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 LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA AND NATIONAL CONSUMER ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae, who are described in an Appendix to this brief, are national public-interest organizations, coalitions of consumer groups and advocates, and legal-services providers. Amici advocate for the interests of consumers or provide legal services to consumers harmed by wrongful business practices. They submit this brief in support of respondents.

Petitioner AT&T Mobility LLC ("AT&T") and its amici maintain that because AT&T's ban on classwide proceedings is embedded in a mandatory arbitration clause, the Federal Arbitration Act ("FAA") preempts the application of state contract law holding the ban unenforceable as unconscionable and exculpatory. Amici are gravely concerned that if the Court accepts that position, businesses could effectively strip consumers of their right to pursue small claims in *any* forum because, for modest claims, classwide proceedings often offer the only effective means for consumers to obtain redress and to force businesses to halt illegal practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like the court of appeals below, state and federal courts across the country, applying the laws of twenty states, have ruled that prohibitions on classwide

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[1] No counsel for a party wrote 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 or entity other than amici curiae, their members, or their counsel made a monetary contribution to this brief's preparation and submission. The parties have filed blanket consents to amicus briefs.

proceedings (whether in court or in arbitration) may be unenforceable in particular cases under general contract-law principles. Respondents' Br. Appx. By its express terms, the FAA does not preempt the application of state contract-law principles to such class-action bans. *See* 9 U.S.C. § 2 (arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). This Court should reject petitioner's effort to turn a question of state-law unconscionability into one of federal law just because an arbitration provision is involved.

There is nothing surprising about the application of state contract law forbidding unconscionable terms and exculpatory clauses to class-action bans embedded in arbitration agreements. Prohibitions on aggregate litigation are properly held unconscionable or unfairly exculpatory where they make important contractual and statutory rights unenforceable—a circumstance that may arise when businesses have engaged in wrongful conduct that inflicts modest damages on individual consumers unlikely to have the knowledge, incentive, or effective means to obtain redress.

To begin with, the losses suffered by individual customers as a result of business misconduct often are small, even though the harm may be enormous in the aggregate. *See, e.g.*, Federal Trade Commission ("FTC") Staff Report, *Consumer Fraud in the United States: An FTC Survey* ES-2, 28, 39 (2004) (estimating that in one year, nearly 25 million adults were victims of certain kinds of consumer fraud; among those who lost money, median loss was $220), *available at* http://www.ftc.gov/

reports/consumerfraud/040805confraudrpt.pdf. When the loss is small, "it is less likely to be recognized by those affected." Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 68 (Rand Inst. for Civil Justice 2000) ("Rand Study"). Even if they realize they have been cheated, aggrieved consumers may not know they have legally enforceable rights, making it unlikely that they will seek relief from unlawful business practices.

When individual damages are low, moreover, it is often not economically feasible to hire a lawyer to take such a "negative value" suit without the ability to spread costs. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (class-action mechanism overcomes problem of small recoveries "by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor") (citation omitted); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[T]his lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."); *see also* Fed. R. Civ. P. 23, 1966 advisory comm. note (observing that "[t]he interest of individuals in conducting separate lawsuits . . . may be theoretic rather than practical" because "the amounts at stake for individuals may be so small that separate suits would be impracticable"). As the Federal Judicial Center ("FJC") has observed: "Without an aggregative procedure like the class action, the average recovery per class member or even the maximum recovery per class member seems unlikely to be enough to support individual actions in most, if not all, of the cases studied." Thomas E. Willging et al., *Empirical Study of Class Actions in*

Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 7 (Fed. Judicial Ctr. 1996).

Although the lack of counsel available to take small-value claims affects all consumers, persons living in poverty are particularly disadvantaged. Whereas an estimated two thirds of middle-class civil legal needs are not met, that estimate climbs to four fifths for low-income persons. *See* Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 377, 397 (2004); *see also* Legal Services Corporation, *Documenting the Justice Gap in America* 4 (2d ed. 2007) ("[o]nly a very small percentage of the legal problems experienced by low-income people (one in five or less) are addressed with the assistance" of a lawyer). As one district court emphasized in certifying a class action against a payday lender: "This is precisely the kind of case that class actions were designed for, with small or statutory damages brought by impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant." *Van Jackson v. Check 'N Go of Ill., Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000). Without a class action, that defendant "might get away with piecemeal highway robbery by committing many small violations that were not worth the time and effort of individual plaintiffs to redress or were beyond their ability or resources to remedy." *Id.*

Aggregate litigation levels the playing field in disputes between businesses (which automatically aggregate the costs and benefits of a practice affecting consumers) and individual consumers (who can do so only by joining a class). Class actions enable plaintiffs

"to exploit the 'economies of scale' the defendant already naturally enjoys from treating separate claims as a single litigation unit." Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1382 (2000). Because class counsel "can spread their investment over all of the claims—just as the defendant does—it becomes possible to make investments in the litigation that the plaintiffs could not make if the claims were prosecuted separately." *Id.* at 1380. As the California Supreme Court has recognized, the availability of classwide action is, "particularly in the consumer context, often inextricably linked to the vindication of substantive rights." *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1109 (Cal. 2005).

Individual arbitration is no substitute for class actions for the same reason that individual litigation in court is no substitute: "While many praise arbitration as relatively inexpensive, and geared to help persons with small claims to achieve justice, no one has seriously suggested that arbitration ensures an economically viable forum for persons with claims of five dollars, ten dollars, or even two hundred dollars." Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 80 (2000). If this Court rules that any class-action ban, no matter how onerous, is enforceable so long as it is included in an arbitration agreement, it will be a simple matter for businesses to prevent the effective enforcement of consumer rights. As one commentator put it: "Any transaction that may be cemented with the click of a mouse is susceptible to a class action waiver." Myriam Gilles, *Opting Out of*

Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 377 (2005).

Amici agree with and will not repeat respondents' arguments about the scope of FAA preemption. Instead, relying on their collective experience, amici take this opportunity to explain why the availability of aggregate litigation (whether in court or in arbitration) is often essential to secure compensation for consumers and to hold businesses responsible for unlawful practices. The FAA does not entitle businesses to insulate themselves from effective redress.

ARGUMENT

AGGREGATE ACTION IS OFTEN ESSENTIAL TO SECURE RELIEF FOR CONSUMERS AND TO HOLD BUSINESSES ACCOUNTABLE FOR WRONGDOING.

