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 *AMICUS CURIAE* OF NATIONAL WORKRIGHTS INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Workrights Institute (NWI) is a nonprofit research and advocacy organization focused exclusively on issues of the workplace and employee rights. Before becoming an independent organization, the Institute was

[1] As reflected on the Court's docket, petitioner and respondents have kindly provided blanket consents to the filing of *amicus* briefs. In accordance with Rule 37.6, we declare that counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

the National Taskforce on Civil Liberties in the Workplace for the American Civil Liberties Union in 1988-1999.

The Institute has long been a leader in the development of employment disputes arbitration. It believes that arbitration holds the promise of making workplace justice widely available to unorganized workers for the first time in our country's history, and that the growth of employment arbitration should be encouraged. The NWI also believes that arbitration will only fulfill that promise if it complies with all the standards of due process. Institute president Lewis Maltby's 1994 article in the New York Law School Journal of Human Rights was the first major publication to advocate this position.[2]

Later Maltby served as an active member of the American Bar Association's National Taskforce on Employment Arbitration, which drafted the employment due process protocol that has become the national standard for arbitral fairness. He testified before the Dunlop Commission on the Future of Worker-Management Relations regarding alternative dispute resolution (ADR). Maltby has also been on the Board of Directors and the Executive Committee of the American Arbitration Association, and was co-chair of its advisory council on employment issues. More recently the NWI provided testimony before a Senate subcommittee on fairness in arbitration[3] and briefing for EEOC Commissioners and

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[2] Lewis Maltby, *Paradise Lost - How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. Sch. J. Human Rts. 1 (1994).

[3] *Overview of Contractual Mandatory Binding Arbitration: Hearing before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong., 2d Sess. 77-80 (2000) (statement of Lewis L. Maltby, President, National Workrights Institute).

staff on employment arbitration. The Institute submitted written comments to the California Judicial Council in 2002 opposing proposed new rules on arbitrator disclosure, on the grounds they were unnecessary and virtually impossible to comply with.

In addition to its interest in arbitration, the National Workrights Institute has played a major role in seeking and securing many new federal and state laws promoting workplace human rights in such areas as genetic discrimination, video surveillance, drug testing, electronic monitoring, whistleblower protection, and off-duty conduct.

SUMMARY OF ARGUMENT

The National Workrights Institute (NWI) would first like to emphasize that an organization which strongly favors the arbitration of employment disputes also firmly believes that the availability of class actions is indispensable for the vindication of certain workplace rights, especially for lower-income persons. Developments in arbitration law in the consumer and the employment contexts obviously affect each other.

Second, as our principal contribution, we wish to place before the Court our analysis of five specific cases that strikingly demonstrate the utter necessity of class actions for effective remediation in certain instances. These five cases all deal with employment claims. They show that restrictions on class actions that petitioner seeks in the present consumer case would also have the most detrimental consequences in enforcing rights in employment and elsewhere. The legal fees generated by the five cases analyzed would have been grossly inadequate to enable any of these important cases to be brought individually.

Finally, it is no solution for petitioner to offer what it suggests in effect is free arbitration for the complaining consumer. That greases the proverbial squeaky wheel – and leaves untouched the mass of consumers (or employees in other contexts) who suffer silently, unaware that there are remedies for their violated rights. Petitioner's approach ignores two of the prime benefits of a class action: first, to educate other members of the class about their rights and to enable their participation in rectifying the wrongs done them, and, second, to provide broad and truly effective relief, which will both remedy the existing misconduct and deter future violations.

ARGUMENT

I. FOR THE LEGAL FRAMEWORK OF THIS CASE, WE ADOPT THE POSITION SET FORTH IN THE BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS.

To avoid burdening the Court with unnecessary repetition, the National Workrights Institute (NWI) adopts the legal positions set forth in the brief *amicus curiae* of the National Academy of Arbitrators concerning preemption of state law by the Federal Arbitration Act, 9 U.S.C. §§ 1-16; the validity and enforcement of agreements to arbitrate; the status of class-action waivers; and other matters germane to this case.

