No. 16-16915

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARCUS A. ROBERTS, KENNETH A. CHEWEY, ASHLEY M. CHEWEY and JAMES KRENN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

AT&T MOBILITY LLC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
The Honorable Edward M. Chen
D.C. No. 3:15-cv-03418-EMC

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE, P.C. IN SUPPORT OF PLAINTIFFS-APPELLANTS

Karla Gilbride
F. Paul Bland, Jr.
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, D.C. 20006
(202) 797-8600

Brian Hardingham
PUBLIC JUSTICE, P.C.
555 12th Street, Suite 1230
Oakland, CA 94607
(510) 622-8150

Counsel for Amicus Curiae Public Justice, P.C.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Public Justice, P.C. states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. Through its work on this project, Public Justice is well-acquainted with the developments in arbitration law, both at the state and federal level, over the past few decades, and in particular how general state law defenses to the formation of contracts, such as unconscionability, have been dramatically curtailed as applied to arbitration clauses by the U.S. Supreme Court's jurisprudence.

Public Justice frequently represents consumers challenging unfair arbitration contracts. It has a strong interest in ensuring that consumers retain their rights to challenge deceptive and abusive corporate conduct in public courts, rather than

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, amicus affirms that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person, other than *amicus*, its members, and counsel, contributed money that was intended to fund preparing or submitting this brief. And in accord with Ninth Circuit Rule 29-3, amicus affirms that all parties consented to the filing of this brief.

having their valid claims suppressed by adhesive arbitration agreements that make it difficult or impossible for them to pursue those claims.

INTRODUCTION

With its opinion in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the U.S. Supreme Court overrode precedent set forth by appellate courts and state courts of last resort that had previously held—under the law of 16 different states—that adhesive consumer contracts with class action bans are unconscionable in cases where those contract terms would gut consumer protection or civil rights statutes. Moreover, because this radical change in the law of unconscionability was grounded in the "liberal federal policy favoring arbitration" and required neutral state laws that regulated all contracts to meet a more demanding standard when contracts to arbitrate were involved, to ensure that those neutral state laws did not have a "disproportionate impact" on arbitration, the *Concepcion* opinion elevated arbitration agreements to a privileged status above other types of contracts. This Court recognized as much in *Mortenson v. Bresnan Communications, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013), when it observed that "*Concepcion* crystalized the directive . . . that the FAA's purpose is to give preference (instead of mere equality) to arbitration provisions."

Through this radical expansion of the FAA's reach and concurrent narrowing of its savings clause, the Supreme Court majority in *Concepcion*

"alter[ed] the legal relations between" consumers and the drafters of adhesive contracts, and "selectively withdr[ew] from [consumers] legal protections against [corporations'] private acts" by making it impossible for consumers to sue those corporations in court when they violated the law, and making it economically infeasible for consumers to pursue their individual small-value claims against corporations in arbitration either. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 782 (1996) (Kennedy, J., concurring). And by interpreting the FAA in a manner "giving preference" to arbitration, *Mortenson*, 722 F.3d at 1160, the Supreme Court has encouraged more and more corporations to promulgate adhesive arbitration agreements, knowing that their enforcement will be "ensured." *Id.* at 1159; *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202 (9th Cir. 1998) (describing the so-called "encouragement test" for establishing state action). By offering an in-depth look at how *Concepcion* changed the law around class action bans specifically and unconscionability more generally, and what has happened to consumer claims in the aftermath of that ruling, Public Justice aims to provide historical context for Plaintiffs' state action and Petition Clause arguments.

ARGUMENT

This brief first examines the state of the law of unconscionability with respect to class action bans in consumer contracts across many jurisdictions before

Concepcion, then turns to the *Concepcion* decision itself and the massive extent to which it wiped away both pending and future consumer claims. Both in the extreme degree to which it changed existing law in many states and the chilling effect it has had on consumers' ability to hold corporations accountable for violations of law by filing suit in court, *Concepcion* provides a particularly striking example of how the Supreme Court's interpretation of the FAA has empowered drafters of adhesive arbitration agreements at the expense of consumers.

I. Before *Concepcion*, Every Federal Circuit Court and State Court of Last Resort to Consider the Issue Held that the FAA Does Not Preclude Courts From Striking Down Class-Action Bans under Generally Applicable State Contract Law.

