it would be anomalous not to take into account the legislative purpose in enacting consumer remedies. California is not alone in enacting private rights of action to aid in the enforcement of the laws

for a public purpose. The antitrust laws provide a canonical example. Private enforcement is the primary vehicle for enforcing the antitrust laws, sometimes supplementing government enforcement, sometimes acting as a substitute. It is widely recognized that class actions play a critical role in ensuring the effectiveness of private enforcement of antitrust and other laws.

4. Petitioner and *amici*'s argument that class actions and class arbitrations do not deter misconduct is unfounded in theory and in fact. Even if class actions resulted in some "false positives," that would hardly prove that the threat of class actions does not deter misconduct. In any event, the suggestion that businesses routinely settle meritless class actions with substantial payments is a myth. Indeed, it is belied by *amici*'s simultaneous claims that class actions insufficiently protect consumers because so few are actually certified and those that do are settled for too little, not too much.

ARGUMENT

I. THE FAA DOES NOT PREEMPT CALIFORNIA UNCONSCIONABILITY DOCTRINE

The Federal Arbitration Act does not preempt California unconscionability doctrine as applied by the Ninth Circuit to the class arbitration waiver at issue here. In "all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a

field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (ellipses in original); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 292 (1995) (Thomas, J., joined by Scalia, J., dissenting) ("To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather we must be 'absolutely certain' that Congress intended such displacement before we give preemptive effect to a federal statute.") (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991)); *cf. California v. ARC America Corp*., 490 U.S. 93 (1989) (holding that state antitrust claims by indirect purchasers were not preempted by federal antitrust law even though policies underlying federal law precluded indirect purchaser suits under federal law). Unconscionability doctrine and consumer protection legislation are areas of traditional state regulation. *See* Resp. Br. 18 (unconscionability); *ARC America Corp*. at 101 (unfair business practices). And it was hardly the "clear and manifest" purpose of Congress in enacting the FAA to preempt the states in these areas.

As set forth in respondents' brief, California's unconscionability doctrine as applied to arbitration agreements in *Discover Bank* does not conflict with the FAA for the simple reason that it applies evenhandedly to non-arbitration agreements as well as

arbitration agreements. Nor does it reflect hostility towards arbitration at all, merely a policy determination that the inability to aggregate claims (in arbitration or court) may undermine the enforcement of state consumer protection laws. Such a determination is entitled to respect in our federalist system. "There is no federal policy favoring arbitration under a certain set of procedural rules," *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989), particularly when those rules would undermine substantive rights.

II. THE CLASS ARBITRATION WAIVER HERE IS NOT FAIR TO CONSUMERS

Petitioner asserts "the courts below effectively found that ATTM's arbitration provision is fair to the Concepcions (and, indeed, any customer who invokes it)" because the courts accepted that an aggrieved customer that asserts a colorable claim is likely to have its claim paid without having to actually go through arbitration. Pet. Br. 35. But the courts below did *not* find the provision fair to the Concepcions or consumers generally. On the contrary, the courts concluded that the arbitration provision was substantively unconscionable precisely because aggrieved customers generally will not submit claims for small dollar amounts, and with good reason.

First, even if they suspect a violation of their rights, most rational consumers will not be willing to

spend the time and effort to pursue arbitration of small claims, such as the $30 in this case. As the Ninth Circuit concluded, "The problem with small damage claims is not that the monetary cost of arbitrating is greater than the potential recovery, but that a person normally will not find it worth the time or the hassle to try to recover such a small amount, even if that person spends no money to hire an attorney or to invoke the arbitration process." Pet. App. 10a n.8.

It is no answer to say that AT&T's incentive to avoid premium payments ensures that consumers will not actually have to go through the arbitration process to receive compensation. A consumer must still send a written notice of dispute to AT&T by certified mail, which itself may not be worth the time and expense given the uncertainty of receiving any compensation. Then, the consumer may have to commence an arbitration proceeding, and be prepared to see it through, because the premium payment can be avoided by AT&T as long as it makes a qualifying settlement offer before the arbitrator is selected. Initiating arbitration requires a consumer to file two copies of another form with the American Arbitration Association (AAA), along with a copy of the arbitration agreement, and to pay a $125 filing fee, which AT&T promises to reimburse, or pay directly upon written request if the consumer "is unable to pay this fee." *Id.* 59a. In demanding arbitration, a consumer also must be willing to assume the risk that an arbitrator might determine the claim does not satisfy

"the standards set forth in Federal Rule of Civil Procedure 11(b)," in which case the payment of fees and expenses would be "governed by the AAA Rules." *Id.* 60a.