A. Businesses Have Adopted Class-Action Bans to Prevent Consumers from Bringing Legitimate Claims.

Petitioner's amici draw a false comparison between the pace and efficiency of a single individual arbitration and that of classwide proceedings. *See, e.g.*, Chamber of Commerce Brief ("Chamber Br.") 12-16; Center for Class Action Fairness Brief ("CCAF Br.") 4, 23-26. The proper comparison is between the claims of hundreds or thousands of individuals pursuing separate arbitrations and a class action. No one would argue that it is faster, more efficient, and more economical to arbitrate *thousands* of separate claims than to proceed with one class action. As one district court put it in applying Delaware law to invalidate a class-action ban: "If even a

tiny fraction of the 67,000,000 cardholders who [plaintiff] seeks to represent were to pursue a similar claim on an individual basis, the costs to Chase would be astronomical." *Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1370 (S.D. Fla. 2009) (noting that class-action ban may keep Chase's costs down, "but only because it precludes the company from having to defend against allegations of wrongful conduct").

As AT&T and other businesses well know, the real alternative to aggregate action is *not* thousands of individual claims, but no cases at all. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). Recognizing that reality, businesses made a concerted effort in the 1990s to adopt mandatory arbitration clauses foreclosing class actions to eliminate their exposure to claims of any sort. *See, e.g.*, Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator?*, 7 Bus. L. Today 24, 26 (1998) (urging lenders to impose arbitration in financial-services contracts because, "[s]tripped of the threat of a class action, plaintiffs' lawyers have much less incentive to sue"). *See generally* Gilles, 104 Mich. L. Rev. at 396-99 (describing corporate strategy of adopting arbitration to avoid class actions).

Telling evidence that businesses prohibit class actions to prevent rather than facilitate consumer redress comes from an empirical study of 26 consumer contracts and 164 nonconsumer contracts from large corporations, including AT&T. The study found that, although 75 percent of the consumer agreements

provided for mandatory arbitration and barred class actions, only 6 percent of the negotiated nonconsumer, nonemployment contracts contained arbitration clauses—a highly statistically significant difference. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 876, 882-84 (2008). The data established that the companies "overwhelmingly selected arbitration as the method for resolving consumer disputes and permitted litigation as the method for resolving business disputes." *Id.* at 883. The authors concluded that the studied businesses "do not view consumer arbitration as offering a superior combination of cost savings, expeditious decision-making, consistency, and justice" but instead "view consumer arbitration as a way to save money by avoiding aggregate dispute resolution." *Id.* at 894-95; *see also* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. Chi. L. Rev. 157, 173 (2006) (noting that in first two years after adoption of mandatory arbitration clause, credit-card issuer First USA filed 51,622 arbitration claims against customers, compared to four filed by consumers).

The danger these bans on class actions pose to the vindication of consumer rights cannot be overstated. As a growing number of courts have acknowledged in holding class-action bans unenforceable under certain circumstances, aggregate action—whether in court or in arbitration—is often imperative to protecting the rights of consumers and to forcing businesses to internalize the costs of their misconduct.

B. Aggregate Action Is Often Necessary to Vindicate Consumer Rights and to Hold Businesses Responsible.

Case books are brimming with class actions that have been brought to vindicate important federal and state consumer-protection statutes in a wide array of contexts, including telecommunications; mortgage, payday, auto, or other loans; title insurance; cable and other home-related services; debt collection; credit cards; consumer purchases; car rentals; rent-to-own services; and others. These actions, which often aggregate numerous small claims, *see* Rand Study 16, 420 (in five of six consumer class actions studied, average loss probably under $1,000),[2] probably could not have been pursued

[2] *E.g.*, *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (misrepresentation of credit-card rewards program, implicating <5% of cardholder's credit-card balance); *Ramirez v. Greenpoint Mortgage Funding, Inc.*, 2010 U.S. Dist. LEXIS 76302, at *50 (N.D. Cal. July 20, 2010) (racially discriminatory mortgage markups, with average 5-year recovery per loan of about $600-$1,100); *Cohen v. Chicago Title Ins. Co.*, 242 F.R.D. 295, 296 (E.D. Pa. 2007) ($169.89 overpayment on title insurance); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529, 535 (Ala. 2002) (claim under $500 for termite-control services); *Ford v. ChartOne, Inc.*, 908 A.2d 72, 78 (D.C. 2006) (charges totaling $38.16 to copy medical records); *Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 719 (D.C. 2003) (excessive $5 cable-service late fee); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 572 (Fla. Dist. Ct. App. 1999) (wrongful $4.50 charge on long-distance calls); *Feeney v. Dell Inc.*, 908 N.E.2d 753, 764 (Mass. 2009) (damages of $13.65 and $215.55 in challenge to sales-tax collection); *Ruhl v. Lee's Summit Honda*, 2010 Mo. LEXIS 200, at *6 (Mo. Aug. 31, 2010) ($600 potential recovery in challenge to car-financing document-preparation fees); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1217 (N.M. 2008) (misrepresentation causing $10-$20 loss per computer); *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d

individually if the contracts had included an arbitration clause with an enforceable class-action ban.

AT&T's own experience bears this out. Few individuals invoke AT&T's allegedly consumer-friendly arbitration clause. As the district court found, of AT&T's then-70 (now 90) million customers, only 570 filed demands for arbitration against AT&T during the period its revised arbitration agreement was in place, and AT&T identified no claims for deceptive advertising. Pet. App. 23a, 44a. Similarly, in *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009), the court had "tangible evidence" that "defendants' 'pro-consumer' provisions" were not having their alleged "intended effect," given that fewer than 200 consumer arbitrations involving AT&T or Cingular had been conducted nationwide since 2003.

In finding bans on class actions unconscionable, courts frequently have relied on consumers' inability to bring separate claims (whether in court or arbitration) because of economic infeasibility, lack of knowledge or incentive, or the inability to attract competent counsel, as well as on the resulting immunity conferred on businesses for wrongful conduct.

1. Consumer Lack of Awareness or Incentive to Vindicate Rights. In *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 263-76 (Ill. 2006), the Illinois Supreme Court held Cingular's class-action ban unconscionable

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693, 695 (N.Y. App. Div. 1986) (average $31 car-rental overcharge), *aff'd*, 509 N.E.2d 347 (N.Y. 1987); *In re Consol. Mortgage Satisfaction Cases*, 780 N.E.2d 556, 557 (Ohio 2002) ($250 in damages per mortgagor).

under Illinois law. Recognizing the practical obstacles to litigating individual challenges to the company's $150 early-termination fee, the court observed that "[t]he typical consumer may feel that such a charge is unfair, but only with the aid of an attorney will the consumer be aware that he or she may have a claim that is supported by law, and only with the aid of an attorney will such a consumer be able to make the merits of such a claim apparent in arbitration or litigation." *Id.* at 268.

