

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*
MARYGRACE CONEFF, ET AL.
IN SUPPORT OF RESPONDENTS**

—◆—
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INTEREST OF *AMICI CURIAE*¹

Marygrace Coneff, a 57-year-old social worker residing in California, represents a putative class of consumers nationwide who were customers of AT&T Wireless Services, Inc. (“AWS”) when that company merged with Cingular Wireless (“Cingular”) in 2004.² Ms. Coneff contends that, following the merger, the merged company – now known as AT&T Mobility (“AT&T”) – purposefully dismantled the AWS network, forcing AWS customers to accept degraded service and pay additional fees, transfer to Cingular and pay additional fees, or cancel their service altogether and incur termination fees. The plaintiffs allege violations of Washington’s Consumer Protection Act.

After AT&T moved to compel individual arbitration, the parties engaged in extensive discovery and factual development concerning the ban on class actions in AT&T’s consumer contract – the same class

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation or submission.

² The other named plaintiffs in the *Coneff* case on behalf of whom this *amicus* brief is filed are Alex Aschero, Christine Aschero, Joanne Aschero, Jennie Bragg, Amy Frerker, Devin Gilker, Jeff Haymes, Michelle Johns, Steven Knott, Liesa Krausse, Harold Melendez, Leonard Shulman, and Steve Shulman.

action ban at issue here. The plaintiffs uncovered evidence showing that, while thousands of customers complained to a consumer advocacy group about their service after the merger, only a few hundred of AT&T's 70 million customers pursued claims against the company in arbitration or small claims court. In addition, several practitioners who specialize in representing individual consumers against corporations testified that AT&T customers such as Ms. Coneff would not be able to retain qualified attorneys on an individual basis. Meanwhile, AT&T failed to produce any evidence that it had ever paid out any of the so-called "premiums" that supposedly make its arbitration clause "consumer friendly" (*see* AT&T Br. 6-7), and counsel for AT&T conceded in open court that the company in fact does not pay those premiums.

On May 22, 2009, based on the extensive factual record, the U.S. District Court for the Western District of Washington found that AT&T's class action ban would exculpate the company from liability for widespread violations of law. *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009). AT&T appealed, and the U.S. Court of Appeals for the Ninth Circuit stayed the appeal pending this Court's decision in *Concepcion*.

As AT&T customers who have successfully proven that AT&T's class action ban would as a factual matter exculpate AT&T from liability, the *Coneff* plaintiffs have a unique perspective on the issues in this case. The evidence in *Coneff* directly refutes

AT&T's unsupported claim that its arbitration clause provides customers with an effective means of redress.



STATEMENT

This case is not really about arbitration – it is about whether corporations can use bans on class actions to evade liability under state consumer protection laws. AT&T is not worried about the exposure created by individual actions, whether in arbitration or in court; few customers have ever brought individual claims against AT&T, and the total economic impact of those disputes on the company is “infinitesimal.” *Coneff*, 620 F. Supp. 2d at 1258. What AT&T *does* care about is making sure that its customers can never join together in a class action, even if they allege system-wide wrongful practices but have individually small disputes.

To that end, AT&T and its corporate affiliates have repeatedly altered their arbitration clauses over time with one goal in mind: to preserve the class action ban. Again and again, courts have struck the ban down as an unlawful attempt to exculpate the company from liability. *E.g.*, *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592 (D.N.J. 2009); *Coneff*, 620 F. Supp. 2d 1248; *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250 (Ill. 2006); *McKee*

v. AT&T Corp., 191 P.3d 845 (Wash. 2008); *Scott v. Cingular Wireless LLC*, 161 P.3d 1000 (Wash. 2007). Each time a court invalidated its class action ban, the company used the unilateral change-in-terms provisions in its contract to “promulgate” a new version of the arbitration clause. For example, in *McKee*, by the time the enforceability of AT&T’s class action ban reached the Washington Supreme Court, at least five different versions of the arbitration clause were in the record. 191 P.3d at 850. Indeed, “AT&T had revised the contract so often – twice alone in the month McKee had opened his account – that even its own lawyers did not know which terms applied.” David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. Rev. 605, 606 (2010).

Significantly, in each new version of its arbitration clause, AT&T left the class action ban untouched – even though that was the term struck down as exculpatory. Instead, AT&T tinkered with *other* terms in the clause, removing terms like high fees and bans on punitive damages and replacing them with “premiums” promising rewards for any consumer able to prevail in individual arbitration. See *Amicus Br. of AT&T Mobility in Supp. of Neither Party*, at 10-11, *T-Mobile v. Laster*, No. 07-976, 128 S. Ct. 2500 (May 27, 2008). AT&T apparently hoped that each modification would distract courts from the problematic class action ban and thus achieve its goal of immunizing itself from any risk of class-wide liability.



SUMMARY OF ARGUMENT

AT&T and its *amici* make broad generalizations about the advantages of AT&T's arbitration clause, proclaiming it "a realistic and effective dispute-resolution mechanism for consumers." AT&T Br. 5. The facts, however, show otherwise.

Put to the test, AT&T's vague assertions have been debunked by hard evidence. In *Coneff*, the district court analyzed testimony from over 20 witnesses, statistics about customers' response to its arbitration clause, and extensive discovery about the clause's development. The admissible evidence was discussed and debated at oral argument. The court then concluded that the evidence overwhelmingly demonstrated, as a factual matter, that AT&T's class action ban is exculpatory: it ensures that, even if the company cheats large numbers of customers in the same way, the vast majority of them will *never* hold AT&T liable no matter how valid their claims are.

AT&T does not deny this. Instead, AT&T asks this Court to hold that so long as its class action ban "does not immunize [AT&T] from *all* liability" under state law, the class action ban must be enforced. AT&T Br. 47 (emphasis added). Under AT&T's theory, as long as just *one* individual can get her money back in individual arbitration, the Court should not concern itself with the millions of other American consumers whom AT&T has allegedly cheated in the same way as the Conceptions and Ms. Coneff. *See* AT&T Br. 36.

AT&T's pitch to this Court is simple: it seeks a new rule of federal law that state consumer protection laws only apply to the tiny number of consumers who would pursue their claims individually, and leave the rest with nothing. But state consumer protection laws are intended not merely to compensate the handful of customers with the tenacity and resources to mount an individual legal challenge; they are aimed at stopping and deterring widespread illegal behavior. AT&T's proposed rule would gut this long-standing purpose of state law and permit businesses to insulate themselves from liability. It should be rejected.