How many consumers would go through this trouble for the *possibility* of recovering $30, even if they believe their rights have been violated? The lower court's determination that few would is amply supported in logic and evidence. *See, e.g.*, Decl. of Neal S. Berinhout ¶ 19 (Mar. 13, 2008) (over 15-month period AT&T received 570 Notice of Dispute and Arbitration Initiation forms for claims of all sizes and types). Moreover, if millions of customers aggrieved by the same conduct did go through the trouble to assert a claim, it is not obvious that AT&T would be so quick to settle their claims.

Second, and more importantly, most customers will not know they are aggrieved or that their rights have been violated. Frequently, attorneys must ferret out wrongdoing and inform victims of their rights; that is a central function of class actions. *See, e.g.*, *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812-13 (1985) ("The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file the suit individually. . . ."); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 Law & Contemp. Probs. 75, 89 (2004) ("lack of information as to the existence of a possible claim will prevent most consumers from filing individual claims in arbitration or litigation").

Under petitioner's dispute-resolution mechanism, attorneys will have no incentive (or ability) to attract clients to pursue claims of wrongdoing.

To be sure, prevailing consumers can recover attorney's fees in arbitration when provided by the statutory cause of action, and AT&T claims it has a policy of including "reasonable attorney's fees in its settlement offers." Pet. Br. 10.[3] Yet while AT&T may have an incentive to pay a single consumer's small claim in full, it would have no incentive to make the attorney whole if the fees were significant, as they would be in any matter of complexity, particularly if the matter involved uncovering wrongdoing in the first place. AT&T would contend, with good justification, that it is unreasonable for a customer to incur tens or hundreds of thousands of dollars in attorney's fees in connection with a demand for only tens or hundreds of dollars. *See Kristian*, 446 F.3d at 59 n.21 ("In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to

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[3] Although petitioner suggests that it is the threat of having to pay the premiums that provides the incentive to offer attorney's fees in the settlement, *see* Pet. Br. 10, that does not appear to be the case. *See* Reply Mem. in Supp. of Def. AT&T Mobility LLC's Mot. to Compel Arbitration 6, and accompanying Reply Decl. of Neil S. Berinhout (May 16, 2008). The attorney premium is apparently triggered by an award on the merits that is "greater than the value of AT&T's last written settlement offer" and less than $7500, Pet. App. 60a, so a settlement offer that fully satisfied the underlying claim without any attorney's fees would not trigger the premium.

prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court."). Moreover, developing a case may require enlisting the aid of experts, whose fees are not typically compensable under the lodestar methodology used in fee shifting statutes, *see American Express,* 554 F.3d at 318, and therefore would likely not be part of any settlement offer. In short, potential claims that require any significant effort by attorneys simply will not be investigated or brought.

Petitioner claims the "district court found that the Concepcions would likely be better off pursuing bilateral arbitration under ATTM's arbitration clause than participating in a class action" because they would likely be made whole under ATTM's dispute-resolution procedure, which is not necessarily the case under class arbitration. Pet. Br. 42. However, that is not what the district court found. Rather, the district court recognized the Concepcions themselves did not believe they would be "better off," as the litigation itself "demonstrated . . . their desire to forego their individual rights under the arbitration provision in order to pursue relief on behalf of a larger group of consumers," Pet. App. 47a n.10, which was their right under state law.[4] More significantly,

[4] The remedial provisions of the substantive laws at issue specifically provide for class or representative actions. *See* Cal. Civ. Code § 1781; Cal. Bus. & Prof. Code § 17203. Moreover, they give the Concepcions the right to seek an injunction on behalf

(Continued on following page)

what the Concepcions would do *ex post*, after consulting an attorney and becoming fully aware of their claims, is irrelevant if, as petitioner asserts, the proper perspective in determining unconscionability is *ex ante*, *i.e.*, at the time of contracting, in light "of all of the circumstances in which [the contractual provision] could apply." Pet. Br. 38.