In *Scott v. Cingular Wireless*, for example, a class of customers alleged that Cingular had overcharged them between $1 and $45 per month in unlawful roaming and hidden charges. The Washington Supreme Court held the class-action ban embedded in the contract's arbitration clause unconscionable under Washington law because "it effectively denies large numbers of consumers the protection of Washington's Consumer Protection Act . . . and because it effectively exculpates Cingular from liability for a whole class of wrongful conduct." 161 P.3d 1000, 1003 (Wash. 2007); *see also id.* at 1005-08. The court recognized that "[c]lass actions are vital where the damage to any individual consumer is nominal" and that this "vital piece" was exactly what the plaintiffs claimed the class-action ban "seeks to eviscerate." *Id.* at 1006. Importantly, the court recognized that, without class actions "many consumers may not even realize that they have a claim. . . . The class action provides a mechanism to alert them to this fact." *Id.* at 1007; *see also Gentry v. Super. Ct.*, 165 P.3d 556, 566 (Cal. 2007) (class-action bans in wage-and-hour cases are frequently exculpatory in part because "individual employees may not sue because they are unaware that their legal rights have been violated");

Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006) ("[W]ithout the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged."); *accord Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 747 (Wis. Ct. App. 2007). Class actions "enable even the unaware to be joined in lawsuits instituted on their behalf." Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1, 12 (2005) (citing successful class action brought by Medicare recipients denied reimbursements without notice or due process, many of whom were unaware of denials).

Challenging a business practice (whether in court or in arbitration) is often time-consuming and daunting for consumers. Most consumers do not have immediate access to a lawyer even if they can afford to seek advice. Low-income consumers, especially, have less flexibility in scheduling and can ill-afford to take time off from work to pursue claims. These real-world costs (apart from ignorance of legal rights or inability to pay attorney fees) prevent consumers from pursuing small claims. *See Reuter v. Davis*, 2006 WL 3743016, at *4 (Fla. Cir. Ct. Dec. 12, 2006) ("[P]arents working from payday to payday with babysitting, transportation, and employment issues, do not necessarily think they can afford attorneys or, if they do, have difficulty keeping appointments."). So it is unsurprising, for example, that, of the nearly 25 million adults affected by consumer fraud in one year, *see supra* p. 2, only 8.4 percent complained to a federal, state, or local agency or Better Business Bureau, and 2.4 percent consulted a lawyer or

other professional. FTC, *Consumer Fraud in the United States* E-6, 80-81, *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

In *Muhammad*, the New Jersey Supreme Court recognized not only the lack of knowledge but lack of incentive for consumers to pursue small recoveries. There, a plaintiff who had paid finance charges totaling $180 for three payday loans, at an annual interest rate exceeding 600 percent, brought a class action attacking such transactions under New Jersey's consumer-protection statutes. 912 A.2d at 91. After conducting "a careful fact-sensitive examination," *id.* at 97, the court held the contract's class-action bar unconscionable under New Jersey law. The plaintiff's case involved "a small amount of damages, rendering individual enforcement of her rights, and the rights of her fellow consumers, difficult if not impossible." *Id.* at 99. As the court reasoned, "[i]n most cases that involve a small amount of damages, 'rational' consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel were willing to take the case." *Id.* at 100; *see also Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 573 (S.D. Tex. 2000) (finding class resolution for payday borrowers superior in part because of "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually").[3]

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[3] Commentators have echoed these observations. *See* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 Law & Contemp. Probs. 75, 88 (2004)

2. Inability to Attract Counsel. The obstacles to securing competent counsel to pursue small claims, even in arbitration, can be prohibitive. *See* Issacharoff & Delaney, 73 U. Chi. L. Rev. at 170 ("Even low-cost arbitration may be too expensive to justify initiation of a claim against a seller unless the expected recovery is significant.") (citation omitted); Burch, 31 Fla. St. U. L. Rev. at 1027 (most lawyers refuse to take "negative value" individual claims). For instance, the small claims at issue in *Scott*, the court determined, were "impracticable to pursue on an individual basis *even in small claims court, and particularly in arbitration*." 161 P.3d at 1007 (emphasis added). Indeed, the court noted that *no* claims from Washington customers had been arbitrated against Cingular *in the preceding six years. Id.*

("[O]ften consumers do not know that a potential defendant's conduct is illegal. When they are being charged an excessive interest rate or a penalty for check bouncing, for example, few know or even sense that their rights are being violated. Nor, given the relatively small amounts at stake, would most consumers find it worthwhile to seek legal advice to determine whether this is the case.") (footnote omitted); Thomas Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 Fla. St. U. L. Rev. 1005, 1027 (2004) (because many consumers are unaware of potential claims against companies, allowing companies to force individual resolution of claims "will significantly reduce their exposure to liability from corporate wrongdoing"). Given this informational asymmetry and lack of meaningful consumer choice, *see* CTIA Br. 8 (most wireless carriers' nationwide service agreements limit arbitration to individual claims), the Center for Class Action Fairness's claim that if class actions are better for consumers than individual arbitration, "the market will make them available," CCAF Br. 4, 27, is plainly wrong.

Similarly, in invalidating an arbitration clause's class-action ban in *Reuter*, a case challenging usurious payday loans, the court found that "[t]he chance that [plaintiff] could have obtained competent counsel absent the possibility of class action status or successfully recognized a potential claim that she could effectively pursue without benefit of counsel is *effectively zero*." 2006 WL 3743016, at *5 (emphasis added). The court emphasized that among the 66,000+ customers who completed over 1 million transactions with annual interest rates exceeding 45 percent over a five-year period, "none has brought an individual claim." *Id.* at *4.

In *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part*, *rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), a substantial trial record was made on the feasibility of customers arbitrating individual claims against AT&T. The court specifically found that "[i]t would not have been economically feasible" for consumers to have pursued previous class actions against AT&T "on an individual basis, *whether the case was brought in court or in arbitration*." *Id.* at 918 (emphasis added). Indeed, it was "undisputed that the lawyers who represented the plaintiffs in these cases would not have taken them if the only claim they could have pursued was the claim of the individual plaintiff." *Id.*; *see also Brewer v. Mo. Title Loans, Inc.*, 2010 Mo. LEXIS 202, at *11-*12 (Mo. Aug. 31, 2010) (holding class-arbitration ban unconscionable and pointing to expert testimony from consumer lawyers that chances of finding attorney were "virtually nil" given "small damages at issue," "complicated nature of the case," and "likelihood of a heavily defended defendant"); *Coneff*, 620 F. Supp. 2d at 1257 (citing evidence that "the

relatively small amount in controversy makes cases against large corporations such as AT&T impractical to pursue on an individual basis" and that lawyers "would not represent the named Plaintiffs in individual actions, *either in court or in arbitration*") (emphasis added).