While we support the position of respondents Vincent and Liza Concepcion here, we reiterate emphatically that the NWI does not oppose arbitration generally, and indeed considers employment arbitration most beneficial to the individual employee, especially the rank-and-file, lower-paid worker. As set forth in our Statement of

Interest, NWI's President Lewis Maltby helped draft the employment due process protocol, advised the Dunlop Commission about ADR, testified before a Senate subcommittee on fairness in arbitration, and briefed EEOC Commissioners and staff on employment arbitration. The NWI also submitted written comments to the California Judicial Council in 2002 opposing proposed new rules on arbitrator disclosure, on the grounds they were unnecessary and virtually impossible to comply with.

II. FIVE EXEMPLARY EMPLOYMENT CASES DEMONSTRATE THAT CLASS ACTIONS ARE NECESSARY FOR MANY EMPLOYEES, ESPECIALLY LOWER-PAID WORKERS WITH MODEST CLAIMS, TO VINDICATE THEIR RIGHTS.

The National Workrights Institute (NWI) examined five of the largest and most-publicized employment class actions of the last two decades and published the results in *Class Actions: A Look at the Record*.[4] The aim was to determine the legitimacy of the claims, the respective recoveries of employees and lawyers, and the need for class actions. We will concentrate here on the class-action issue. What this Court decides in the present consumer case will necessarily affect arbitration in employment and other contexts. Approval of petitioner AT&T Mobility's restrictions on class actions would have gravely adverse consequences for arbitration generally. The following are the facts of the five employment cases NWI reviewed.

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[4] National Workrights Institute, Class Actions: A Look at the Record (undated), *available at* http://www.workrights.org/issue_discharge/NWIClassAction.pdf (last visited September 6, 2010).

BOEING[5]

A group of 15,000 employees sued Boeing for discriminating against women and racial minorities in compensation. Boeing's own Diversity Salary Assessment team stated that "Asian and Black hires received, on average, lower starting salaries than Caucasians in the Northwest." A 1997 internal audit concluded: "Similarly situated women and minorities have lower starting salaries." It also found that "women and minorities are placed in lower grade levels and lower paying positions." In merit pay reviews, the audit reported: "African-Americans tend to receive lesser (percentage) increases in engineering." In January 1998 top Boeing executives attending a diversity session at the company's annual meeting were briefed on an internal survey of its affirmative action issues. "Racial bias" was reported in hiring and "gender and racial bias" in promotions.

Boeing settled the case for $15 million. Of this, $3.85 million was received by attorneys representing the employees. After all other expenses had been paid, the employees recovered $7.3 million, or just under half the total settlement. For the employees receiving compensation, the amounts ranged from $1,000 to $50,000.

MITSUBISHI[6]

Over 300 female employees filed a class action against Mitsubishi for sexual harassment. They alleged they had been groped, pressured for sex, and threatened by co-workers. Some women claimed they had to agree

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[5] Williams v. Boeing Co., No. C98-761P (W.D. Wash.).

[6] EEOC v. Mitsubishi Motor Mfg. of America, Inc.. No. 96-1192 (C.D. Ill.).

to sex to win jobs. Drawings of genitals, breasts, and various sexual acts, labeled with women's names, were placed on car fenders and run down the assembly line. The women had complained to management but received scant attention.

After the class suit was initiated, Mitsubishi apologized to the women and agreed to pay $34 million, the largest sexual harassment settlement in history. There were no legal fees because EEOC represented the women. The women got an average of $69,959.

IBP[7]

In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), over 5,000 employees claimed they were entitled to compensation under federal wage and hour laws for time spent walking to their work areas after donning protective gear. Unlike the other cases in this study, management did not settle. The case ultimately reached this Court, which unanimously ruled that the employees were entitled to compensation for this time.