From an *ex ante* perspective, before the consumer knows what claims may arise, no reasonable consumer would trade the right of consumers to bring class actions (or arbitrations) in exchange for the purported "benefits" of petitioner's arbitration clause. The right to bring collective actions deters, uncovers, and stops manifold wrongdoing by businesses – including anticompetitive conduct, fraud, deception, privacy breaches, and distributing harmful products, among other things – and provides compensation to consumers even when they have no idea they have been wronged. In contrast, petitioner's

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of the class to enjoin practices that constitute unfair competition (Cal. Bus. & Prof. Code § 17203), or unlawful methods, acts, or practices (Cal. Civ. Code § 1780(a)(2)). However, AT&T's arbitration clause permits an "arbitrator to award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." Pet. App. 61a. Thus, the Concepcions would have been precluded in arbitration from obtaining the injunction they sought to restrain AT&T "from engaging in [its] false advertising campaign and charging customers sales tax on any amount other than the amount each individual consumer pays for each cell phone. . . ." Complaint at 15 (Mar. 27, 2006).

dispute-resolution mechanism at best offers the benefit of promoting the settlement of small claims that a consumer is able to discover on her own and that do not require any attorney assistance or investigation, although even this benefit is largely illusory because AT&T would have a business incentive to settle one-off small claims of complaining customers regardless of the potential premium payments. *See* Decl. of Neal S. Berinhout ¶ 17 ("ATTM generally attempts to accommodate customers who have complaints in order to retain them as customers.").

Petitioner's *amici* argue that individual arbitration is cheaper and more efficient than class actions or class arbitrations, and that businesses pass along these savings to all consumers. *See, e.g.,* Br. of CTIA – The Wireless Association® As *Amicus Curiae* in Supp. of Pet'r 17 ("The quantum of evidence, witnesses, and discovery involved in addressing a carrier's practices on a statewide or nationwide basis is exponentially larger than that needed to address a single customer's dispute."); Br. of *Amici Curiae* American Bankers Ass'n et al. in Supp. of Pet'r 13-14; Br. of the Center for Class Action Fairness as *Amicus Curiae* in Supp. of Pet'r 28-29. However, even if businesses would pass along their lower dispute-resolution costs to consumers, hardly a self-evident proposition in an industry as concentrated as the wireless industry, the relevant comparison should be between the cost and efficiency of thousands or millions of individual arbitrations and a single class arbitration; otherwise businesses' lower costs from individual arbitration

simply arise from their reduced payouts to consumers, *i.e.*, insulation from liability. *See Ting v. AT&T*, 182 F. Supp. 2d 902, 931 n.16 (N.D. Cal. 2002) ("[T]he notion that it is to the public's advantage that companies be relieved of legal liability for their wrongdoing so that they can lower their cost of doing business is contrary to a century of consumer protection laws."), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003).

In fact, class actions and arbitrations necessarily reduce transaction costs because a class action or arbitration may only go forward where the court or arbitrator determines it is "superior to other available methods for the fair and efficient adjudication of the controversy." American Arbitration Ass'n, Supp. Rules for Class Arbitration, Rule 4(b), http://www.adr.org/sp.asp?id=21936 (effective Oct. 8, 2003); *see* Fed. R. Civ. P. 23(b)(3) (virtually identical rule); *see also Shroyer*, 498 F.3d at 990-91 (discussing AAA Rule 4 and noting that class arbitration "will foster, not hamper, the efficiency and expeditious nature of arbitration").

Petitioner asserts, "ATTM's arbitration provision provides customers with significant benefits, in comparison to the litigation system, *with respect to claims that are not susceptible to class treatment.*" Pet. Br. 38 (emphasis added); *see also id.* 53 ("'[i]n bilateral arbitration, parties 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, and the

ability to choose expert adjudicators to resolve specialized disputes'") (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010)) (brackets in original). But it is not obvious that arbitration of small claims is superior to bringing a claim in small claims court, a right that consumers would always retain. Moreover, if arbitration of individual claims is indeed as cost beneficial as petitioner suggests, then one would expect AT&T to continue to offer individual arbitration as an option (or requirement) for consumers in cases that are not susceptible to class treatment. Yet petitioner and various *amici* contend that "businesses will give up on arbitration altogether" if the *Discover Bank* rule is upheld. Pet. Br. 53; *see also, e.g.,* Chamber of Commerce Br. 11-16; Wireless Ass'n Br. 20-21. This prediction is not credible, or else amounts to a repudiation of the virtues of arbitration that industry has been peddling for years.