Attorney-fee provisions, a business's commitment to pay arbitration fees, and access to small-claims court do not solve the problem of small individual claims. As the New Jersey Supreme Court observed, the "availability of attorney's fees is illusory if it is unlikely that counsel would be willing to undertake the representation." *Muhammad*, 912 A.2d at 100 ("One may be hard-pressed to find an attorney willing to work on a consumer-fraud complaint involving complex arrangements between financial institutions of other jurisdictions when the recovery is so small."); *see also Scott*, 161 P.3d at 1007 ("Shifting the cost of arbitration to Cingular does not seem likely to make it worth the time, energy, and stress to pursue such individually small claims.");[4] *cf. Delta Funding Corp. v. Harris*, 912

[4] *See also Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1289 (D. Ariz. 2006) (finding "no indication" that "attorney fees are an adequate substitute" for class-action mechanism or that they "ameliorate the problems" posed by class-action bans) (citation omitted); *Feeney*, 908 N.E.2d at 764-65 (availability of attorney's fees, damages, and multiple damages "not sufficient to ensure that a consumer or business with a small-value claim will be able to find an attorney willing to take the case absent the ability to aggregate claims"); *Coady*, 729 N.W.2d at 747 n.15 (access to small-claims court not significant given doubts that attorneys would be willing to take individual small-claims cases or that plaintiffs could effectively represent themselves in small-claims court against multimillion-dollar national corporations).

A.2d 104, 115 (N.J. 2006) (rejecting challenge to class-arbitration ban where plaintiff sought more than $100,000 in damages).

That the possibility of a fee recovery does not provide adequate incentive for most lawyers to accept individual consumer cases is particularly true when fees and costs are likely to dwarf the recovery, making it less likely that a lawyer will be compensated adequately to bring the claim. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("results obtained" factor an important consideration in determining attorney-fee award); *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 n.21 (1st Cir. 2006) ("In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to 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."). "[P]ractically, attorneys are generally unwilling to take on individual arbitrations to recover trivial amounts of money." *Scott*, 161 P.3d at 1007.

3. Corporate Accountability. Because aggregate action is sometimes the only means by which consumers can vindicate their rights, it follows that "permitting the proponent of [a contract of adhesion] to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable." *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W. Va. 2002) (invalidating arbitration clause barring class actions as unconscionable under West Virginia law in

challenge to unauthorized addition of $8.44 in insurance to jewelry purchase). In short, a class-action ban potentially "gives defendant a virtual license to commit, with impunity, millions of dollars' worth of small-scale fraud." *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 951 (Or. Ct. App. 2007).[5]

Accordingly, respected treatises and many other commentators have emphasized that deterrence is a significant—if not the chief—purpose served by class actions. *See, e.g.*, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:36, at 314 (4th ed. 2002) ("Class actions were designed not only to compensate victimized members of groups . . . , but also to deter violation of the law, especially when small individual claims are involved."); National Association of Consumer Advocates ("NACA"), *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, Guideline 1 (2006) (a "focus on individual compensation misses a central point of class actions: deterring misconduct by the defendants"), *reprinted in* 255 F.R.D.

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[5] *See also Powertel*, 743 So. 2d at 576 ("The arbitration clause . . . effectively removes Powertel's exposure to any remedy that could be pursued on behalf of a class of consumers."); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 98 (Mo. Ct. App. 2008) ("Individualizing each claim absolutely and completely insulates and immunizes [the company] from scrutiny and accountability for its business practices and 'also serves as a disincentive for [the company] to avoid the type of conduct that might lead to class action litigation in the first place.'") (citations and internal quotation marks omitted); *Coady*, 729 N.W.2d at 747 ("[T]he prospect of class-wide relief 'ordinarily has some deterrent effect on a manufacturer or service provider,' but any such effect is eviscerated by arbitration clauses like Cross Country's.") (citation omitted).

215 (2009); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043, 2047, 2056-74 (2010) (small-stakes class actions serve only deterrence, not insurance, function).

These judicial and scholarly observations about the important accountability-function served by class actions are grounded in both economics and common sense. The Chamber of Commerce, however, contends that class actions do not discourage corporate misconduct. Chamber Br. 4-10. Nonsense. Class actions can induce compliance with the law in a way that individual litigation often cannot. As the California Supreme Court correctly observed in considering a class-action ban in an employment arbitration agreement:

> While employees may succeed under favorable circumstances in recovering unpaid overtime through a lawsuit or a wage claim filed with the Labor Commissioner, a class action may still be justified if these alternatives offer no more than the prospect of "random and fragmentary enforcement" of the employer's legal obligation to pay overtime. . . . In other words, absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime.

Gentry, 165 P.3d at 567 (citations omitted); *see also* Sternlight & Jensen, 67 Law & Contemp. Probs. at 90 (expressing skepticism that successful individual suits lead companies to change their policies, given that a company "may find it worthwhile to pay off a few individual claims but keep its overall policy"). It is more

profitable for a business to pay $100 to the few able to navigate the judicial or arbitration systems without a lawyer than to stop illegal practices that net thousands or millions of dollars a year.

Empirical research confirms that class-action lawsuits shape corporate conduct. In the Rand study, for example, corporate representatives interviewed by researchers admitted that class actions had "played a regulatory role by causing them to review their financial and employment practices. Likewise, some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions." Rand Study 9, 119. These accounts corresponded with changes in businesses practices. In all six consumer cases studied, the litigation was associated with changes in practice, and in four of the six, "the evidence strongly suggest[ed] that the litigation, directly or indirectly, produced the change in practice." *Id.* at 431.

Of course, obtaining monetary awards from defendants is not the only way to secure institutional change. "[T]he primary remedy sought in any small claims class action is often equitable in nature, making the payment of money to individual class members secondary to the far-more-valuable prospective relief." NACA Class Action Guideline 1. AT&T's clause foreclosing class actions, however, also bars injunctive relief extending beyond a customer's "individual claim." Pet. App. 61a.