ARGUMENT

I. AT&T'S CLASS ACTION BAN HAS BEEN PROVEN TO IMMUNIZE THE COMPANY FROM LIABILITY FOR WIDESPREAD VIOLATIONS OF STATE LAW.

AT&T and its *amici* argue repeatedly that its class action ban is not exculpatory. Indeed, AT&T boasts that one judge stated that its arbitration clause contains “perhaps the most fair and consumer-friendly provisions this Court has ever seen.” AT&T Br. 1 (citing *Makarowski v. AT&T Mobility*, No. 2:09-cv-1590-GAF-CW, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009)). That much-heralded remark appears in a two-page minute order entered against a *pro se* plaintiff who brought only an individual claim, made

no legal arguments against AT&T's class action ban, and required the assistance of an interpreter. *Id.*³

In contrast, in *Coneff*, the question of whether AT&T's class action ban was exculpatory was the subject of a pitched evidentiary battle. Nine expert witnesses who had spent years representing individual consumers against corporations, along with several other experts and fact witnesses, submitted declarations on behalf of the plaintiffs. AT&T responded with its own declarations, and witnesses on both sides were deposed. The plaintiffs submitted information on individual arbitrations brought against AT&T. After considering all the evidence, the district court issued findings of fact that AT&T's class action ban would exculpate the company from liability for widespread violations of law. The rich factual record developed in *Coneff*, along with that of another putative class action against AT&T, *Cruz v. Cingular Wireless, LLC*, No. 2:07-cv-714-FtM-29DNF, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), provide key

³ See also Pl.'s Opp'n to Mot. to Compel Arbitration, *Makarowski*, 2009 WL 1765661 (June 17, 2009); Civil Minutes on Def.'s Mot. to Compel Arbitration and Dismiss Case, *Makarowski*, 2009 WL 1765661 (June 1, 2009) ("The Court ORDERS defense counsel to contact plaintiff, through an interpreter, and advise her that she has two (2) weeks, through and including June 15, 2009, to file an opposition to the Motion to Compel Arbitration.").

insights into the practical, real-world effects of AT&T's class action ban.⁴

A. The Factual Record in *Coneff* Proved That AT&T's Class Action Ban Would Function as an Exculpatory Clause.

AT&T claims that its clause provides “a realistic and effective dispute-resolution mechanism for consumers,” AT&T Br. 5, and that, notwithstanding its ban on class actions, it “remains liable to all of its customers for all wrongdoing,” AT&T Br. 44; *see also* DRI Br. 5 (touting the “significant benefits” of AT&T's arbitration clause). AT&T's *amici* also cite various “studies” for their argument that consumers file individual arbitrations. *See, e.g.*, Ctr. for Class Action Fairness Br. 25-26. But these generalities ring hollow in light of the extensive facts specific to AT&T's own clause and customers.

As explained below, the factual record in *Coneff* established that:

- The “premiums” in AT&T's arbitration clause are window dressing – they are

⁴ The *Cruz* plaintiffs allege that AT&T imposed a monthly charge for optional “Roadside Assistance” that they never requested, in violation of Florida's consumer protection law. *Cruz*, 2008 WL 4279690, at *1. The trial court granted AT&T's motion to compel individual arbitration, *id.* at *4, and the plaintiffs have appealed to the Eleventh Circuit.

never actually paid out to consumers or their attorneys.

- Fewer than 200 of AT&T's millions of customers brought claims in individual arbitration against the company for any reason, compared to thousands who sought help from a consumer group for the specific claims alleged in *Coneff*.
- Absent a class action, the vast majority of putative class members in *Coneff* would be unlikely to realize their legal rights had been violated.
- Assuming a member of the putative class in *Coneff* ascertained that her legal rights had been violated, she would almost certainly be unable to find a lawyer to bring an individual case against AT&T.

1. The data in *Coneff* confirmed that the vast majority of dissatisfied AT&T customers do not use the arbitration clause. *Coneff*, 620 F. Supp. 2d at 1258. By the end of 2007, AT&T had become the largest wireless provider in the nation, with over 70 million customers. *Id.* at 1252. But between January 1, 2003, and December 31, 2007, only 170 customers in the entire country filed arbitration actions against AT&T.⁵ And between October 30, 2006, and December

⁵ Decl. of Bruce Simon in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 2-3, *Coneff*. References to evidence in *Coneff*, 620 F. Supp. 2d 1248, will simply cite "*Coneff*."

31, 2007 – after the implementation of the 2006 arbitration clause at issue here – only *ten* consumer arbitrations were filed against AT&T.⁶ And only 256 claims were filed in small claims court against AT&T in 2007 nationwide.⁷ AT&T never provided any evidence as to the nature of any of those claims.

In comparison, Consumers Union reported that the year AWS and Cingular merged, the companies had the worst records of customer complaints filed with the FCC.⁸ Meanwhile, Consumer Watchdog, a non-profit consumer advocacy organization, received thousands of complaints from consumers like Ms. Coneff.⁹ The *Coneff* class action was brought as a result of those complaints.¹⁰

Within 24 hours of the press announcement that *Coneff* had been filed, 1,800 AT&T customers contacted Consumer Watchdog with the same claims. As of March 2007, 4,700 complaints were received.¹¹ “No other legal action brought by [Consumer Watchdog]

⁶ Simon Decl. 2-3.

⁷ Third Decl. of Neal Berinhout in Supp. of Cingular’s Am. Mot. to Compel Arbitration 10-11, *Coneff*.

⁸ Decl. of Kevin Coluccio in Supp. of Pls.’ Opp’n to Am. Mot. to Compel Arbitration, Ex. S, *Coneff*.

⁹ Decl. of Douglas Heller in Supp. of Pls.’ Opp’n to Am. Mot. to Compel Arbitration 2, *Coneff*.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 2-3.

has . . . resulted in such a tremendous number of complaints following the announcement of a suit.”¹²

2. The *Coneff* plaintiffs submitted testimony from nine expert witnesses concerning the types of cases consumer lawyers handle on an individual basis. These experts all were extremely knowledgeable about the market for representation of individual consumers: they had principally represented consumers for many years; were active in professional organizations of consumer lawyers; regularly attended and provided legal education to other attorneys at consumer law conferences; and regularly referred consumer cases to other lawyers and had consumer cases referred to them. These experts also based their opinions on the *Coneff* complaint and the relevant arbitration clauses. In addition, a number of them reviewed discovery produced by AT&T and testimony submitted in support of AT&T’s motion for individual arbitration. Every one of these experts testified that he or she would not represent the named plaintiffs in individual actions, either in court or in arbitration.¹³

¹² *Id.* at 2.