Petitioner and its *amici* cite various companies' service agreements that state that the companies "will not seek to enforce" their arbitration agreements if the prohibition on class arbitrations cannot be enforced, *see, e.g.*, Pet. Br. 56, but these provisions do not mean that the companies categorically will refuse to arbitrate individual claims. It is unreasonable to maintain, as the Wireless Association does, "the Ninth Circuit's decision means that parties' requests for individual arbitration will not be honored by the courts." Wireless Ass'n Br. 19. At most, the decision means that such requests by businesses may not

be honored against a consumer that prefers to bring or participate in a class arbitration or class action.

In short, the waiver of consumers' rights to institute the best "available method[ ] for the fair and efficient adjudication of the[ir] controvers[ies]," AAA Rule 4(b), can hardly be considered fair or efficient for the Concepcions or other consumers.

III. THE ROLE OF CLASS ACTIONS IN AIDING PUBLIC ENFORCEMENT CANNOT BE IGNORED

Petitioner's argument (Br. 19-20) that it is inappropriate for courts applying California unconscionability doctrine to consider "social policy concerns relating to deterrence," or "public policy" considerations involving "non-parties" who are subject to the same arbitration agreement as the Concepcions, ignores the basic fact that legislatures – state and federal – provide private rights of action not merely to ensure compensation of particular victims, but also to aid in the enforcement of the law and deter wrongful conduct. Petitioner and its *amici* may believe that class actions are unnecessary for deterrence because of criminal sanctions, civil enforcement by state and federal law enforcement authorities, or regulatory action. But the legislatures that created the private rights of action have determined otherwise. *See* Nagareda at 1903-04 ("The existence of complementary avenues for public enforcement is . . . beside the point . . . if the problem consists of the effective

amendment of public law by way of arbitration clauses."); *Kristian*, 446 F.3d at 59 ("When Congress enacts a statute that provides for both private and administrative enforcement actions, Congress envisions a role for both types of enforcement. . . . Weakening one of those enforcement mechanisms seems inconsistent with the Congressional scheme."); *see also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government."). Private enforcement in general, and class actions in particular, are central to the enforcement schemes of many statutes. The antitrust laws are a good example.

A. Class Actions Are Critical to the Enforcement of the Antitrust Laws

This Court has often emphasized the importance of private actions to the enforcement of the antitrust laws. *See, e.g., California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Mitsubishi Motors,* 473 U.S. at 635 ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws").

"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969); *see also Perma Life Mufflers Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").

This Court has repeatedly referred to the private litigant's role in antitrust as that of a "private attorney general." *See, e.g., Mitsubishi Motors*, 473 U.S. at 635 ("The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.") (internal quotation marks omitted); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,* 483 U.S. 143, 151 (1987) (Clayton Act "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"); *see also Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 542 (1983); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

Relative importance of private and public enforcement. Private actions are the dominant means by which antitrust violations are remedied and deterred. In *Reiter*, this Court noted "private

suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). In the late 70's, when the Court decided *Reiter*, "nearly 20 times as many private antitrust actions [were] pending in the federal courts as actions filed by the Department of Justice." *Id.* Today, the number of private antitrust cases brought in federal court exceeds the number of U.S. government actions (civil and criminal) by more than 25 to 1. Although the number of private actions has declined significantly since 1978, the number of government actions has fallen even more sharply (in percentage terms). *See* American Antitrust Institute, *The Next Antitrust Agenda* 222, 228 (Albert A. Foer ed. 2008).

Enforcement by "private attorneys general" serves an important role in Congress' overall enforcement scheme, sometimes as a complement to government enforcement (in "follow on" actions), sometimes as a substitute. A 2008 study analyzing 40 of some of the largest successful private antitrust cases since 1990 found that of the $18-19.6 billion recovered for victims in those cases, almost half of the total recovery came from 15 cases that did not follow government actions. *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F.L. Rev. 879, 891,

897 (2008).[5] Another six of the 40 cases involved "mixed" public/private origin, which netted recoveries of $4.2 billion, and another nine provided relief significantly broader in scope than the government enforcement action. *See id.* at 897-98, 909-10. Sometimes, it was the government that "piggybacked" on private actions. *See, e.g., In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 n.31 (E.D.N.Y. 2003) (explaining that the Department of Justice filed a lawsuit based in part on information provided by class counsel); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 226 (D.D.C. 2005) (noting that class action counsel uncovered the illegal activity of vitamin manufacturers across the globe and shared the information with the Department of Justice "enabling the criminal investigation to begin"). Notably, the total amount of criminal fines obtained by the government during the same period for all prosecutions ($4.2 billion) was less than one quarter of the private recoveries in the 40 cases studied. *See* Lande & Davis at 893.[6]

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[5] The study does not purport to be a comprehensive account of all antitrust settlements or actions during the period. *See* Lande & Davis at 889. Research for the study was funded by AAI. *See id.* at 879.