A ground-breaking series of class actions that challenged racial discrimination in car financing is paradigmatic of the systemic change that classwide

treatment can achieve. Beginning in 1998, class actions brought under the Equal Credit Opportunity Act against virtually all major automotive lenders attacked practices permitting subjective and racially discriminatory dealer-markups of car-financing rates.[6] Lenders had allowed dealers to negotiate loans at rates higher than the rates at which the lenders were willing to extend the buyers credit and then rewarded the dealers for the markups. The buyer was not told that the dealership was marking up and profiting on the loan. Until the class actions were filed, many lenders had loan programs that placed no limits on how much dealers could increase the interest rates. *See* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 Cal. L. Rev. 669, 693-94 (2007) (describing industry lending practices).

Between 1993 and 2004, these subjective dealer markups cost African-American buyers on average between $347 and $508 more than whites in subjective markups. Mark A. Cohen, *Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation*, Vanderbilt University Law School, Law & Economics, Working Paper Number 07-01, at 13 (Dec. 2006), *available at* http://ssrn.com/abstract=951827; *see also Coleman v. GMAC*, 196

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[6] *See, e.g.*, *Cason v. NMAC*, No. 3-98-0223 (M.D. Tenn.); *Coleman v. GMAC*, No. 3-98-0211 (M.D. Tenn.); *Smith v. Chrysler Fin. Co.*, No. 00-6003 (DMC) (D.N.J.); *Jones v. Ford Motor Credit Co.*, No. 00-CIV-8330 (PAC) (KNF) (S.D.N.Y.); *Baltimore v. Toyota Motor Credit Corp.*, No. CV-01-05564-FMC (Mcx) (C.D. Cal.); *Borlay v. Primus Auto. Fin. Servs., Inc.*, No. 3-02-0382 (M.D. Tenn.); *Willis v. American Honda Fin. Corp.*, No. 3-02-0490 (M.D. Tenn.).

F.R.D. 315, 320 (M.D. Tenn. 2000) (for GMAC customers, African Americans allegedly charged on average $315.35 more than whites), *rev'd on other grounds*, 296 F.3d 443 (6th Cir. 2002).[7]

Settlements of these class actions achieved significant equitable relief—such as caps on dealer markups; offers of pre-approved, no-markup loans to hundreds of thousands of African American and Hispanic customers; and disclosure and consumer education programs. *See* Ayres, 95 Cal. L. Rev. at 704-16 (describing key settlements); Cohen, *Imperfect Competition* 33-34 (same); National Consumer Law Center, Auto Finance Discrimination (links to settlement documents in several auto-finance class actions), http://www.nclc.org/litigation/case-index-closed-cases.html. An estimated 1.4 million African-American car financers benefited, in an amount exceeding $800 million. Ayres, 95 Cal. L. Rev. at 716.

Equally important, the litigation "reshaped loan pricing throughout the industry." *Id.* at 714-15 (documenting the chronology of reform in industry practice); Cohen, *Imperfect Competition* 37-40 (describing resulting market changes). Such fundamental reforms of an entire industry could have been accomplished only through classwide proceedings—and could have been evaded by adding arbitration clauses foreclosing class actions to car-financing contracts.

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[7] Professors Ayres and Cohen served as expert witnesses for the plaintiffs in several of these cases.

C. Attacks on Class-Action Abuses Are Exaggerated and Irrelevant.

AT&T and its amici attack class actions as flawed and the lawyers who bring them as essentially corrupt. *See, e.g.*, Petitioner's Br. 46 n.14; Chamber Br. 7-11, 17-19; CCAF Br. 6, 11-22.

These criticisms have nothing to do with the question presented here. Congress did not enact the FAA to regulate the conduct of class-action litigation. The existence of some abuses is a reason to correct them, not to eliminate class actions entirely, and courts and arbitrators have ample authority to supervise classwide proceedings. Every instance of class-action abuse is matched by multiple examples of class-action successes, and, as discussed above, aggregate litigation often affords the *only* effective means for consumers to obtain redress and to hold businesses accountable for misconduct. Indeed, even while it modified the rules governing them, Congress made the judgment 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 against a defendant that has allegedly caused harm." Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 2(a)(1) (2005).

In any event, empirical research demonstrates that the broadside attacks against class actions and the lawyers who bring them are either exaggerated or not borne out by the facts. We address several of the key arguments below.

1. Class Actions as Blackmail. AT&T and its amici repeat what is dogma for class-action opponents—that many class actions are essentially strike suits that coerce defendants to settle even when the plaintiff's claim has little merit. *See* Petitioner's Br. 46 n.14; Chamber Br. 8-9. Both the blackmail claim and its related premise—that "almost all class actions settle," Chamber Br. 9 (quoting Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002))—have little basis in reality.

In its study of class-action litigation in four federal district courts and in later research as well, the FJC found that class and nonclass settlement rates were comparable; that class actions could not successfully be deployed as strike suits because defendants generally had a reasonably prompt chance to test the merits; and that there was no objective evidence that settlements were coerced even by class-certification decisions. *See* Willging et al., *Empirical Study* 7-10, 32-34, 60-62, 89-90; *see also* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 645-50 (2006).

A basic premise of the "blackmail," or "strike suit," charge is that defendants are coerced into settling meritless class actions because they lack "a cost-effective opportunity to litigate the merits." Willging et al., *Empirical Study* 32. Yet the FJC found that defendants generally had an opportunity to obtain a judicial ruling on dispositive motions in a reasonably timely manner. *Id.* at 34. Approximately two thirds of

cases had rulings on a motion to dismiss or for summary judgment or a sua sponte dismissal order. *Id.* at 32. Three fifths of cases were dismissed or had summary judgment granted in whole or in part in two districts and two fifths in the other two districts. *Id.* at 33.

As a result, for at least one third of cases, "judicial rulings on motions terminated the litigation *without a settlement, coerced or otherwise*." *Id.* at 34 (emphasis added). A 2005 study by the FJC (of cases filed in, removed to, and remanded by federal courts) found that federal and state courts certified 24 percent of cases as class actions and that most cases not certified were terminated by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' individual claims. Willging & Wheatman, 81 Notre Dame L. Rev. at 606-07. The frequency and success of rulings on dispositive motions and relative infrequency of class certification dispel the myth that the mere filing of a class action exerts undue pressure on defendants to settle.