Section 2 of the Federal Arbitration Act (FAA) makes written agreements to arbitrate "valid, irrevocable, and enforceable." 9 U.S.C. § 2. This clause in isolation would require the enforcement of *all* arbitration agreements no matter how exculpatory their terms, or even in the absence of bargained-for exchange. To avoid this harsh consequence, § 2 also includes a savings clause, which expressly conditions the enforceability of arbitration agreements on grounds available "at law or in equity for the revocation of any contract." Section 2 thereby preserves an essential role for state common law: it makes arbitration agreements subject to standard contract-law defenses, and indicates that parties are not to be stripped of their right to sue in court based on contract terms that are invalid or contrary to public policy.

Looking to § 2, the Supreme Court has found that "Congress precluded States from singling out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), thereby ensuring that arbitration agreements cannot be deemed unenforceable simply by virtue of being arbitration agreements. But the Court has also historically given weight to the savings clause, holding that under § 2, "States may regulate contracts, including arbitration clauses, under general contract law principles." *Id.* at 686. Noting that § 2 "places arbitration agreements on an equal footing with other contracts," the Supreme Court indicated that as with other contracts, "generally applicable contract defenses, such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements." *Doctor's Assocs.*, 517 U.S. at 687.

Consonant with *Doctor's Associates*'s characterization of unconscionability as a "generally applicable contract defense," the Restatement (Second) of Contracts notes that the "policy against unconscionable contracts or terms applies to a wide variety of types of conduct" and that "[t]he determination that a contract or term is or is not unconscionable is made in light of its setting, purpose and effect." Restatement (Second) of Contracts § 208, cmt. a (1981). The common law of many states likewise acknowledges that "public policy considerations [often] determine whether a contract term is sufficiently unfair or oppressive to be deemed unconscionable." *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 35 (Or. 2010)

(collecting cases dating back to the 1880s); *see also Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008) (characterizing unconscionability as "a doctrine that exists for the revocation of any contract").

California's unconscionability doctrine—which eventually became the focus of *Concepcion*—is codified in California Civil Code § 1670.5, which is "applicable to all types of contracts, rather than as part of the Commercial Code." *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 123 n.12 (Cal. Ct. App. 1982); *see also Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 175 (Cal. 1981) (indicating that unconscionability is "applicable to all contracts generally"). California courts may "refuse to endorse" any contract found "to have been unconscionable at the time it was made" or sever or "limit the application of any unconscionable clause so as to avoid any unconscionable result." Cal. Civ. Code § 1670.5.

Like the common law of other states, California's unconscionability doctrine also includes the longstanding general prohibition on exculpatory clauses in all contracts, which existed in "the common law of England and America before the declaration of independence." *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 412 (1889). That rule, present in California law since 1872, renders unenforceable "*[a]ll contracts* which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud." Cal. Civ. Code § 1668 (emphasis added).

In *Discover Bank v. Superior Court*, the California Supreme Court considered the enforceability of a class-action ban contained in the arbitration provision of a standard credit card agreement and concluded that "at least some class action waivers in consumer contracts are unconscionable under California law." *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005). The court found procedural unconscionability because the credit card agreement was an adhesive contract that had been sent to consumers as a "bill stuffer." *Id.* With respect to substantive unconscionability, the court noted that class-action bans "may operate effectively as exculpatory contract clauses" because when many consumers are exposed to a seller's fraudulent practices "the class action is often the only effective way to halt and redress such exploitation." *Id.* at 1108-09. And even when consumers are aware of the fraud, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* at 1105-06 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)). Accordingly, class actions are "inextricably linked to the vindication of substantive rights," and class-action bans, "at least to the extent they operate to insulate a party from liability that would be imposed under California law, are generally unconscionable." *Id.* at 1109.

Rather than creating a per se rule that all class action waivers were unconscionable, *Discover Bank* held that "when the waiver is found in a consumer

contract of adhesion in a setting in which the disputes between the contracting parties predictably involve small amounts of damages," and it is alleged "that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," the waiver is effectively an "exemption of the party 'from responsibility for its own fraud, or willful injury to the person or property of another,'" and "unconscionable under California law." *Discover Bank*, 113 P.3d at 1110 (quoting Cal. Civ. Code. § 1668).

California's *Discover Bank* rule was hardly an outlier: at the time *Concepcion* was decided, class-action bans (regardless of whether they were contained in arbitration agreements) had been held to be unenforceable under the common law of 20 states. And not a single state court of last resort or federal appellate court had held that this common law improperly singled out arbitration agreements in violation of FAA § 2, or that the FAA otherwise preempted these state law holdings. Instead, these courts had consistently determined that such state rules of general applicability did not discriminate against arbitration agreements. Rather than treating arbitration agreements "in a manner different from that in which [they] otherwise construe[] nonarbitration agreements," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), the courts simply held that class action bans found in adhesion contracts were unconscionable when they served to suppress plaintiffs'

claims—regardless of whether or not the class action ban was found in a contract with an arbitration clause.