¹³ *See, e.g.*, Decl. of Peter Maier in Supp. of Pls.’ Opp’n to Am. Mot. to Compel Arbitration 13, *Coneff* (“I [would] be unwilling to take on an arbitration claim against [AT&T] for an individual customer . . . [and] it is very unlikely that any other private attorney in the State of Washington would be willing to do so.”); Decl. of Dale Irwin in Supp. of Pls.’ Opp’n to Am. Mot. to Compel Arbitration 3, *Coneff* (“If I had been approached by a [plaintiff] in this case and asked to handle such a claim as made

(Continued on following page)

First, the experts testified that the small amount in controversy made the *Coneff* claims impractical to pursue individually:

- Attorneys cannot reasonably represent individuals with small claims on an hourly basis because “the hourly charge would . . . exceed the entire amount in controversy.”¹⁴ “No lawyer concerned with ethical propriety would be comfortable charging a client by the hour for such services.”¹⁵ Nor would attorneys accept such cases on a contingency fee basis, because the potential recovery does not justify the expense of prosecuting the case.¹⁶ One expert had previously declined to represent two AT&T customers for that reason.¹⁷
- Even the simplest consumer cases require the completion of certain tasks (*e.g.*, interviewing the client, explaining the retainer, opening a file, analyzing evidence, and drafting a demand letter), the fees for which would far exceed the

in the Complaint on an individual basis, I would not have accepted the case.”).

¹⁴ Decl. of Jerome Hartzell in Supp. of Pls.’ Opp’n to Am. Mot. to Compel Arbitration 5, *Coneff*.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 6-7.

¹⁷ Decl. of Steven Fahlgren in Supp. of Pls.’ Opp’n to Am. Mot. to Compel Arbitration 2, *Coneff*.

amount in controversy for an individual AT&T customer.¹⁸

Second, the experts noted that, although the *Coneff* plaintiffs' claims are individually small, they are legally complex:

- Representing an individual consumer against AT&T would require analyzing the terms, scope, and governing law of the contract and arbitration clause.¹⁹ Further, to survive a motion to dismiss, consumers would need to defeat complex legal defenses such as federal preemption.²⁰
- The plaintiffs' claims would "require institutional and financial discovery and analysis" concerning AT&T's maintenance

¹⁸ Maier Decl. 6-7.

¹⁹ Decl. of Mary Fons in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 3-4, *Coneff*.

²⁰ *Id.* at 4; *see also* Decl. of Stuart Rossman in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 7-8, *Coneff*. For example, AT&T has repeatedly argued that state consumer protection claims are preempted by the Federal Communications Act or barred by other complex defenses. *See Peck v. Cingular Wireless, LLC*, 535 F.3d 1053 (9th Cir. 2008); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004); *Phillips v. AT&T Wireless*, No. 4:04-CV-40240, 2004 WL 1737385, at *1 (S.D. Iowa July 29, 2004); *see also Riensche v. Cingular Wireless LLC*, No. C06-1325Z, 2007 WL 3407137, at *4 (W.D. Wash. Nov. 9, 2007) (claims barred by "voluntary payment doctrine").

of the AWS network following the merger.²¹

Third, AT&T confirmed that the so-called “premiums” in its arbitration clause are illusory. In response to direct questioning by the district court, AT&T’s counsel responded: **“If you’re asking me how often are the premiums paid out, I don’t think it happens.”**²² Consistently, the plaintiffs’ experts explained that AT&T controls whether it pays the premiums:

- AT&T’s contract gives the company 30 days to make a settlement offer, which “virtually ensures” that after the attorney has gone to the trouble of evaluating and investigating the case, interviewing the client, and opening a file, AT&T will pay just enough to escape the premiums.²³ Thus, any attorney considering whether to represent an AT&T customer would know she risks forfeiting her fees and costs after investing substantial time and resources.²⁴

²¹ Fons Decl. 4.

²² Transcript of Oral Arg. at 9, *Coneff* (emphasis added). Not surprisingly, AT&T failed to provide any evidence that it had ever paid the premiums. *See, e.g.*, Dep. of Neal Berinhout 131:13-17, *Coneff* [“hereinafter *Coneff* Berinhout Dep.”]; Simon Decl. 1.

²³ Decl. of Marcus Viles 3, *Cruz*, 2008 WL 4279690. References hereinafter to evidence in *Cruz* will simply cite “*Cruz*.”

²⁴ Hartzell Decl. 7-8; Maier Decl. 9-10.

- AT&T can easily game the premiums, “pursu[ing] a strategy of ‘buying off’ the strongest claims by making offers that are attractive to the consumer even after the arbitrator is selected.”²⁵

Fourth, the plaintiffs’ experts testified that few if any of the *Coneff* class members would ever realize that they had legal remedies absent a class action:²⁶

- Even if customers suspected their rights had been violated, few would have the “ability or sufficient knowledge” to pursue their case without an attorney.²⁷
- AT&T’s counsel conceded that consumers are unlikely to know their rights until they are “actually engaged in a dispute.”²⁸

²⁵ Maier Decl. 11.

²⁶ Maier Decl. 12; Decl. of Daniel Blinn in Supp. of Pls.’ Opp’n to Am. Mot. to Compel Arbitration 4, *Coneff*.

²⁷ Fons Decl. 5.

²⁸ *Coneff* Berinhout Dep. 190:22-24. The testimony submitted in *Cruz* echoed these concerns. As one expert with twenty years of experience representing consumers explained, “The chilling reality of AT&T’s scheme is that by unilaterally scuttling and granting itself amnesty from Rule 23, AT&T, if successful, takes away one of this Court’s most powerful tools – notice.” Viles Decl. at 4.

Fifth, experts testified that class actions are essential to enforce consumer protection laws:

- The former Division Chief for Consumer Protection of the Washington Attorney General's office, who supervised more than 100 employees charged with responding to more than 250,000 consumer complaints each year, testified that her office lacked the resources to pursue the majority of cases.²⁹ Thus, they "relied on a private class action to correct the deceptive or unfair industry practice."³⁰
- The former Chief of the Business and Labor Protection Bureau in the Massachusetts Attorney General's office testified that "these claims, even if meritorious, will not be litigated if they cannot be pursued on a class basis."³¹

Based on all of these factors, the plaintiffs' experts testified that AT&T's class action ban would

²⁹ Decl. of Sally Garratt in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 2-4, *Coneff*.

³⁰ *Id.* at 5.