Cases certified as class actions are even more rigorously tested. In the 1996 FJC study, more than two thirds of certified class actions in the four districts had rulings on a motion to dismiss, motion for summary judgment, or both, leading the FJC to conclude that the prevalence of judicial rulings and active case management "greatly diminishes the likelihood that the certification decision itself, *as opposed to the merits* of the underlying claims, coerced settlements with any frequency." Willging et al., *Empirical Study* 61 (emphasis added). Of course, "[n]othing is self-evidently wrong with a settlement that occurs because a defendant

fears losing at trial. Settlements occur everyday for this reason, and no one questions their desirability." Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1359 (2003). The potential for a loss on the merits is always a primary factor affecting a defendant's willingness to settle. The only difference here is that a class-action defendant faces liability for wrongs done to a multitude rather than just to one individual.

Even the claim that all *certified* class actions settle, *see* Chamber Br. 7, 9, is overstated. Willging & Wheatman, 81 Notre Dame L. Rev. at 647. In the FJC's 2005 study, almost a quarter of cases certified for trial and litigation did not result in an approved classwide settlement. *Id.* The settlement rate for certified class actions was similar to that of conventional lawsuits, with approximately 70 percent of cases filed in federal court ending in pretrial settlement. Silver, 78 N.Y.U. L. Rev. at 1401-02; Bone & Evans, 51 Duke L.J. at 1285 n.129.

In sum, the assertion that class actions unfairly coerce businesses into settlements and that this coercion nullifies whatever deterrent effect a class device might have, *see* Chamber Br. 10, is not supported by the facts. And to the extent that class certification exerts what is usually *deserved* settlement pressure, the 1998 addition of subsection (f) to Federal Rule of Civil Procedure 23, authorizing discretionary interlocutory appeals from the grant or denial of class certification, diminishes it. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004); *see also* Fed. R. Civ. P. 23, 1998 advisory comm. note. And, while certification may induce some defendants to settle, the *denial* of class certification is just as likely to

create "hydraulic" pressures on *plaintiffs*, "causing them to either settle or—more likely—abandon their claims altogether." *Klay*, 382 F.3d at 1275.

2. Excessive Attorney Fees Relative to Class Recoveries. Another totem for AT&T and its amici is that class lawyers reap huge fees from class settlements that leave class members with "pennies on the dollar" or worthless coupons (particularly non-transferable coupons with no market value). *See* Petitioner's Br. 46 n.14; Chamber Br. 18-19; CCAF Br. 6, 11-22. We agree that some class settlements have unreasonably enriched lawyers and provided insufficient benefits to the class. Indeed, our amici stand at the vanguard of efforts to provide guidance to class-action lawyers to help them maximize class recoveries. *See, e.g.*, NACA Class Action Guideline 4 (urging that coupon settlements "should generally be avoided"). But AT&T and its amici significantly overstate the problem.

First, "pennies on the dollar" recoveries: In examining the incidence of so-called "two-dollar" class-member recoveries, the FJC's 1996 study focused on class actions in four districts that produced an average distribution per class member under $100. There were only nine such cases over the two-year period studied, eight of which were securities cases. Willging et al., *Empirical Study* 14. None involved "two-dollar cases," which led the FJC to conclude that "[t]he absence of such nominal recoveries in the four districts suggests that the anecdotal cases on which the discussion was based, which presumably arose in other districts, may represent outlier cases at the bottom of the range of class action recoveries." *Id.* The FJC did not find

"recurring situations where (b)(3) actions produced nominal class benefits in relation to attorneys' fees." *Id.* at 11, 77.

Second, coupon settlements: Even before Congress limited the incentive to negotiate them by linking attorney-fee awards to the value of coupons redeemed, 28 U.S.C. § 1712, the prevalence of coupon settlements had sharply dropped because of increased judicial scrutiny. *See* NACA Class Action Guideline 4 (citing, *e.g.*, *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995)). The FJC's 2005 pre-CAFA study reported that transferable coupons were the sole recovery in only 4 percent of class actions studied and that in only two cases (1 percent), were nontransferable coupons the sole class remedy. Willging & Wheatman, 81 Notre Dame L. Rev. at 651; *accord* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1739 (2008).

Third, attorney fees: Although the Rand study found that, in three of six consumer cases studied, class counsel received more than the total class recovery, Rand Study 437, broader empirical studies have determined that "[i]n most cases, net monetary distributions to the class exceeded attorneys' fees by substantial margins," Willging et al., *Empirical Study* 11, 69; *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. of Empirical Legal Stud. 248, 250, 253-55 (2010) (overwhelmingly important determinant of attorney fee is size of class recovery).

Even the Rand study found that, overall, in considering actual dollars paid out, class counsel received one third or less than the actual settlement value in six of the ten total cases studied. Rand Study 435. More importantly for present purposes, the Rand study concluded that, because the average loss in the consumer cases was less than $5,000 and in five of six cases probably less than $1,000, "[i]t is highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense." *Id.* at 420 (footnote omitted). Indeed, the report emphasizes that in all of the cases studied, "class members would not likely have received any monetary compensation absent a class action or some other form of aggregation." *Id.* at 467. Again, if arbitration clauses containing class-action bans had been inserted in the contracts in these cases, then *no* relief for class members would have been achieved, and the companies would have had no incentive to alter their behavior—as the study found that they had. *See id.* at 9, 119, 431.

Empirical research has also repeatedly established that the average attorney-fee award in class actions hovers at one third or less of the total settlement—comparable to or even lower than the traditional one-third rate for contingency-fee nonclass litigation. Willging et al., *Empirical Study* 90 ("Based on anecdotal evidence, we expected to find a high level of abuse in the form of attorneys' fees that were disproportionate to the class recoveries. Instead we found that attorneys' fees were generally in the traditional range of approximately one-third of the total settlement."); *id.* at 69 (fee-recovery rate infrequently exceeded traditional 33.3% rate, with median rates ranging from 27% to 30%);

Willging & Wheatman, 81 Notre Dame L. Rev. at 651 (2005 FJC study finding that attorney fees and expenses typically 29% of total recovery).

This finding is particularly robust, having been confirmed by recent ambitious studies. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 1, 4, 27 (forthcoming 2010; manuscript pagination) (mean and median attorney-fee awards using percentage-of-settlement method were about 25%), *available at* http://ssrn.com/abstract_id=1442108; Eisenberg & Miller, 7 J. Empirical Legal Stud. at 260, 262 (overall mean and median fee-to-recovery ratios were 24% and 25%, respectively, and 25% and 20% for consumer class actions). State courts award lower-than-average percentage fees, with a mean fee-to-recovery ratio of 20 percent. Eisenberg & Miller, 7 J. Empirical Legal Stud. at 259, 261.