The reasoning of these other state court opinions was markedly similar to that used by California courts. The Washington Supreme Court, for example, concluded that an arbitration clause with a class action waiver was unconscionable because it prevented consumers from "pursuing valid claims, effectively exculpating the drafter from potential liability for small claims, no matter how widespread." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007). That court then held that the finding of unconscionability under state law was not preempted by the FAA because it did nothing to put arbitration on a different footing than other contracts: under Washington law, contracts that effectively exculpate their drafter from liability for broad categories of liability are not enforceable, regardless of whether or not they contain an arbitration clause. *Id.*

Similarly, the Third Circuit, applying New Jersey law, held that a class action ban in an arbitration agreement was unconscionable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties *predictably* involve small amounts of damages." *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009). The court further concluded that federal preemption did not apply to this "generally applicable contract defense." *Id.* at 230.

All told, the courts of last resort in at least eleven states—Alabama, California, Illinois, Massachusetts, Missouri, New Jersey, New Mexico, North Carolina, South Carolina, Washington, and West Virginia—had all squarely decided that class action bans in adhesive consumer contracts were unenforceable when the facts showed that these terms were exculpatory, and that the FAA did not preempt that result.[2] Intermediate courts in states including Oregon and Wisconsin were in accord.[3] The federal circuits that had decided the issue reached the same conclusion: the First, Third, Ninth, and Eleventh Circuits had all held that the FAA does not preempt determinations that class action bans are invalid under state law.[4]

---

[2] *See Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 20-24 (Mo. 2010); *Herron v. Century BMW*, 693 S.E.2d 394, 399 (S.C. 2010); *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762-68 (Mass. 2009); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008-09 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006); *Muhammad v. County Bank of Rehoboth Del.*, 912 A.2d 88, 94-96 (N.J. 2006), cert. denied, 127 S. Ct. 2032 (2007); *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1110-17 (Cal. 2005); *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002).

[3] *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 746 (Wis. App. 2007), review denied, 737 N.W.2d 432 (Wis. 2007).

[4] *See, e.g., Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (New Jersey law); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1219-22 (9th Cir. 2008) (Washington law), *cert. denied*, 129 S. Ct. 45 (2008); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 57-59 (1st Cir. 2007) (Massachusetts law); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007) (California law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (Georgia law); *see also Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th

And trial courts interpreting the law of Arizona, Delaware, Michigan, and Pennsylvania reached the same conclusion.[5]

AT&T Mobility in its petition for certiorari in *Concepcion* did not identify a single precedential ruling in any jurisdiction holding that the Federal Arbitration Act preempted either California's *Discover Bank* rule or a comparable rule in another state. Pet. for Writ of Cert., *AT&T Mobility LLC v. Concepcion*, No. 09-893, 2010 WL 6617833 (January 25, 2010).

Thus, before *Concepcion* was decided in 2011, the overwhelming weight of legal authority made it clear that courts in many jurisdictions would strike down class action bans in consumer adhesion contracts where small-dollar claims were involved and the contract served to suppress plaintiffs' ability to assert their claims. Given this precedent, in many jurisdictions there was little reason for corporations to include arbitration clauses with class action bans in consumer contracts , because such terms were likely to be held unenforceable in virtually every jurisdiction that considered them.

Cir. 2010) (certifying question whether a class ban is enforceable under Florida law to the Florida Supreme Court).

[5] *Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1279-80 (D. Ariz. 2007); *Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1371-72 (S.D. Fla. 2009) (applying Delaware law); *Wong v. T-Mobile USA, Inc.*, No. 05-739222, 2006 WL 2042512 (E.D. Mich. July 20, 2006); *Lazado v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. Ct. 2006).

II. The Supreme Court's *Concepcion* Decision Upended Established Precedent in Sixteen States and Stripped Millions of Consumers of their First Amendment Right to Sue in Court.

The incentive for powerful corporations to promulgate adhesive arbitration clauses in general—and class action bans in particular—to favor their interests at the expense of consumers drastically increased in 2011, when the U.S. Supreme Court decided *Concepcion*. That decision held that the Federal Arbitration Act preempts California's *Discover Bank* rule, and other neutral state contract law rules that "disfavor" or "disproportionately impact" arbitration. *Concepcion* radically limited the scope of § 2's savings clause compared to how courts had previously interpreted it, and this change has had serious real-world implications for consumers, employees, and others subjected to nonnegotiable adhesion contracts with arbitration clauses.