[6] The vitamins cartel "case" is instructive. That cartel resulted in criminal fines of about $900 million, the largest in U.S. history, and private recoveries of $3.9 to $5.2 billion. *See* John M. Connor, *The Great Global Vitamins Conspiracies, 1985-1999* at 131 (Apr. 9, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120936. Yet, despite the enormous sanctions, the combined criminal and private recoveries amounted to less

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In many instances, private enforcement is the only available means to redress an antitrust violation. As Professors Lande and Davis explain:

> As a practical matter, the government cannot be expected to do all or even most of the necessary enforcement for various reasons including: budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.

Id. at 906; *see also* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 690-91 (1982) (President Reagan's antitrust chief explaining that private litigants with specialized knowledge "may have a comparative advantage over the Division in the cost of and efficiency in prosecuting a given case").

Role of class actions. It is widely recognized that class actions play a particularly important role in ensuring that the private damages remedy serves its intended function of deterring antitrust violations

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than 80% of the cartel overcharges in real terms. *See id.* at 139-40.

and compensating victims. As the bipartisan Antitrust Modernization Commission concluded, "The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs." Antitrust Modernization Commission, *Report and Recommendations* 241 (2007). This Court also has emphasized the important role that class actions play in enforcing the federal antitrust laws. *See Hawaii v. Standard Oil*, 405 U.S. at 266 ("[C]lass actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *Reiter*, 442 U.S. at 343 n.6 ("the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23"); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions. . . . Accordingly, courts have repeatedly found antitrust claims to be particularly well suited for class actions. . . .").

Cartels and other antitrust violators that inflict widespread economic harm would have little to fear from the treble-damages remedy without class actions because individual treble-damages actions by customers are not common, and are unheard of in the

case of consumers. For example, in the Lande and Davis study, only six of the 40 successful cases did not involve class actions, *see* Lande & Davis at 901, and those were suits by competitors, *see id*. at 899. Private antitrust actions are extremely expensive to pursue either in court *or in arbitration* because they involve "complicated question[s] of fact" and the application of "equally complex" law to those facts. *Kristian,* 446 F.3d at 58. Attorney's fees and expert witness fees, even in garden-variety price-fixing cases, typically will be in the millions of dollars. *See, e.g., In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 409-10 (D.N.J. 2006) (fees and expenses exceeded $6 million in case that settled before class certification; approximately $400 million of purchases at issue). Even when some of the defendants have pled guilty to criminal price-fixing charges, pursuing a private damages action can "be quite onerous, expensive, and time-consuming," *id.* at 399, because liability against other defendants may not be easy to prove, the statute of limitations (and the period of liability) will frequently be at issue, and it is costly to prove damages, not to mention defend against the inevitable motions to exclude expert witnesses and other motions that defendants file.

Negative-Value Cases. Given the expense of litigation, individual antitrust cases challenging cartel behavior are often negative-value cases, *i.e.*, cases "in which the stakes to each member are too slight to repay the cost of the suit." Alba Conte & Herbert B. Newberg, 2 *Newberg on Class Actions* § 4:33, at 290

(4th ed. 2002). "Economic reality dictates" that such actions "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

The existence of a negative-value suit is often said to be the "most compelling rationale for finding superiority in a class action." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998); *see also Shutts*, 472 U.S. at 809 ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."); *Roper*, 445 U.S. at 338 (class action "may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise," thereby "vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost").

That prevailing plaintiffs' attorney's fees are recoverable under the Clayton Act does not ordinarily make individual actions (in arbitration or court) practical because expert witness expenses are effectively

not recoverable, *see American Express,* 554 F.3d at 318, and the recovery of attorney's fees does not compensate attorneys for the risk of not prevailing, *see Kristian*, 446 F. at 59 n.21 ("being made whole is hardly a sufficient incentive for an attorney to invest" in an uncertain case on a contingent basis); *City of Burlington v. Dague*, 505 U.S. 557 (1992) (under common fee-shifting statutes, lodestar may not be adjusted upward to reflect the fact that attorneys were retained on a contingent-fee basis).