Significantly, Eisenberg and Miller's research documents a substantial "scaling effect"—that class counsel receive a smaller proportion of the recovery as recovery size increases—over the 15-year period studied. *Id.* at 263-64. That scaling effect confirms that aggregate litigation produces "the kind of efficiency hoped for." *Id.* at 279. Only with aggregate litigation can consumers hope to exploit the same scale economies as businesses litigating the same disputes.

Consumers, not lawyers, reap the overwhelming share of class-action recoveries. One major study of 1,120 class actions showed that for every dollar recovered in common-fund class actions, 18.4 cents went to attorneys for fees and other costs, and 81.6 cents went

to class members, "which should seem to be a pretty good deal for class members." Stuart J. Logan et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports 169 (Apr. 2003). Professor Fitzpatrick's study of 688 class settlements found that the "perennial concern with class action litigation" that "class action lawyers are reaping an outsized portion" of class recoveries "may be exaggerated" because only 13 percent of the total settlement amount in 2006, and 20 percent of the amount in 2007, went to class-action lawyers in fee and expense awards. Fitzpatrick, 7 J. Empirical Legal Stud. at 23-24 (manuscript pagination). The attacks on class actions and the lawyers who bring them are, again, based more on atypical anecdotes than on empirical evidence regarding general practice.

3. Government Enforcement Authority. Government enforcement authority does not render classwide litigation unnecessary. *See* Chamber Br. 3, 5-6; Am. Bankers Ass'n Br. 21-29. As this Court has recognized, "[t]he 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*." *Deposit Guar. Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 339 (1980) (emphasis added). The argument that regulatory enforcement is sufficient is also at odds with clear legislative intent in California and elsewhere to authorize private enforcement of consumer and employee protections. *See, e.g.*, *Feeney*, 908 N.E.2d at 765 (as purposes of Massachusetts' consumer-protection statute reflect, "availability of the Attorney General's enforcement authority is . . . not sufficient to ensure that the goals of the statute are realized").

The fact is, "in practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations." Rand Study 69. That is true of federal as well as state agencies. In 2009, the Consumer Sentinel Network, an online database of consumer complaints made to the FTC, Better Business Bureaus, and other agencies and organizations, received more than 1.3 million consumer complaints—over 720,000 fraud-related. FTC, *Consumer Sentinel Network Data Book for Jan. - Dec. 2009*, at 3 (2010), *available at* http://www.ftc.gov/sentinel/reports/sentinel-annualreports/sentinelcy2009.pdf. Obviously, the FTC, with its staff of 1,100 employees, *see* FTC, *Performance and Accountability Report, FY 2009*, at III, *available at* http://www.ftc.gov/opp/gpra/2009parreport.pdf, lacks the resources to investigate and respond to this volume of complaints, and so it depends on supplemental private enforcement. *See* FTC's Thomas B. Leary Addresses Class Action Litigation Summit (2003) ("The Federal Trade Commission is a relatively small agency with broad competition and consumer protection responsibilities. . . . We depend on private litigation to supplement our efforts, and therefore, we have a direct interest in the way that class actions are administered."), http://www.ftc.gov/opa/2003/06/learyspeech.shtm; *see* Rand Study 69-70 (citing examples of regulatory agencies relying explicitly on private actions to augment their efforts).[8]

[8] *See also Cooper*, 503 F. Supp. 2d at 1289 ("The mere possibility that a state agency may at some time file an enforcement action should not preclude Plaintiff and other similarly situated consumers

Equally telling is a recent article by a Food and Drug Administration ("FDA") official, who advised the food industry that the FDA could not possibly respond to most deceptive food claims. "Going after them one-by-one with the legal and resource restraints we work under is a little like playing Whac-a-Mole . . . ." Expressing doubts that it would bring enforcement actions, given "FDA's finite resources," the official "call[ed] on the food industry to exercise restraint" and invited scrutiny by the Center for Science in the Public Interest and the media. Michael Taylor, *How the FDA Is Picking Its Food Label Battles*, The Atlantic (2010), http://www.theatlantic.com/food/print/2010/07/how-the-fda-is-picking-its-food-label-battles/59927.

In the absence of governmental action, class actions can bring corporate misconduct to light and even spur public agencies to act. *See, e.g.*, *Wilson v. Airborne, Inc.*, 2008 U.S. Dist. LEXIS 110411, at *4, *10, *35 (C.D. Cal. Aug. 13, 2008) (approving creation of $23.25 million non-

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from seeking a legal remedy . . . ."); *Ting*, 182 F. Supp. 2d at 920 (rejecting argument that FCC is forum before which class members can "effectively vindicate" right to recover damages from AT&T); *Gentry*, 165 P.3d at 569 (rejecting argument that availability of enforcement by Labor Commissioner is "adequate substitute for classwide arbitration"); *Kinkel*, 857 N.E.2d at 276 (state attorney general's authority to bring action insufficient, given office's need to allocate "scarce resources to a variety of issues affecting consumers"); *Vasquez-Lopez*, 152 P.3d at 950 ("possibility of state action cannot reliably serve as a substitute for private actions," given attorney general's contention that amount of consumer fraud in state "far exceeds" ability to investigate and prosecute it); *Scott*, 161 P.3d at 1004 (noting declaration by consumer-protection chief that attorney general's office lacked "sufficient resources to respond to many individual cases" and often relied on private class actions).

reversionary settlement fund in nationwide class action brought by purchasers of Airborne, a product that falsely touted it was a "Miracle Cold Buster" that could ward off a cold after onset, and using a fee multiplier of 2.0 in part because case "may have been a factor in a subsequent investigation by the [FTC] and the attorneys general of many states"); FTC Press Release (Aug. 14, 2008) (FTC complaint and agreed-upon final order followed settlement of *Wilson* class action), *available at* http://www.ftc.gov/opa/2008/08/airborne.shtm. But by inserting into its packaging a mandatory arbitration clause with a class-action ban, Airborne potentially could have avoided accountability (public or private).

4. Supposed Consumer Cost-Savings. Finally, petitioner's amici argue that class-action bans in arbitration clauses are economically beneficial to consumers because the alleged cost-savings to businesses are passed along to customers in the form of lower costs. CTIA Br. 12; Am. Bankers Ass'n Br. 14. That self-serving claim is baseless. Although the degree to which prohibitions on aggregate action result in lower costs to consumers is an empirical question, "so far, no empirical data exists." Burch, 31 Fla. St. U. L. Rev. at 1028; *accord* Issacharoff & Delaney, 73 U. Chi. L. Rev. at 170 n.67. And if businesses save money from class-action bans, it is only because they have denied aggrieved customers effective recourse.