The award was $11.4 million. The employees received $9.5 million and their attorneys the remaining $1.9 million. The awards to individual workers ranged from $20 to $15,000. The average award was $1,886.

There is an additional element of public interest in the collective enforcement of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, at issue in the *IBP* case. The Act's purpose is not only to compensate employees who have been underpaid and to deter future violations, but also to police the marketplace and prevent wrongdoers from securing a competitive advantage over firms complying

[7] Alvarez v. IBP, Inc., No. CT 98-5005-RHW (E.D. Wash.).

with the wage and hour laws. As this Court stated in *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987), the FLSA "reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions."

THE GAP[8]

Over 30,000 workers employed by firms producing garments for The Gap, J. Crew, Tommy Hilfiger, and other prominent retail outlets were the subject of suits brought in 1999 over the conditions in the factories where they worked on the island of Saipan, a territory of the United States. It was claimed that the workers were:

> virtually imprisoned when not working in "dormitories" that were unfit for human habitation;
>
> forced to work up to 12 hours a day, 7 days a week, without being paid overtime;
>
> not paid at all for many of the hours they worked;
>
> forced to remain in Saipan against their wills; and
>
> required to pay illegitimate "debts" to their employers.

Many of these allegations were confirmed by reports from the U.S. Departments of Labor and of Interior. The employers' time records, obtained through discovery,

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[8] Union of Needletrades Industrial and Textile Employees (UNITE) v. The Gap, Inc., No. CV01-0031-1387 (Cal. Super. Ct., San Francisco). *See also* Does I v. The Gap, Inc., No. CV-01-0031 (D.N.M.I.); Does I v. Advanced Textile Corp., No. CV-99-0002 (D.N.M.I.).

showed widespread violation of wage and hour laws. Copies of the workers' contracts, also obtained through discovery, confirmed allegations about illegal control of workers' off-duty conduct.

The defendants ultimately resolved the case through a settlement agreement that provided $20 million to compensate the workers and to create a monitoring program to prevent future abuses.

COCA-COLA[9]

In 1998 over 2000 African-American employees of Coca-Cola filed a class action alleging they were paid less than comparable Caucasian employees. *Abdallah v. Coca-Cola Co.*, 133 F. Supp. 2d 1364 (N.D. Ga. 2001). There were indications that African-Americans were paid 60 percent less on average than Caucasians. In addition, the evidence showed that Caucasians were twice as likely as African-Americans to reach the professional or managerial level, four times as likely to reach the director level, and ten times as likely to reach the vice-presidential level.

Coca-Cola settled the suit for $192 million. Plaintiffs' counsel received $20 million and the remaining $172 million went to the employees. The average recovery was $81,810.

For present purposes, the critical question is whether these employees could have secured appropriate remedies without the capacity to bring class actions. The National Workrights Institute (NWI) compared the amounts received and the legal fees they would have generated (on a standard contingent fee basis) if the

[9] Abdallah v. Coca-Cola Co., No. 1-98-CV-3679 (RWS) (N.D. Ga.).

actions had been brought on an individual basis with the estimated legal fees these employees would actually have been required to pay to file an individual suit. To obtain the latter figure, NWI asked experienced employment lawyers to review each case and estimate the legal fees they would have charged to represent a single member of the class. Each attorney was also asked whether he or she would have been willing to represent the employee on a contingency fee basis. The following table shows the results of this analysis. The potential (contingent[10]) legal fees generated by the average recovery and by the highest recovery in each case are compared with what an experienced employer lawyer estimated would be the actual fee required to handle the case on an individual basis.

Individual Recoveries and Related Legal Fees (in Dollars)

Case	Average Recovery	Potential Legal Fees
Boeing	487	162
Coca-Cola	81,810	32,720
The Gap	193	77
IBP	1,886	753
Mitsubishi	69,959	27,984

[10] We have been conservative and have generally used the high contingent fee figure of 40%.