B. Class Actions Are Critical to the Enforcement of the California Unfair and Deceptive Practices Statutes

While a canonical example, the Sherman Act is hardly the only statute that affords generous private remedies to serve the public interest in deterring unlawful conduct and that relies heavily on class actions to serve that end. The statutes at issue in this case, California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq*., and Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq*., do as well. As the California Supreme Court has noted,

> Both consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. [They] make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private

> enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.

Kraus v. Trinity Mgmt. Servs., Inc., 999 P.2d 718, 724-25 (Cal. 2000); *see In re Tobacco II Cases*, 207 P.3d 20, 33 (Cal. 2009) (stating that Proposition 64, which added injury requirement for standing, "did not propose to curb the broad remedial purpose of the UCL or the use of class actions to effect that purpose"); *see also Broughton v. Cigna Healthplans of California*, 988 P.2d 67, 76-77 (Cal. 1999) ("the plaintiff in a CLRA damages action is playing the role of a bona fide private attorney general"); *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 711 (Cal. Ct. App. 2001) ("injunctive relief afforded by the CLRA is unique, as its purpose is not simply to correct future private injury but to remedy a public wrong").

In sum, private class actions are an important component of the enforcement schemes of many statutes, including the ones at issue in this case, and the courts below appropriately took this legislative policy into account in assessing the unconscionability of petitioner's class arbitration waiver.

IV. THE ARGUMENT THAT CLASS ACTIONS DO NOT DETER MISCONDUCT IS UNFOUNDED

Petitioner's and *amici*'s broadside attack on class actions as essentially shakedown schemes by class action lawyers is unfounded in theory and in fact. In particular, the argument that class actions do not further deterrence because they force defendants to settle "meritless" claims (*i.e.*, "blackmail" settlements) is particularly weak. For one thing, even if class actions resulted in some significant number of mistaken "convictions" (*i.e.*, settlements of meritless claims), one would need to know the number of mistaken "acquittals" (i.e., instances where courts fail to hold defendants liable for unlawful conduct) before concluding that class actions should be harder or easier to bring. "[B]oth types of error reduce deterrence. . . ." A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law, in* I *Handbook of Law and Economics* 403, 427 (A. Mitchell Polinsky & Steven Shavell eds., 2007).[7]

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[7] The Polinsky & Shavell chapter, relied on by the Chamber of Commerce (Br. 10), underscores the importance of "private enforcement of law to control undesirable behavior. . . ." Polinsky & Shavell at 405. They note that "allowing private suits for harm . . . motivate[s] victims to initiate legal action and thus . . . harness the information they have for purposes of law enforcement," *id.* at 406, "private parties sometimes play a complementary role by supplying information to enforcement authorities and by bringing private suits," *id.* n.3, and that private suits

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More significantly, the suggestion that businesses routinely settle "meritless" class actions with substantial payments is a myth. "Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions." Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 159 (2006); *see id.* at 158 ("Class action practice in the real world is characterized by a very high incidence of successful motions to dismiss, successful motions for summary judgment, and unsuccessful motions for class certification."); *see also* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1393 (2003) ("Dispositive motions make it hard for plaintiffs to use the threat of endless litigation to obtain payments on unmeritorious claims."); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. Rev. 65, 70 n.12 (1996) ("In real litigation . . . defendants' counsel are generally quite adept at placing time-consuming and expensive motions and other obstacles in the path of plaintiffs' counsel . . . such that it seems unlikely a plaintiff can create a sufficient threat, based on disparity of litigation cost alone, to coerce a settlement."). *But see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006) (describing congressional findings of abuse

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"constitute a substitute, at least to some extent, for public enforcement," *id.* at 450.

of securities class actions prior to enactment of securities litigation reform legislation in 1995 and 1998).

Insofar as a class action with $100 million in damages and a 10% likelihood of success settles for $10 million (*i.e.*, expected value) – the example used in the brief of the Chamber of Commerce (Br. 8) – such a settlement is *efficient* and cannot be ascribed to a "meritless" suit, particularly if it comes after summary judgment has been denied. *See, e.g.,* Advisory Committee's Notes on 1993 Amendments, Fed. R. Civ. P. 11, subdivs. (b), (c) ("[I]f a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient 'evidentiary support' for purposes of Rule 11."). As petitioner's expert, Professor Nagareda, has explained, the "amplification" of a class action is not "a source for normative concern" in a settlement involving a small likelihood of success when that likelihood is based on the potential that a fact finder will resolve ambiguous facts against the defendant. *See* Nagareda at 1891.