The court's rejection of AT&T's cost-savings argument in *Ting* is particularly apt. The court was not prepared to assume, without evidence, that AT&T's dispute-resolution provisions produced lower charges, "since while lower costs can produce lower charges, they

can also produce higher profits." 182 F. Supp. 2d at 931 n.16. More importantly, however, "the 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." *Id.*

We could not have said it better.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

AMICI CURIAE

The Legal Aid Society of the District of Columbia, a District of Columbia non-profit organization, was founded in 1932 to "provide aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better serve their needs." Legal Aid By-Laws, Art. II. Legal Aid is the oldest general civil legal service program in the District of Columbia and represents hundreds of litigants each year before the District's courts and administrative agencies. Legal Aid's consumer practice, founded in 2008, seeks to protect low-income residents of the District of Columbia from unfair, deceptive, exploitative, or otherwise unlawful consumer practices and transactions. Legal Aid is committed to ensuring that low-income consumers can effectively enforce their contractual and statutory rights. It believes that for modest consumer claims, classwide proceedings are often necessary to enable consumers to obtain redress and hold businesses accountable for misconduct.

AARP is a non-partisan, non-profit organization dedicated to representing the needs and interests of people age fifty and older. AARP is greatly concerned about fraudulent, deceptive, and unfair business practices, many of which disproportionately harm older people. AARP thus supports laws and public policies designed to protect older people from such business practices and to preserve the legal means for them to seek redress. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

The Center for Responsible Lending is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive consumer practices. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $5 billion in financing to help more than 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

The Center for Science in the Public Interest ("CSPI") is an independent non-profit organization supported by more than 750,000 individual members as well as charitable donations and foundation grants. CSPI accepts no funding from industry or government agencies. As part of its advocacy efforts, CSPI publishes an award-winning Nutrition Action Healthletter to inform its members of health topics of interest. CSPI's litigation department has used state consumer protection laws to achieve more honest labeling of artificial ingredients and to halt deceptive marketing. Litigation, or the threat of litigation, has spurred several companies to change their practices. In many of these cases, CSPI had long sought voluntary change by the companies or action by regulators, to no avail. CSPI's experience shows that without the threat of litigation, these changes would not have happened.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A nonprofit 501(c)(3) organization, Consumer Action focuses on financial education that empowers low- to moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. Consumer Action was a named plaintiff in

successful court challenges to mandatory arbitration in AT&T and Bank of America consumer agreements.

Consumer Federation of America ("CFA") is an association of nearly 300 non-profit consumer organizations. CFA was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA works to advance consumer interests and pro-consumer policies by researching and reporting consumer issues and behavior, and by advocating about consumer concerns before the federal and state governments. CFA also educates the public, news media, and policymakers about consumer issues, and supports consumer-oriented organizations in their work. CFA's membership is comprised of national, state, and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations.

The National Association of Consumer Advocates ("NACA") is an association of over 1,500 consumer advocates organized to help create and strengthen state and federal laws designed to protect purchasers from unscrupulous business practices in connection with consumer transactions. NACA has established itself as one of the most effective advocates for the interests of consumers in this country. Its publication, *Standards and Guidelines for Litigating and Settling Consumer Class Actions, Revised*, 255 F.R.D. 215 (2009), serves as a reference to lawyers and judges alike.

The National Consumer Law Center, Inc. ("NCLC") is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a nationally recognized expert on consumer credit issues and has drawn on this expertise to provide information,

legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over forty years. NCLC is the author of the widely praised eighteen-volume *Consumer Credit and Sales Legal Practice Series*, which includes manuals on *Consumer Arbitration Agreements* (5th ed. 2007 and Supp. 2009) and *Consumer Class Actions* (7th ed. 2010). NCLC has been actively involved in the debate concerning mandatory pre-dispute arbitration clauses, class-action bans, and access to justice for consumers. On September 15, 2009, NCLC's Director of Litigation provided testimony to the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee on *Mandatory Binding Arbitration: Is it Fair and Voluntary?*. In April, 2010, NCLC published a report entitled *Forced Arbitration: Consumers Need Permanent Relief*. NCLC frequently is asked to appear as amicus curiae in consumer-law cases before courts around the country and does so in appropriate circumstances.

The National Consumers League's mission is to work toward social and economic justice for consumers and workers in the United States and abroad. The League believes that access to justice is an essential component of achieving social and economic justice and that the explosion of mandatory-arbitration clauses in consumer contracts, intended to constrict the public's access to the courts, is undemocratic and against the social and economic interests of both consumers and workers. Moreover, without the class-action process many, many meritorious cases would never be heard. NCL therefore supports the right of consumers and workers to band together in class actions to fight injustice.

The National Legal Aid and Defender Association ("NLADA"), established in 1911, is the largest national organization dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender systems. Among NLADA's more than 2,000 members are civil legal aid programs and legal services providers who are funded by IOLTA programs in all fifty states, the District of Columbia, and the Virgin Islands. These programs represent thousands of individuals whose rights as consumers have been violated, often by the same individual or corporation. The scarce resources of NLADA's members, and the overall interests of the clients they serve, are often most effectively and efficiently used through the pursuit of class-action relief.

Public Good is a public-interest organization dedicated to the proposition that all are equal before the law. Through amicus curiae participation in cases of particular significance for consumer protection, civil rights, and civil liberties, Public Good seeks to ensure that the protections of the law remain available to everyone. Access to class-action procedures for claims that would not otherwise be adjudicated or arbitrated exemplifies the rights that Public Good seeks to defend.

U.S. PIRG (Public Interest Research Group) is a federation of twenty-five state-based, citizen-funded, non-profit, non-partisan organizations that advocate for the public interest. With its staffs of researchers, advocates, organizers, and students, the PIRG federation supports citizen interest in opposition to commercial or governmental wrongdoing that threatens the health or safety of Americans, or violates fundamental principles of fairness and justice. Specifically, with respect to consumer rights, U.S. PIRG takes action on issues including consumer protection

from unfair and deceptive practices, unconscionable fees and charges, product safety, warranties, monopolization, investor protection, utilities regulation, healthcare, and consumer privacy. U.S. PIRG conducts investigative research, publishes reports and exposés, and advocates for legislation and regulatory changes at the local, state, and federal levels. It supports procedural rights that allow consumers to seek redress for violations of consumer protection laws and to enjoin illegal practices. The PIRG federation has been active for thirty-eight years. The federation is supported by hundreds of thousands of citizens via membership contributions and receives a significant portion of its funding from foundation grants.