Case	Highest Recovery	Potential Legal Fees	Required Legal Fees
Boeing	50,000	20,000	125,000
Coca-Cola	N/A	N/A	120,000
The Gap	N/A	N/A	25,000[11]
IBP	15,000	6,000	30,000
Mitsubishi	N/A	N/A	162,000

The results are striking. In all five cases the legal fees required to bring an individual action far surpass the contingent fees the cases would have generated. Even the employees who obtained the largest amounts would have been unable to afford counsel. The highest recoveries were secured by the employees of Coca-Cola, who received $81,810 each. Even this amount, however, would not have been sufficient for the employees to retain counsel individually. This recovery would have generated legal fees of at most approximately $32,720 even under extremely generous assumptions.[12] This is barely one-quarter of the $120,000 in legal fees an experienced employment lawyer estimated would be required to handle the case. For the other employee-plaintiffs in the cases NWI examined, the discrepancy between the legal

[11] This figure represents only the estimated legal fees for bringing an action against the factory owner solely on the basis of claims limited to the Fair Labor Standards Act. The legal fees for bringing the entire case on behalf of a single employee would have been substantially higher.

[12] This figure assumes a contingency fee of 40%, which is the maximum commonly charged. In many cases the fee is lower, frequently 33%. It also assumes that there are no expenses in the case, which are paid from the employee's share of the recovery. Under other assumptions, the fee generated would be even lower.

fees required to handle the case and the legal fees an individual case would generate are even greater. Not one of the over 50,000 employees in the cases NWI reviewed would have been able to pay for legal representation without the availability of class actions.

These five cases also illustrate dramatically several other sobering truths about the deficiencies of individual actions in pursuing employee rights. There is a forbiddingly heavy cost for the discovery and statistical analysis usually needed in proving pattern-and-practice discrimination in Boeing and Coca-Cola situations. Public exposure is a frequent obstacle in a sexual harassment case like Mitsubishi. Garment workers' justified fears of physical violence, debtors' prison, and other extreme forms of retaliation in the Gap case led the Court of Appeals to allow plaintiffs to proceed under "Jane Doe" pseudonyms in *Does I-XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000). Finally, as discussed more fully in the next section, company-wide injunctive relief or the equivalent sort of settlement obtained in some of these class actions may simply be unavailable in an individual suit or grievance.

A survey of plaintiffs' employment lawyers conducted in 1995 indicated that a worker had to have a minimum of $60,000 in economic damages (not counting pain and suffering or punitive damages) for a lawyer to take the case to court.[13] Even if the cost of litigation has increased only as much as inflation, the minimum required damages

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[13] William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* 50 Disp. Resol. J., Oct-Dec. 1995, at 40, 44-45. See also Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J., May-July 2003, at 8, 10-11.

would now be about $84,000.[14] Yet the average economic loss for employees who lose their jobs is only about $14,000.[15] Viewed another way, plaintiffs' employment lawyers have reported that they agreed to represent only about one in 20 workers who sought counsel in an employment dispute.[16] However one looks at the figures, the inescapable conclusion is that the vast majority of employees will not be able to vindicate their employment rights without the benefit of class actions.

We realize that in the present case before the Court, petitioner AT&T Mobility LLC (ATTM) has attempted to obviate the need for any particular consumer claimant to resort to a class action to protect his or her own immediate rights. With seeming magnanimity, petitioner has agreed to finance any arbitration where the arbitrator awards a claimant more than ATTM's last settlement offer. As we shall demonstrate below, this seeming magnanimity masks the loss of two other major virtues of class actions. For the moment, however, it is enough to say that ATTM's approach itself is an implicit acknowledgment of our basic proposition: a class action – or something of an equivalent nature – is an essential procedure for the vindication of the rights of claimants of modest means with modest claims.

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[14] The Consumer Price Index in 1995 was 152. In 2009 it was 214, an increase of 40%. U.S. Dep't Labor, Bur. Lab. Stat., *available at* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (last visited September 9, 2010).