³¹ Rossman Decl. 2, 6. Witnesses also testified that class actions filed against telecommunications corporations that compensated thousands of customers for wrongful charges and ended several unfair practices could not have been brought individually. Decl. of Alan Mansfield 2-3, *Coneff*; Decl. of Alan Plutzik 2-3, *Coneff*.

effectively bar the overwhelming majority of customers from seeking redress for wrongdoing like that alleged in the complaint.³²

On May 22, 2009, after hearing all of the evidence, the district court in *Coneff* held that AT&T's class action ban was unenforceable under Washington law because it would "effectively exculpate [AT&T] from any potential liability for unfair or deceptive acts or practices." *Coneff*, 620 F. Supp. 2d at 1259.³³

First, the court concluded that the alleged harm to each class member involved "small sums of money," which would be "dwarfed by the legal complexity presented by the facts alleged in Plaintiffs' complaint," including claims that "a multi-billion dollar corporation[] intentionally degraded AT&T's pre-existing wireless network in order to exponentially increase their profits by assigning small fees to customers switching to [the new] network." *Id.* The court credited the testimony of the plaintiffs' experts that attorneys could not feasibly represent individual consumers with these claims. The court found the testimony of consumer attorney and expert Jerome

³² Blinn Decl. 4; Fons Decl. 5; Garratt Decl. 7; Irwin Decl. 3, 6; Maier Decl. 14; Decl. of Bren Pomponio in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration 3, *Coneff*.

³³ Under Washington law, like California law, a class action ban is exculpatory where it would "den[y] *large numbers* of consumers the protection of [law]" and "exculpate[] [the corporation] from liability for a *whole class* of wrongful conduct." *Scott*, 161 P.3d at 1003 (emphasis added).

Hartzell – that an attorney concerned with “ethical propriety” would not charge a client by the hour for such representation – “particularly compelling.” *Id.*

Second, the court found as a factual matter that the “premiums” in AT&T’s arbitration clause do not ensure a remedy, because AT&T is “in full control of insuring that [they are] never awarded.” *Id.* at 1258.

Third, the court emphasized that the “tangible evidence” demonstrated that only an “infinitesimal” percentage of AT&T’s customers had brought arbitrations or small claims against AT&T. *Id.* The court dismissed AT&T’s argument that the plaintiffs might receive only a “nominal” benefit from a class action, emphasizing that one “primary purpose of a class action lawsuit is to allow private citizens to act as private attorneys general in protecting the public’s interest.” *Id.* at 1259 (internal quotations and citation omitted).

The court concluded that “customers are either unaware of their right to take advantage of these ‘pro-consumer provisions,’ or the customers have no incentive to bring their claims against AT&T given the prohibitively expensive costs of individual arbitration. In either circumstance, [AT&T is] utilizing the provisions in the [agreements] to effectively insulate [itself] from any potential liability for unfair or deceptive acts or practices.” *Id.*

B. AT&T's Efforts to Counter the Factual Record in *Coneff* With "Expert" Testimony Were Unavailing.

While AT&T's claims in this Court that its arbitration clause is consumer friendly rest only on its own unsupported assertions, in *Coneff* and other cases in the lower courts it has repeatedly relied heavily on a single source: Vanderbilt University law professor Richard Nagareda.

After the *Coneff* lawsuit was filed, Evan Tager, AT&T's outside litigation counsel, contacted Professor Nagareda.³⁴ Nagareda had written a law review article in which he expressed his hostility to class actions generally,³⁵ and AT&T's general counsel Neal Berinhout had read Nagareda's writings and liked them.³⁶ During their initial consultation, Tager and Nagareda discussed the *Coneff* case.³⁷ AT&T was in the process of amending some features of its arbitration clause in preparation to file a motion to compel individual arbitration in *Coneff*, and Tager asked Nagareda if he would review the clause and prepare a declaration in support of that motion.³⁸ Nagareda

³⁴ Dep. of Richard Nagareda 48:20-24, *Coneff* [hereinafter "*Coneff* Nagareda Dep."].

³⁵ Decl. of Richard Nagareda in Supp. of Mot. to Compel Arbitration 2-4, *Coneff* [hereinafter "*Coneff* Nagareda Decl."].

³⁶ *Coneff* Berinhout Dep. 28:17-29:1.

³⁷ *Coneff* Nagareda Dep. 62:5-11.

³⁸ Dep. of Richard Nagareda 51:3-5, *Cruz* [hereinafter "*Cruz* Nagareda Dep."]; *Coneff* Berinhout Dep. 27:1-6.

agreed, in exchange for a \$5,000 retainer and \$500 per hour.³⁹

AT&T now includes a declaration from Nagareda in support of its motion for individual arbitration whenever its customers try to initiate a class action.⁴⁰ As of March 2008, Nagareda had appeared as an expert for AT&T in at least 17 cases.⁴¹ In each declaration, he has made a series of identical statements about AT&T's 2006 clause and testified that the clause is not unconscionable.⁴²

Nagareda's depositions revealed, however, that his "expert" opinions have no foundation. He acknowledged that he is not an expert in consumer law.⁴³ He confessed that he has never once represented a consumer,⁴⁴ served as an arbitrator,⁴⁵ or even observed an arbitration.⁴⁶ During his three years practicing law, he never tried a case, appeared in court, or had primary responsibility for a case.⁴⁷ His

³⁹ *Coneff* Nagareda Decl. 4.

⁴⁰ Dep. of Neal Berinhout 79:10-19, 81:1-3, *Cruz* [hereinafter "*Cruz* Berinhout Dep."].

⁴¹ *Cruz* Nagareda Dep. 45:12-19.

⁴² *E.g.*, *Coneff* Nagareda Decl. 4; Decl. of Richard Nagareda in Supp. of Mot. to Compel Arbitration 5, *Cruz*; *Cruz* Nagareda Dep. 68:9-17.

⁴³ *Cruz* Nagareda Dep. 34:20-21.

⁴⁴ *Id.* at 20:20-23, 35:15-16.

⁴⁵ *Id.* at 14:19-24.

⁴⁶ *Id.* at 15:5-7.

⁴⁷ *Id.* at 20:9-17; *Coneff* Nagareda Dep. 15:15-21.

only “experience” with the critical issue of how lawyers determine whether bringing a particular claim is economically feasible consists of “reading scholarly literature, law review articles, [and] books by other folks, as opposed to actually working with clients.”⁴⁸ His “expertise” on class action bans, likewise, consists solely of having read “scholarly literature and the major appellate case law on waivers of class arbitration.”⁴⁹ When asked how the enforceability of class action bans would be decided under the state law applicable in one case in which he testified, Nagareda replied, “I have no idea.”⁵⁰

Nagareda’s praise for AT&T’s arbitration clause fizzled under close questioning. For example, his declarations state that AT&T’s clause “reduce[s] dramatically the cost barriers to the bringing of individual consumer claims.”⁵¹ But he admitted he was referring only to the costs of the arbitration proceeding itself, which he conceded could be minor compared to the costs of investigation and expert witnesses, especially in a case raising system-wide issues.⁵²

Nor could Nagareda back up his broad claims about AT&T’s class action ban. He theorized, for

⁴⁸ *Coneff* Nagareda Dep. 17:21-18:3.