The facts of *Concepcion* are straightforward and resemble many other consumer class actions that plaintiffs had successfully litigated in the past. The *Concepcion* plaintiffs enrolled in AT&T Mobility's service based on an AT&T promotion indicating that the service would include a free phone. *Concepcion*, 563 U.S. at 337. When the plaintiffs later learned that despite the phones having been advertised as free, they had nonetheless been charged $30 sales tax for the phones, they brought suit for false advertising and fraud and sought to certify the case as a class action. *Id.* AT&T moved to compel arbitration based on the services contract

the plaintiffs had signed, which included an arbitration clause stating that the plaintiffs were required to arbitrate only in their "individual capacity." *Id.*

The district court refused to compel arbitration and this Court affirmed, holding that the arbitration clause was unconscionable under California's *Discover Bank* rule. *Id.* at 338. This Court also held that the FAA did not preempt the *Discover Bank* rule because "*Discover Bank* placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration." *Id.* at 338 (quoting *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 858 (9th Cir. 2009)).

But in a five to four decision, the Supreme Court reversed this Court and held that the FAA preempts the *Discover Bank* rule "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Concepcion*, 563 U.S. at 352. The majority acknowledged that the case did not present the "straightforward" preemption situation where the state law banned arbitration outright. *Id.* at 341. Rather, the inquiry in the case was "more complex" because a doctrine long held to be generally-applicable to all contracts, unconscionability, was allegedly being applied in a manner that disfavored arbitration. *Id.* The majority then concluded that even state-law defenses that are generally applicable to all contracts—in the terms of FAA § 2, "grounds as exist at

law or in equity for the revocation of any contract"—could be preempted if "the rule would have a disproportionate impact on arbitration agreements." *Id.* at 342.

The majority's analysis ultimately rested on its own conclusion that class procedures are not compatible with arbitration. *See id.* at 346-50. As a result, the Court determined that a state law rule requiring the availability of class procedures (whether in litigation or arbitration) is counter to the purposes of the FAA and may not be enforced to invalidate an existing agreement to arbitrate. *Id.* at 348, 350.

The Court's analysis greatly weakened § 2's apparent preservation of unconscionability and other general contract defenses: rather than simply evaluating whether a given contract defense is applicable on a particular set of facts, after *Concepcion* courts must engage in a supplemental inquiry whenever arbitration is at issue, to determine what practical effect the state-law rule might have on arbitration. And where that rule "interferes with fundamental attributes of arbitration," even if—as with the class action ban—a supposed attribute is found nowhere in the FAA itself, then the state law rule is preempted. *Id*. at 344. This open-ended inquiry, coupled with the strong pro-arbitration tone of the opinion, encouraged many courts in the wake of Concepcion to enforce arbitration clauses in situations where they would not have enforced them before, and made denying plaintiffs access to the judicial forum the easiest choice for courts faced with FAA preemption arguments.

The effect of the ruling in *Concepcion* was sea changing. It overturned the law in every jurisdiction where the courts had found a class action ban that had an exculpatory effect to be unconscionable under state law and it left plaintiffs powerless to exercise their constitutional right to sue in court or even to assert their claims in an economically viable way in a private forum. States were likewise left with a greatly diminished capacity to defend their citizens against large scale corporate misfeasance in the consumer and employment contexts.

III. *Concepcion*'s Continuing Harsh Effects

The upheaval *Concepcion* wrought is evident in the trajectory of the cases that were on appeal when the decision came down, the stark contrast between the relief plaintiffs obtained in court before 2011 and courts' uniform dismissal of comparable cases only a few years later, and consumers' continuing failure to access courts to obtain relief for small-dollar claims even though it is apparent that those claims are not being arbitrated either. This sweeping change provides companies with a powerful incentive to insert arbitration clauses with class action bans into each and every one of their consumer agreements—doing so enables them to act with impunity and to deprive consumers of any meaningful recourse.

A. In One Stroke, *Concepcion* Wiped Out Many Thousands of Consumers' Pending Claims

When consumers are stripped of their ability to access the courts to assert their rights, the harm is readily apparent. Since the Supreme Court decided

Concepcion, many consumer class actions were dismissed from courts and compelled into individual arbitration (meaning that the named representative plaintiffs can proceed for themselves, but no one else, in arbitration, and that the class action portion of the case was dismissed). One study released in April 2012 identified 76 putative class actions where this had occurred. Public Citizen, *Justice Denied – One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident* at 4 (April 2012). This study almost certainly underestimates the number of cases dismissed: it only counts cases where the court published an opinion that showed up on the Westlaw database, and Public Justice knows of numerous consumer class actions that district courts dismissed in short, even one-line orders.