[15] Median annual earnings are $36,587 and the median duration of unemployment is 19.9 weeks. U.S. Dep't Labor, Bur. Lab. Stat., *available at* http://www.bls.gov/ncs/ocs/sp/nctb1346.txt; http://www.bls.gov/news.release/empsit.t12.htm (last visited September 9, 2010).

[16] Howard, *supra* note 13, at 44-45.

III. CLASS ACTIONS SERVE TWO VITAL FUNCTIONS BEYOND THE VINDICATION OF ANY ONE INDIVIDUAL'S RIGHTS: THEY ALERT CLASS MEMBERS TO THE EXISTENCE OF THEIR RIGHTS, AND A BROAD AND AGGREGATED AWARD IS A MAJOR DETERRENT TO CONTINUED VIOLATIONS.

Many individual consumers and rank-and-file employees are woefully ignorant of their rights – or lack of rights. See, *e.g.*, Lewis Maltby, Can They Do That? Retaking Our Fundamental Rights in the Workplace 1-4 (2009); American Bar Ass'n, Family Legal Guide xi-xv (3d ed. 2004). A major aim of a class action is to educate the members of the class about the rights they may not realize they possess until the class action brings the matter to their attention. Even the seemingly generous approach of petitioner AT&T Mobility negates this significant benefit. The proverbial squeaky wheel gets the grease – but all the other, similarly situated "wheels" – the other unsuspecting, less knowledgeable consumers or employees – are left unattended and without a remedy.

Another essential objective of a class action is to get a sufficiently broad and substantial corrective order to stop the wrongdoing and to deter future misconduct. Sometimes that is simply a matter of the larger amount of money awarded to a group rather than to an individual claimant. But a paper delivered at a recent annual meeting of the National Academy of Arbitrators (NAA) also pointed out that "company-wide reforms are generally not available in the single-plaintiff context – even *after* a liability finding against the employer."[17] Cited as an

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[17] Adam Klein & Nantiya Ruan, *Mandatory Arbitration of Employment Class Action Disputes: From the Perspective*

example was *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955 (11th Cir. 2008), where the trial court dismissed the employees' pattern-and-practice claims on the grounds they could proceed only as a class action and the plaintiffs had not sought class certification.

Other papers presented at the same NAA meeting shed more valuable light on these dual functions of class actions – education and effective enforcement. Professor Martin Malin relied on *Gentry v. Superior Court*, 165 P. 3d 556 (Cal. 2007),[18] to the effect that "class actions may be necessary to protect the statutory rights of employees other than the individual plaintiff because incumbent employees may fear retaliation if they bring individual claims, and because many claimants may be unaware of their rights."[19] More broadly, Arbitrator and Adjunct Professor Barry Winograd took note of the position that "class actions play a significant and favored role in protecting the public's interest in full enforcement of important statutes for the benefit of employees, consumers, borrowers, and others."[20]

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of Plaintiffs' Counsel, in Arbitration 2008 – U.S. and Canadian Arbitration: Same Problems, Different Approaches, Proceedings of the Sixty-First Annual Meeting of the National Academy of Arbitrators 142, 145 (Patrick Halter & Paul D. Staudohar eds. 2009; hereinafter "Arbitration 2008") (emphasis in the original).

[18] *Cert. denied sub nom* Circuit City Stores, Inc. v. Gentry, 552 U.S. 1296 (2008).

[19] Martin H. Malin, *Class Action Waivers in Arbitration Agreements: The Chaotic State of the Law*, in Arbitration 2008, *supra* note 17, at 111, 119-20.

[20] Barry Winograd, *An Introduction to Mandatory Arbitration and Class Action Waivers*, in Arbitration 2008, *supra* note 17, at 127, 134.

Petitioner AT&T Mobility's stratagem in this case accommodates (to an extent) the one vigilant individual. It can totally nullify the interests of the other class members – and the public interest – that the class action was designed to promote.

CONCLUSION

For the reasons stated here and in the brief *amicus curiae* of the National Academy of Arbitrators and the brief of the respondents, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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