⁴⁹ *Id.* at 34:16-35:5.

⁵⁰ *Cruz* Nagareda Dep. 118:20-24; *see also id.* at 99:13-17.

⁵¹ *Coneff* Nagareda Decl. 4.

⁵² *Coneff* Nagareda Dep. 95:3-96:7.

instance, that enforcement of the ban would not repeal any cause of action or alter any “substantive rights.”⁵³ However, when asked what causes of action the plaintiffs alleged in cases where he testified, he could not answer.⁵⁴ And when asked what rights AT&T’s customers were seeking to vindicate, he responded, “I don’t know.”⁵⁵

Indeed, Nagareda admitted that it was his practice to submit sworn declarations in cases without knowing even such basic facts as the claims in the operative complaint.⁵⁶ He defended his ignorance on grounds that the “specific factual setting” of a case is not “especially relevant.”⁵⁷ At another point, however, he conceded that the class action ban in AT&T’s 2006 clause *would* be unconscionable if “in a given situation” it amounted to a “repeal of [a] private right of action.”⁵⁸

Nagareda’s declarations proclaim that he has “never seen an arbitration provision that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring claims.”⁵⁹ But

⁵³ *Cruz Nagareda Dep.* 100:3-6.

⁵⁴ *Coneff Nagareda Dep.* 43:18-44:1; *id.* at 45:15-23.

⁵⁵ *Cruz Nagareda Dep.* 99:24-100:2.

⁵⁶ *Id.* at 58:24-59:7, 68:18-24; *Coneff Nagareda Dep.* 43:18-44:1, 65:19-25

⁵⁷ *Cruz Nagareda Dep.* 96:4-6.

⁵⁸ *Coneff Nagareda Dep.* 71:11-24.

⁵⁹ *Coneff Nagareda Decl.* 4.

he admitted at deposition that he did not write that statement,⁶⁰ and discovery confirmed that it was added to the declaration by counsel for AT&T.⁶¹

The heart of Nagareda's declarations is his "informed prediction" that the availability of the "premiums" in AT&T's clause is "likely" to result in high numbers of claims and high payouts to aggrieved customers.⁶² But after actual data showed that only a tiny number of customers had filed arbitrations against AT&T under the 2006 clause – directly refuting his testimony – Nagareda continued to make the same "informed prediction[s]" he had made before the clause was implemented – including in the *Concepcion* case.⁶³

The Court should not accept AT&T's insinuation in its question presented that its customers can vindicate their rights without class actions – or the "informed" speculations of Professor Nagareda and AT&T's *amici* that AT&T's class action ban does not

⁶⁰ *Coneff* Nagareda Dep. 89:5-14.

⁶¹ *Id.* Ex. 3 (email from Evan Tager to Richard Nagareda, Oct. 23, 2006).

⁶² *Coneff* Nagareda Decl. 5.

⁶³ Decl. of Richard Nagareda in Supp. of Def. AT&T's Mot. To Compel Arbitration 7-8, *Laster v. AT&T Mobility, LLC*, No. CV 09-1590-GAF, 2009 WL 1765661 (C.D. Cal. June 18, 2009); see also *Cruz* Nagareda Dep. Exs. 26-27. The *Coneff* court was unpersuaded by Nagareda's speculations. 620 F. Supp. 2d at 1257. See also *Hall*, 608 F. Supp. 2d at 604 ("[I]n spite of Professor Nagareda's claim that [a fair market for settlement] would be created, no evidence exists that it in fact exists.").

immunize AT&T for wrongdoing. The evidence in *Coneff* proved otherwise.

II. THE FACTUAL RECORDS IN MANY CASES DEMONSTRATE THAT OTHER CORPORATIONS' CLASS ACTION BANS WOULD IMMUNIZE THEM FROM LIABILITY FOR WIDESPREAD VIOLATIONS OF STATE LAW.

The *Coneff* decision is hardly an outlier. Many courts have refused to enforce class action bans where the evidence demonstrated that the term would function as an exculpatory clause, notwithstanding vague assertions to the contrary such as those AT&T makes here.

In *Ting v. AT&T*, for example, a sister AT&T company stipulated that class action bans are sometimes exculpatory. 182 F. Supp. 2d 902, 918-19 (N.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, 319 F.3d 1126 (9th Cir. 2003). After a full trial, the court issued a 74-page decision striking down AT&T's class action ban as unconscionable under California law. *Id.* at 930-31. Prior to AT&T's promulgation of its contract, consumers had brought several successful class actions against phone carriers. *Id.* at 917-18. In one case, AT&T paid 100% of the class members' damages; in another, a class recovered \$88 million from a different carrier. *Id.* at 918. AT&T conceded that none of the lawyers in those cases would have brought them on an individual basis. *Id.* at 918-19. Relying on this and a wealth of other

evidence, the district court found that AT&T's class action ban "functions as an effective deterrent to litigating many types of claims . . . and, ultimately, would serve to shield AT&T from liability even in cases where it has violated the law." *Id.* at 918.

Another court recently held that the evidence established that a class action ban was exculpatory under the specific facts of a wage-and-hour class action. In *Gentry v. Superior Court (Circuit City)*, a customer service employee claimed that the company improperly designated the employees as managerial to avoid paying overtime. 165 P.3d 556, 559-60 (Cal. 2007). The trial court granted Circuit City's motion to compel individual arbitration. *Id.* at 560.

The California Supreme Court reversed, explaining that "in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws." *Id.* at 559. The court emphasized that the state's wage and hour laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." *Id.* at 563 (citation omitted). Noting that class action bans "will only be invalidated after the proper factual showing," the court remanded the case. *Id.* at 570.

On remand, discovery revealed that, other than the named plaintiff, only *one* of the putative class members had ever challenged Circuit City's overtime policy. Decl. of Ellen Lake in Supp. of Pls.' Opp. to

Mot. to Compel Arbitration ¶ 7, *Gentry v. Circuit City Stores, Inc.*, No. BC280631, 2008 WL 8009240 (Cal. Super. Ct. Aug. 28, 2008). Moreover, between 1998 and 2008, only *two* California Circuit City employees had brought *any* claims in arbitration. *Id.* at ¶ 8.