B. Consumers with Similar if not Identical Claims Experienced Strikingly Different Results Depending on Whether their Cases Were Resolved Before *Concepcion* or Remained Pending When it Was Decided.

Evidence presented in multiple cases filed before the Supreme Court decided *Concepcion* demonstrates that class action bans in consumer contracts strip consumers of the right to obtain a recovery both in the judicial forum and in the private arbitration setting. By way of example a few such cases are discussed below. Each involved consumers' efforts to bring viable claims against a telecommunications service provider in court, and each involved an arbitration provision with a class action ban. Though all of the consumers had similar

grievances, only those with the good fortune to resolve their cases before *Concepcion* was decided proceeded to the merits and received compensation for their claims. Those unfortunate enough to have their cases still pending at the time of *Concepcion* were both barred from asserting their right to sue and left with no realistic alternative means of recovery.

1. *Coneff v. AT&T Corporation*

One such case litigated by Public Justice—*Coneff v. AT&T Corporation*—was brought soon after Cingular Wireless and AT&T Wireless merged in 2004. *Coneff v. AT & T Corp.*, 620 F. Supp. 2d 1248, 1250 (W.D. Wash. 2009), rev'd and remanded, 673 F.3d 1155 (9th Cir. 2012). The plaintiffs alleged that once the companies had joined, Cingular deliberately degraded AT&T Wireless's network in order to induce customers to transfer their plans to Cingular plans, which were more expensive and less favorable to consumers. *Coneff*, 620 F. Supp. 2d at 1250. The plaintiffs asserted that this plan was designed to force all AT&T customers to "upgrade" to Cingular plans by paying an $18 transfer fee, buying an $18 SIM card, entering a new service contract with Cingular, or buying a new phone from Cingular. *Id*. Customers who wanted to continue without paying additional money for the supposed upgrade were left to either fulfill their contract with degraded AT&T Wireless service or pay a $175 early termination fee to cancel service. *Id*.

Coneff's rich factual record shows the real-world effects of the Supreme Court's arbitration jurisprudence in *Concepcion*. After AT&T attempted to enforce an arbitration clause and class action ban in its consumer contracts by moving to compel arbitration, over a dozen expert and fact witnesses submitted declarations on behalf of the plaintiffs demonstrating that the class action ban would exculpate the company for widespread violations of the law. AT&T countered that the forced arbitration clause in the contract somehow worked to consumers' benefit by providing a suitable forum for them to resolve grievances. The district court considered the evidence and sided with the plaintiffs. *Id*. at 1257-60.

The data considered in *Coneff* confirmed that the vast majority of dissatisfied AT&T customers did not attempt to arbitrate their claims. *Coneff*, 620 F. Supp. 2d at 1258. By the end of 2007, AT&T was the largest wireless provider in the nation, with over 70 million customers. *Id.* But over a five-year period—from 2003 through 2007—only 170 customers in the entire country filed arbitration actions against AT&T. *Coneff*, 2:06-cv-944 (W.D. Wa.), Dkt. No. 153, Bruce Simon Decl. ¶¶ 6-10. And between October 30, 2006 and December 31, 2007 only ten consumer arbitrations were filed against AT&T. *Id*. Furthermore, only 265 claims were filed in small claims court against AT&T in 2007 nationwide. *Coneff*, 620 F. Supp. 2d at 1258.

The dearth of arbitrations and small claims court cases against AT&T during those years was hardly the result of overwhelming customer satisfaction with the company: the policy and action division of Consumer Reports, Consumers Union, reported that the year AT&T Wireless services and Cingular merged, the companies had the worst records of customer complaints filed with the FCC. *Coneff*, 2:06-cv-944 (W.D. Wa.), Dkt. No. 138-5, Ex. S to Coluccio Decl. And Consumer Watchdog, a nonprofit consumer advocacy organization, received thousands of complaints from consumers like Ms. Coneff. *Coneff*, 2:06-cv-944 (W.D. Wa.), Dkt. No. 144, Douglas Heller Decl. ¶¶ 5-8. Indeed, the *Coneff* class action was brought as a result of dozens of those complaints. Within 24 hours of the press announcement that *Coneff* had been filed, 1,800 AT&T customers contacted Consumer Watchdog with the same claims. As of March 2007, the organization had received 4,700 complaints, the most complaints it had ever received following the announcement of a lawsuit. *Id.* ¶ 9.