To be sure, settlements in excess of expected value based on defendant's risk aversion are arguably problematic, but there is little reason to believe that defendants are more risk averse than plaintiffs, and good reason to believe the contrary. *See* Silver at 1408-15. Class settlements based on a multiplication of statutory damages also could potentially be problematic when those damages are unmoored to any actual damages. *See* Nagareda at 1885-88 (discussing minimum statutory damages); *see also Shady Grove*

Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting). But even then, the normative concern would depend on whether aggregation "works a distortion of underlying substantive law." Nagareda at 1896.

In any event, there is no reliable empirical evidence that settlements of meritless class actions are common. In antitrust, for example, when the Antitrust Modernization Commission recently studied whether the antitrust laws should be modernized and considered the claims of some critics that the range of available remedies under the antitrust laws resulted in excessive payments by defendants, it reported that "[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission. . . ." *AMC Report* at 247; *see also* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 103 (2010) ("claims of excessive costs, abuse, and frivolousness in litigation may have much less substance than many think, and extortionate settlements may be but another urban legend"); Silver at 1395 n.164 ("[t]here is little empirical evidence supporting the theory that frivolous lawsuits are common").

Indeed, petitioner's *amici* contradict their complaints about the burden of meritless class action settlements by attacking class actions as insufficiently protective of consumers, pointing out the significant hurdles to obtaining class certification, *see, e.g.,* Chamber of Comm. Br. 17 ("only 20% of putative classes are certified" because of rigorous

class certification standards), and that plaintiffs' counsel sometimes settle strong cases for *too little, see id.* at 19 ("Class counsel and defendants each have an incentive to settle on terms that may be unfavorable to the plaintiff consumers but reap large fees to counsel."). The Class Action Fairness Act of 2005 was specifically designed to protect consumers from such problematic settlements and to remedy other perceived abuses, but overall Congress found that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action. . . ." Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4 (2005), *as reprinted in* 28 U.S.C. § 1711 note.

The notion that class action lawyers are the primary beneficiaries of class actions does not withstand scrutiny. For example, the Fitzpatrick study cited by the Center for Class Action Fairness shows that in 2006 and 2007, class action settlements in federal court recovered nearly $33 billion in monetary relief, of which roughly $5 billion, or about 15%, was awarded to class action lawyers. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empir. Leg. Stud. (forthcoming 2010), *available at* http://ssrn.com/abstract=1442108; *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008,* 7 J. Empir. Leg. Stud. 248, 262, 265 (2010) (comprehensive study of

class action settlements showing that mean fee was 23 percent of class award, with lawyers receiving a smaller proportion as the size of the recovery increased, *e.g.*, a mean fee of 12% for recoveries exceeding $175.5 million). Lande and Davis reported that the 34 antitrust class actions in their study recovered a total of about $14-15 billion for businesses and consumers, before deducting attorney's fees. *See* Lande & Davis at 899, 901 (sum of direct and indirect purchasers' recoveries). And that did not include the monetary value of any injunctive relief, which in some instances dwarfed the compensatory relief. *See id.* at 891, 901-02; *e.g., Visa Check/ Mastermoney*, 297 F. Supp. 2d at 511-12 (noting "injunctive relief will result in future savings to the Class valued from approximately $25 to $87 billion or more," while compensatory relief was $3.38 billion). In the 30 cases where the information was available, attorney's fees (and expenses) constituted approximately 14.5% ($1.4 billion) of the cash recoveries in those cases ($9.7 billion). *See* Lande & Davis at 902-03 & n.95, 911-12 (noting that percentage of recovery declined as recovery increased).

There are surely occasional abuses by class action lawyers, just as there are sometimes abuses by defense lawyers. *See* Miller at 66 ("[T]he defense bar and its clients are not always innocent victims of frivolous litigation or abusive conduct; indeed defense attorneys [may] protract pretrial processes . . . to coerce contingent-fee lawyers . . . into settlement"). However, there is simply no basis for the claim that

businesses routinely settle meritless class actions or that such settlements undercut the deterrent value of class actions generally.

CONCLUSION

For the foregoing reasons, and those set forth in respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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