In addition, several witnesses testified that the putative class members would not be able to secure counsel individually because of the small size of their claims. *Gentry*, 2008 WL 8009240. They testified to their first-hand experience that many employees become aware of their rights only after litigation commences. A former Division of Labor Standards attorney testified that corroborating witnesses in his investigations would frequently refuse to testify against their current employers for fear of retaliation. *Id.* The plaintiffs also submitted evidence from a certified public accountant, who had found that 75-80% of human resources personnel surveyed admitted they would not hire potential applicants who had brought a legal claim against a former employer, even if the claim was meritorious. Based on this factual record, the trial court reversed and found that the class action ban was exculpatory. *Id.*

Similarly, a North Carolina judge recently evaluated a robust factual record and held that a payday lender's class action ban was exculpatory. *Kucan v. Advance America*, No. 04-CVS-2860, 2009 WL 2115349 (N.C. Super. Ct. June 26, 2009). The record revealed that "there ha[d] never been any arbitration proceeding arising from this business" despite "the large number" of loans. *Id.* at ¶ 50. In addition,

seventeen attorneys – all accepted by the court as experts – testified that, “because the stakes of an individual arbitration on behalf of a payday borrower are so small, no attorney would represent a payday borrower claim on an individual basis,” despite the availability of statutory attorney fees. *Id.* at ¶ 41. Financial experts testified that it would require between 65 and 100 hours of financial analysis to understand the lenders’ scheme. *Id.* at ¶ 42. Two attorney experts testified in person and were extensively cross-examined. The court ultimately found it “unlikely an attorney would bring an individual case for a payday lending customer in court or arbitration due to the complexity of the cases and the lack of economic feasibility of such representation.” *Id.* at ¶ 44. The court further found it “very unlikely an individual payday borrower could obtain Legal Aid or pro bono representation.” *Id.* The court concluded that, if payday borrowers were required to proceed individually, they “would not be able to effectively prosecute the type of claims raised by plaintiffs here, even if the claims are legally justified and correct.” *Id.* at ¶ 46. As a result, the court concluded that “the class action prohibition operate[d] as an exculpatory clause.” *Id.* at ¶ 50.

In another payday lending case, a Florida court heard expert testimony that “it would be virtually impossible” for a borrower to find an attorney to represent her individually. *See* Evidentiary Hearing Tr., Dec. 17, 2007 at 39, *Betts v. McKenzie Check Advance of Florida, LLC*, No. CL 01-320-AI (Fla. 15th

Jud. Cir., Jan. 4, 2008) (testimony of Lynn Drysdale). The expert had worked for 20 years as a legal aid attorney. Her testimony was based on extensive experience attempting to find counsel for payday borrowers faced with abusive debt collection methods, the complexity of the area of law, the absence of significant statutory guidance on loan transactions, the small amounts involved in the type of case, and the resources required to bring a claim. *Id.* Based on this and other testimony, the trial judge held the lender's class action ban unenforceable. *See Betts*, No. CL 01-320-AI, Slip Op. at 5.

Similarly, in *Brewer v. Missouri Title Loans, Inc.*, ___ S.W.3d ___, No. 90647, 2010 WL 3430411 (Mo. Aug. 31, 2010), the Missouri Supreme Court affirmed a trial court's decision that an extensive factual record proved a lender's class action ban was exculpatory. The named plaintiff had obtained a \$2,215.00 title loan and was charged over \$500 in interest – an annual rate of over 300 percent. *Brewer v. Missouri Title Loans, Inc.*, No. ED 92659, 2009 WL 4639899 (Mo. Ct. App. Dec. 8, 2009). The trial court held an evidentiary hearing where it heard testimony from three experts on the market for consumer representation. The experts testified that the chances of an individual plaintiff locating an attorney were “virtually nil” due to low damages and the likelihood of a “heavily defended” defendant. 2010 WL 3430411, at *4. As a result of this evidence, the Missouri Supreme Court concluded that the class action ban would leave

consumers “with no meaningful avenue of redressing complicated statutory and common law claims.” *Id.*

Finally, the First Circuit recently addressed a class action ban in an antitrust case. In *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), the court found that the evidence sharply contradicted abstract arguments about the supposed efficiency of individual arbitration. Cable customers alleged that Comcast was consolidating its market position through anti-competitive swapping agreements. *Id.* at 30. They “provided uncontested and unopposed expert affidavits demonstrating that without some form of class mechanism – be it class action or class arbitration – a consumer antitrust plaintiff will not sue at all.” *Id.* at 58. The experts included an attorney with twenty-six years of experience litigating antitrust class actions, a former judge, and an economist. Their testimony persuaded the court that it would be “completely unrealistic and impractical” for an individual plaintiff to retain expert witnesses, without whom a plaintiff’s case would be “extremely compromised, and effectively precluded.” *Id.*

These cases confirm the teaching of the evidence and holding in *Coneff*. When a full factual record is developed, the great weight of the admissible evidence has shown that without a class action, many consumers would be effectively left with no remedy – and corporations would be immunized from liability for widespread violations of law.

III. ENFORCING CLASS ACTION BANS THAT WOULD PERMIT WIDESPREAD VIOLATIONS OF STATE LAW WOULD GUT STATE CONSUMER PROTECTION LAWS AND LEAVE CONSUMERS WITHOUT ADEQUATE PROTECTION.

As the factual records in *Coneff* and the cases above demonstrate, enforcing class action bans in some circumstances would exculpate a corporation from liability to the vast majority of its customers. AT&T does not dispute this. Rather, AT&T and its *amici* claim that, so long as the company is not immunized from “*all* liability,” its class action ban does not offend state law as properly applied, AT&T Br. 47 (emphasis added) – and that in any event, federal and state regulators will adequately protect consumers. That is wrong on both counts.

First, state consumer protection laws were enacted not merely to ensure that a handful of highly motivated individuals can get their money back; they exist to protect the public at large and to deter and remedy *widespread* unlawful conduct. AT&T’s proposed rule would gut that central purpose by permitting corporations to exclude all but a tiny subset of consumers from the protections of state law. This would render many state consumer protection laws a dead letter.

Second, the U.S. government’s own studies show that the federal and state regulators are failing to curb wireless companies’ most rampant abuses.

AT&T's request to be policed only by those agencies is a plea for near-total immunity.

A. State Consumer Protection Laws Are Aimed at Protecting All Consumers.

For nearly forty years, States have relied on consumer protection statutes as their principal means of protecting consumers from deception, cheating, and other abuses. These state laws were designed to create a private right of action and to stop widespread wrongful conduct – purposes that have nothing whatsoever to do with arbitration. AT&T urges this Court to hold that the Federal Arbitration Act (“FAA”) permits businesses to ban class actions even when, as a factual matter, it would mean permitting those businesses to continue cheating the vast majority of their customers. That proposed rule would radically undermine state consumer protection laws.