The *Coneff* plaintiffs submitted testimony from nine expert witnesses concerning the types of cases consumer lawyers can realistically handle on an individual basis. These experts were all extremely knowledgeable about the market for representation of individual consumers: they had represented consumers for many years, were active in professional organizations for consumer lawyers, regularly provided legal education to other consumer lawyers at conferences, and

regularly both referred clients to other lawyers and received client referrals themselves. After reviewing the *Coneff* complaint, the relevant arbitration clauses, and AT&T documents produced in discovery, every expert testified that he or she would not represent the named plaintiffs in individual actions, either in court or in arbitration.[6]

Considering the evidence, the district court in *Coneff* concluded that the class action waiver in AT&T's contract would serve to suppress plaintiffs' claims in any case where the cost of suit outweighs the amount of potential recovery. *Coneff*, 620 F. Supp. 2d at 1257. The court added that that was certainly the case in *Coneff* itself, where plaintiffs' damages ranged from $4.99 to $175, amounts "dwarfed by the legal complexity presented by the facts alleged"—that "Cingular, a multi-billion dollar corporation, intentionally degraded AT&T's pre-existing wireless network in order to exponentially increase their profits by assigning small fees to customers switching to the new network." *Id.* The court concluded that "there can be no question that the cost of pursuit would be prohibitively expensive for a consumer proceeding on an individual basis." *Id.*

---

[6] *See, e.g.*, *Coneff*, 2:06-cv-944 (W.D. Wa.), Dkt. No. 149, Peter Maier Decl. ¶ 33 ("I [would] be unwilling to take on an arbitration claim against [AT&T] for an individual customer . . . [and] it is very unlikely that any other private attorney in the State of Washington would be willing to do so."); *Id.* Dkt. No. 146, Dale Irwin Decl. in Supp. of Pls.' Opp'n to Am. Mot. to Compel Arbitration ¶ 8 ("If I had been approached by a [plaintiff] in this case and asked to handle such a claim as made in the Complaint on an individual basis, I would not have accepted the case.").

The court also found to be significant the consumer attorneys' declarations concluding that it would be uneconomical to litigate plaintiffs' claims on an individual basis. It found particularly compelling the statement of one North Carolina attorney who declared that "the hourly charge would . . . exceed the entire amount in controversy," and that "no lawyer concerned with ethical propriety would be comfortable charging a client by the hour for such services." *Id.*

The court further emphasized that "tangible evidence" demonstrated that only an "infinitesimal" percentage of AT&T's 70 million customers had brought arbitrations or small claims against AT&T. *Id.* at 1258 It concluded that in light of the thousands of complaints that consumer advocacy groups had received about consumers' service after the AT&T-Cingular merger, the minuscule amount of customers who pursued arbitration "proves that the customers were either unaware of their right" to take advantage of the arbitration agreement, or that they had "no incentive to bring their claims . . . given the prohibitively expensive costs of individual adjudication." *Id.* at 1258-59. The court concluded that either way, AT&T was using the contract provisions to "effectively exculpate [itself] from any potential liability for unfair or deceptive actions or practices in commerce," and that the court "will not condone such a broad and exculpatory practice." *Id.* at 1259.

Despite the district court's extensive findings and resulting denial of AT&T's motion to compel arbitration, on appeal this Court overturned the district court and compelled arbitration, finding that the Federal Arbitration Act (as the Supreme Court had recently interpreted it in *Concepcion*) required that result. *Coneff v. AT & T Corp.*, 673 F.3d 1155, 1157-58 (9th Cir. 2012). *Coneff*, therefore, is a detailed example of how far *Concepcion* moved the needle in favor of powerful corporations at consumers' expense: arbitration clauses can be used with impunity to suppress plaintiffs' legitimate claims so long as each plaintiff's potential recovery is small relative to the cost of bringing a claim.

Given this Court's enforcement of the arbitration provision, *Coneff* is also a clear example of the kind of malfeasance telecommunications companies have been free to engage in with impunity post-*Concepcion*. Now that arbitration provisions with class action bans are allowed to stand even when they demonstrably act to suppress all claims in the judicial forum and virtually all claims in the private arbitral forum, plaintiffs have no outlet for their grievances against these powerful companies and the companies are free to overcharge customers.

Coneff is no outlier—most disputes consumers have with telecommunications providers over the cost and quality of service have the similar characteristic of being small dollar grievances individually (even if in the

aggregate they add up to tens of millions of dollars), and of requiring a level of time commitment from attorneys and experts that will almost instantaneously surpass the value of any individual claim.

2. *Scott v. Cingular Wireless*

Unlike *Coneff*, *Scott* was fully resolved before *Concepcion* was decided. The *Scott* plaintiffs—all customers of defendant Cingular Wireless—asserted that they were improperly billed for long distance or out-of-network "roaming" calls, and that individual plaintiffs were overcharged up to $45 a month for these calls. *Scott v. Cingular Wireless*, 161 P.3d 1000, 1003 (2007). Though the individual claims were not for high dollar amounts, in the aggregate, the allegations asserted that Cingular overcharged its customers millions of dollars. *Id.* Cingular moved to compel individual arbitration of all claims based on an arbitration clause with a class action ban in its consumer contracts. *Id.* at 847. The Washington Supreme Court eventually heard the case and refused to send the case to arbitration because the class action ban "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." *Id.* The consumers continued to prosecute their case against Cingular in court and reached a settlement with the company.

Notably, when ruling in favor of the consumers, the Washington Supreme Court considered a declaration from attorney Sally Gustafson Garratt, who had previously served as the division chief for consumer protection in the Washington State attorney general's office. *Id.* at 849. Ms. Garratt stated that the attorney general's office did not have sufficient resources to respond to many individual cases and often "relied on [ ] private class action to correct the deceptive or unfair industry practice and to reimburse consumers for their losses." *Id.* The plaintiffs also submitted a declaration from Peter Maier, an attorney in private practice who specialized in consumer law. *Id.* Like the attorney experts in *Coneff*, he explained that the claims against Cingular "are too small and too complex factually and legally" to be adjudicated separately. *Id.* Maier declared that he would be unwilling to take on such cases and opined, "it is very unlikely that any other private practice attorney would be willing to do so." *Id.*

3. *Pendergast v. Sprint*

Much like *Scott*, *Pendergast* concerned a putative class of plaintiffs who alleged that their mobile phone service provider (Sprint as opposed to Cingular) improperly charged customers roaming fees while they were physically in its coverage area. The plaintiffs asserted that Sprint's network limitations caused it to route calls placed within its geographic coverage area to cellular towers owned by other carriers, thereby causing improper roaming fees to be charged to the

plaintiffs' accounts. The plaintiffs brought claims under Florida's consumer protection statutes, and sought monetary and injunctive relief. The named plaintiff estimated that his individual damages were approximately $20. *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1132 (11th Cir. 2010). He also filed an affidavit asserting that he could not afford to pay a lawyer an hourly fee to assert his claims against Sprint and that, absent the benefit of a class action, he would not pursue his claims at all because the risk of non-recovery and cost of arbitration outweighed the value of any potential award. *Id*.

Sprint moved to compel arbitration and the district court granted its motion. The plaintiff appealed and the case was argued before the Eleventh Circuit, after which time the U.S. Supreme Court decided *Concepcion*. Applying *Concepcion*, the Eleventh Circuit ruled that it made no difference whatsoever whether the plaintiffs' small value claims would go undetected and unprosecuted if Sprint's arbitration clause were enforced—under *Concepcion*, the arbitration clause and accompanying class action bar were upheld. *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1235 (11th Cir. 2012).

4. *Cruz v. Cingular*

The Cruz plaintiffs alleged that AT&T imposed a monthly charge for optional "Roadside Assistance" that they never requested, in violation of Florida's consumer protection law. *Cruz v. Cingular Wireless, LLC*, No. 207-CV-714, 2008

WL 4279690, at *1 (M.D. Fla. Sept. 15, 2008). The plaintiffs provided evidence that only an infinitesimal percentage of customers—0.000007%—had filed an arbitration claim with AT&T[7] and multiple attorneys submitted affidavits asserting that it would not be cost-effective for them to pursue these consumer claims against AT&T unless it was on an aggregated basis. *Cruz v. Cingular Wireless*, LLC, 648 F.3d 1205, 1214 (11th Cir. 2011). But as with this Court in *Coneff*, on appeal the Eleventh Circuit determined that after *Concepcion* it was of no consequence whether the arbitration clause was exculpatory, and the court upheld the order compelling arbitration on that basis. *Id.* at 1214-16.

***

Coneff, *Pendergast*, and *Cruz* demonstrate that consumers have no ability to seek relief for small-dollar charges unilaterally imposed by telecommunications companies, even when those charges are demonstrably unwarranted. And though the consumers *did* obtain relief in *Scott*, that would not have been the case if *Scott* had been brought after *Concepcion*.

C. The *Concepcion* Ruling Continues to Suppress an Untold Number of Consumer Claims.

The most harmful effect of the ubiquitous mandatory arbitration clauses in consumer telecommunications contracts is this suppression of consumers' viable legal claims. Detailed factual records from *Coneff* and other pre-*Concepcion* cases

[7] Cingular adopted the AT&T Mobility name after the two companies merged.

show that many viable consumer claims against telecommunications companies simply cannot be pursued in an economically viable way after *Concepcion* cloaked class action bans in the protective shield of FAA preemption.