To more clearly see the rule AT&T urges this Court to adopt, imagine that AT&T illegally overcharges 100,000 customers by \$50 apiece. Imagine further that only 100 of those customers (a) realize they have been cheated; (b) know their legal rights under state consumer protection laws; (c) get angry enough to try to get their money back; and (d) are able to find a lawyer to represent them or proceed on their own against the multinational corporation. AT&T wants this Court to hold as a matter of federal law that so long as AT&T's arbitration clause

provides a reasonable probability that the 100 people who manage to accomplish steps (a) through (d) can obtain a refund, the FAA preempts state laws protecting the other 99,900 consumers.

AT&T's proposed rule would reverse decades of progress States have made in protecting consumers from widespread abuses by businesses. When Congress passed the Federal Trade Commission ("FTC") Act in 1914, it ushered in the first federal regulation of certain deleterious corporate practices. *See* FTC Act, Pub. L. No. 63-203, 38 Stat. 717, 719 (1914), *codified as amended at* 15 U.S.C. § 41-58 (2000). However, one major shortcoming sharply limited the statute's effectiveness – it had no private right of action. *See, e.g., Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974). The FTC itself repeatedly argued that a private right of action would ensure meaningful enforcement of the Act by "encourage[ing] consumers to act as 'private attorneys general' to police business practices," G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 N.W. L. Rev. 1198, 1213-14 (1988), but no private right of action was ever added.

Into this gap stepped the States, in "one of the most successful law reform efforts of its kind." *Id.* During the 1960s and 1970s, almost every State passed a statute outlawing unfair or deceptive practices. *See* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724 (1972). Because of the enforcement problems that plagued

federal regulation and the inability of attorneys general to pursue every case involving an unfair or deceptive act or practice, *see, e.g., Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 776 (Mass. 1975) (state attorney general's inability to handle all complaints was primary motivation for enacting private right of action), state laws expressly provided a private right of action. *See* Mary Dee Pridgen, *Consumer Protection and the Law* § 3:2 (2007).

As state legislatures and courts have made clear, the private right of action created by state consumer protection laws is intended to stop widespread abuses, not merely to enable individual redress. For example, the Washington Supreme Court emphasized that consumers bringing actions under the state's Consumer Protection Act "do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests." *Scott*, 161 P.3d at 1006. Likewise, the Oregon Supreme Court has held that the Oregon Unlawful Trade Practices Act is "designed to encourage private enforcement" of the Act's standards of trade and public policies "as much as to provide relief to the injured party." *Weigel v. Ron Tonkin Chevrolet Co.*, 690 P.2d 488, 493 (Or. 1984). Florida courts have repeatedly emphasized that Florida's consumer protection law "does not exist solely for the benefit of the individual parties, [but] is instead designed to afford a broader protection to the citizens of Florida." *Am. Online, Inc. v. Pasioka*, 870 So. 2d 170, 171-72

(Fla. Dist. Ct. App. 2004). In California, the high court has held that California’s Unfair Competition Law “focus[es] on the defendant’s conduct, rather than the plaintiff’s damages, in service of the statute’s larger purpose of protecting the general public against unscrupulous business practices.” *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009).

The Colorado Supreme Court likewise recognized that the state’s consumer protection law “serves more than a merely restitutionary function” for injured customers – instead, its “primary purpose” is “deter[ring] and punish[ing] deceptive trade practices.” *Hall v. Walter*, 969 P.2d 224, 231 (Colo. 1998). Similarly, Ohio courts “safeguard the [Ohio Consumer Sales Practices Act]’s remedial and deterrent functions” by exposing and discouraging deceptive trade practices. *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1170 (Ohio Ct. App. 2004). *See also Furst v. Einstein Moomjy, Inc.*, 860 A.2d 435 (N.J. 2004) (New Jersey law seeks “not only to make whole the victim’s loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices”).⁶⁴ By striking down exculpatory class action bans,

⁶⁴ *See also, e.g.*, Vt. Stat. Ann. Tit. 9 § 2451 (purpose of Act is “to protect the public”); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 519 (4th Cir. 1999) (“[North Carolina’s Unfair Trade Practices Act’s] primary purpose is to protect the consuming public”); *Am. Car Rental, Inc. v. Comm’r of Consumer Protection*, 869 A.2d 1198, 1207-08 (Conn. 2005) (“The purpose of the [Connecticut Unfair Trade Practices Act] is to protect the public”); *Agliori v. Met. Life Ins. Co.*, 879 A.2d 315, 318 (Pa.

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see parts I and II, courts have ensured that state consumer protection laws and the private right of action fulfill their intended purpose.

In sum, AT&T's characterization of state consumer protection laws as designed merely to permit individual consumers to seek redress, *see* AT&T Br. 36, 45, is flatly wrong. A rule allowing corporations to contractually limit the effectiveness of those state laws would affect a radical incursion into state laws that are unrelated to arbitration.

B. Federal and State Regulators Do Not Protect Consumers from Widespread Violations of Their Rights by Telecommunications Corporations.

AT&T and its *amici* suggest that severely limiting private enforcement of consumer protection laws is not problematic because federal and state regulators will adequately protect consumers. *See, e.g.*, Am. Bankers Ass'n Br. 26. Nothing could be further from the truth.

Super. Ct. 2005) (“The purpose of the [Pennsylvania] Unfair Trade Practices and Consumer Protection Law (UTPCPL) is to protect the public.”); *HBN P’ship v. Schappe*, 532 N.W.2d 144 (Wis. App. 1995) (Wisconsin’s consumer protection act “was enacted to protect the public”).

Millions of Americans now rely on wireless phones as their primary means of telephone communications. Meanwhile, government reports reveal that, although cell phone providers elicit more consumer complaints than any other industry, the principal agency responsible for protecting consumers – the Federal Communications Commission (“FCC”) – is not up to the task.⁶⁵

High incidences of cheating, scams, and overcharges in the telecommunications industry have been documented by consumer advocates. For example, companies have been caught imposing rate increases under the guise of ostensibly government-mandated “regulatory cost recovery charges.”⁶⁶ In a class action against AT&T, a jury awarded nearly \$17 million to California long-distance customers, finding that the company had fraudulently inflated the universal service fees designed to fund service for Americans in rural and poor communities.⁶⁷ Similarly,

⁶⁵ See generally Respondents’ Br. 5-6 (detailing increasing consumer complaints about “bill shock,” deceptive contracts, early termination fees, etc.).