It is impossible to tell how many legitimate cases have *not* been brought against telecommunications providers in the wake of *Concepcion,* but Public Citizen's determination that over 70 pending class actions were dismissed in the first year after that case was decided makes it clear that the number is substantial. Public Justice continues to receive repeated requests to serve as counsel in class actions brought under state consumer protection statutes against telecommunications companies, but we typically decline those requests, even where the claims appear meritorious, if we determine that the post-*Concepcion* landscape presents insuperable legal barriers to overcoming the inevitable arbitration clause and class action waiver. And when we or our members decline these cases, the potential clients are left with their rights unvindicated, knowing that they have been harmed by corporate misconduct but unable to petition the courts (or proceed on an individual basis in arbitration) for redress of that harm.

Each year, class actions enable millions of consumers to obtain injunctive relief and monetary compensation.[8] In contrast, a New York Times investigation

[8] Between 2008 and 2012, class action settlements yielded $2.7 billion in cash, in-kind relief, and expenses paid by financial services companies. CFPB Study § 8.1.

gathered the records from arbitration firms across the United States and determined that from 2010 through 2014 only 505 customers in the country went to arbitration over a dispute of $2,500 or less. Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice": New York Times, November 1, 2015. Available at http://www.nytimes.com/2015/11/01 /business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html. Verizon, which has more than 125 million subscribers, faced 65 consumer arbitrations during those five years. *Id.* Time Warner Cable, which has 15 million customers, faced only seven. *Id.* And Sprint, which has over 57 million subscribers, faced only six arbitrations during the same period. *Id.*

In 2015, the Consumer Financial Protection Bureau released a detailed report on arbitration clauses in consumer contracts for financial products and services. That report found similarly low participation rates in arbitration, especially for small-value claims: it concluded that consumers filed an average of 411 arbitrations annually with the American Arbitration Association ("AAA") regarding financial products and services from 2010 through 2012, with only around 25 of those arbitrations each year involving disputes of $1,000 or less. Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (March 2015) http://files.consumerfinance.gov/f/201503_

Only 16% of this figure went to attorneys' fees, and at least 34 million consumers received cash relief as a result of these class action settlements. *Id.*

cfpb_arbitration-study-report-to-congress-2015.pdf (CFPB Study"), at § 1.4.3. Another study of a broader cross section of consumer arbitrations found that only 184 of 4,839 consumers, or less than 4%, arbitrated claims for $1,000 or less. David Horton & Andrea Cann Chandrasekher, After the Revolution: An Empirical Study of Consumer Arbitration, 104 GEO. L.J. 57, 117 (2015).

The use of arbitration clauses in adhesive contracts strips consumers of their right to sue in court and thereby ensures that the vast majority of consumers who suffer legal wrongs will never even try to pursue their rights under federal and state consumer protection laws. Available data from the CFPB Study and other sources, the dearth of consumer class actions against telecommunications companies after the Supreme Court's ruling in *Concepcion*, and the evidence submitted in particular cases like *Coneff* all confirm the obvious: that when consumers are left with no option but to individually pursue small-dollar claims in arbitration, consumers' claims against those companies are suppressed and the companies are left free to violate consumer protection statutes with virtual impunity.

CONCLUSION

When entered into freely between parties of equal bargaining power, arbitration can be a valuable form of alternative dispute resolution. But in the wake of the Supreme Court's sweeping *Concepcion* decision, clauses mandating arbitration and banning class actions have all too often become a blunt instrument

that stronger parties can employ—at consumers' expense—to exempt themselves from the reach of consumer protection laws. It is no surprise that so many corporations have taken advantage of the incredibly powerful tool that the Supreme Court has handed to them through its evisceration of the FAA's savings clause in *Concepcion*: indeed, a proliferation of adhesive forced arbitration contracts is the entirely predictable result of the Supreme Court's recent "encouragement" and "endorsement" of arbitration. *See Duffield*, 144 F.3d at 1202.

Dated: March 8, 2017

Respectfully submitted,

By: /s/ Karla Gilbride

Karla Gilbride
F. Paul Bland, Jr.
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, D.C. 20006
(202) 797-8600

Brian Hardingham
PUBLIC JUSTICE, P.C.
555 12th Street, Suite 1230
Oakland, CA 94607
(510) 622-8150

CERTIFICATE OF COMPLIANCE

I certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 6,964 words.

Dated: March 8, 2017 /s/ Karla Gilbride

CERTIFICATE OF SERVICE

On March 8, 2017, I electronically filed the foregoing using the appellate CM/ECF system, which will notify all counsel of record.

Dated: March 8, 2017 /s/ Karla Gilbride