⁶⁶ See *Consumer Wireless Issues: Hearing Before the Subcomm. on Commc’ns of the S. Comm. on Commerce, Sci., and Transp.*, 110th Cong. (2007) (testimony of Patrick Pearlman, Deputy Consumer Advocate, Pub. Serv. Comm’n of W. Va.), available at <http://commerce.senate.gov/public/index.cfm?p=Hearings> (browse by hearings in Oct. 2007, then follow link for *Consumer Wireless Issues*) [hereinafter “Pearlman testimony”].

⁶⁷ See PRNewswire, *Jury Awards \$17M to California Residents in AT&T Class Action*, Reuters, Nov. 20, 2008, <http://www.reuters.com/article/idUS222951+20-Nov-2008+PRN20081120>.

AT&T charged Washington customers for “roaming,” despite the fact that their contracts promised no roaming charges.⁶⁸ And AT&T charged Florida customers a monthly fee for an optional “roadside assistance” service that they never ordered.⁶⁹

Despite these widespread abuses, AT&T and its *amici* insist that consumer class actions are not needed to keep cell phone companies in check, because government agencies will step in. For example, the American Bankers Association argues that “if [AT&T] were to impose an unreasonable charge or engage in any unjust or unreasonable practice, [the FCC] would have broad authority” to investigate, adjudicate consumer complaints, issue rulings ordering the company to pay damages, and assess forfeitures. Am. Bankers Ass’n Br. 22; *see also* Chamber Br. 6. AT&T’s *amici* also argue that state utility commissions have authority to compel wireless companies to comply with state law.

Those claims are flatly contradicted by the federal government’s own data. According to a 2009 report issued by the U.S. Government Accountability Office (“GAO”), the “FCC lacks the authority to compel a carrier to take action to satisfy many consumer complaints.”⁷⁰ Despite the FCC’s status as the primary

⁶⁸ *Scott*, 161 P.3d 1000.

⁶⁹ *Cruz*, 2008 WL 4279690.

⁷⁰ GAO, *Telecommunications: FCC Needs to Improve Oversight of Wireless Phone Service* 20 (2009), available at
(Continued on following page)

federal agency charged with overseeing the telecommunications industry, it has “refrained from regulating wireless phone service” and instead has taken a “‘light touch’ in regulating the industry.”⁷¹

The FCC receives thousands of informal complaints from wireless consumers every year, but all it does is forward the complaints to the companies.⁷² As long as the company “responds” in some way, the FCC considers the complaint resolved.⁷³ Except for forwarding complaints, the FCC “conduct[s] little additional oversight of . . . wireless service carriers.”⁷⁴ The FCC does not track whether problems are ever resolved to the consumer’s satisfaction.⁷⁵ Indeed, the GAO concluded that “it is not clear whether resolving problems is an intended outcome of FCC’s consumer complaint efforts.”⁷⁶

<http://www.gao.gov/new.items/d1034.pdf> [hereinafter “*Wireless Phone Service*”].

⁷¹ *Id.* at 21, 23.

⁷² Few consumers with complaints even bother going to this ineffective agency in the first place. *Id.* at 18 (only 13% of customers would complain to FCC if company failed to resolve problem). As explained to a congressional subcommittee, “Consumers are not stupid. They are unlikely to bother agencies to register complaints that they know the agencies cannot, or will not, take meaningful action to address.” Pearlman testimony at 8.

⁷³ *Wireless Phone Service* at 16.

⁷⁴ *Id.* at 15.

⁷⁵ *Id.* at 16, 20, 24.

⁷⁶ *Id.* at 20. Although consumers also have the option of filing a formal complaint, few consumers use that process
(Continued on following page)

Even though problems with billing, service, early termination fees, and marketing are consistently among the top five categories of consumer complaints,⁷⁷ the FCC has steadfastly declined to bring enforcement actions to address these concerns.⁷⁸ Likewise, the FCC has no rules addressing contract terms, explanation of service terms, call quality, or customer service.⁷⁹ And the FCC has never conducted any formal investigation of companies' compliance with truth-in-billing rules.⁸⁰ When the FCC does investigate, it closes 83% of investigations without taking any enforcement action.⁸¹

because it requires a filing fee. *Id.* at 15 n.31. In fact, the FCC held only one proceeding in response to a formal complaint from a consumer in the five years prior to the GAO report. *Id.*

⁷⁷ See, e.g., FCC, *First Quarter 2010 Report on Informal Consumer Inquiries and Complaints* 1-2 (2010), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0813/DOC-300795A1.pdf.

⁷⁸ The FCC's web site lists no enforcement actions against wireless carriers concerning early termination fees, billing, or service. FCC, Working for You, <http://www.fcc.gov/eb/tcd/working.html> (last visited Sept. 21, 2010). The agency has not undertaken any enforcement actions involving marketing since 2003. FCC, Marketing Enforcement Actions, <http://www.fcc.gov/eb/tcd/mktg.html> (last visited Sept. 21, 2010).

⁷⁹ *Wireless Phone Service* at 22.

⁸⁰ *Id.* at 25.

⁸¹ GAO, *Telecommunications: FCC Has Made Some Progress in the Management of Its Enforcement Program but Faces Limitations, and Additional Actions Are Needed* 3 (2008), available at <http://www.gao.gov/new.items/d08125.pdf>.

Meanwhile, most state utility commissions do not regulate wireless phone service at all,⁸² and *only five* state commissions reported taking *any* enforcement action against a wireless provider in a five-year period.⁸³ Many commissions reported to the GAO that while state law appears to give state agencies some authority to regulate cell phone companies, the industry has vigorously opposed such regulation on grounds of federal preemption.⁸⁴

Consumers cannot depend on federal or state regulators to protect their interests. The state consumer protection laws that AT&T's proposed rule would gut are, in many cases, the only meaningful remedy available to consumers.



⁸² *Wireless Phone Service* at 27.

⁸³ *Id.* at 30.

⁸⁴ *Id.* at 31, 33-34; see also Pearlman testimony; *Consumer Wireless Issues: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., and Transp.*, 110th Cong. (2007) (testimony of Lori Swanson, Minn. Attorney General) (State enacted "Consumer Protections for Wireless Customers" Act, but statute was struck down as preempted before it could take effect), available at <http://commerce.senate.gov/public/index.cfm?p=Hearings> (browse by hearings in Oct. 2007, then follow link for *Consumer Wireless Issues*).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals affirming the district court's denial of AT&T's motion to compel individual arbitration should be affirmed.

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