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 AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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October 6, 2010

QUESTION PRESENTED

Class-action bans are provisions in standard-form contracts that purport to bar consumers or employees from pursuing classwide proceedings in any forum. In circumstances where they would function as exculpatory clauses, class-action bans have been held unenforceable under the generally applicable contract law of twenty states—without regard to whether they are found in arbitration agreements.

The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The question presented is:

> When a class-action ban that is otherwise unenforceable under generally applicable contract law is embedded in an arbitration agreement, is the contract law preempted by the FAA?

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INTEREST OF AMICUS[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that has assisted African Americans and other people of color in securing their civil and constitutional rights for more than six decades. In litigation before this Court and other courts, LDF has focused particularly upon class actions because of their effectiveness in facilitating collective action to secure systemic change. *See, e.g.*, *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968).

LDF also has appeared as a party and as an amicus before this Court to ensure that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, is interpreted in a manner consistent with effective enforcement of our nation's civil rights laws. *See, e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF THE ARGUMENT

American democracy depends upon robust civil rights laws that are vigorously enforced. Yet that vigorous enforcement is now threatened by the expanding reach of a novel contractual provision—one that could bar increasing numbers of individuals from pursuing class actions in any legal forum if they want to obtain a job, purchase a car, receive a loan, or enter into other contractual transactions.

AT&T Mobility invoked such a class-action ban, which was inserted in its standard-form arbitration agreement with cell-phone users, in an attempt to preclude class treatment of respondents' fraud allegations. Applying California contract law, the Ninth Circuit held that AT&T Mobility's class-action ban was unconscionable because it effectively insulated the company from the full scope of its potential liability. Pet. App. 4a-11a. While this case thus directly involves the effect of class-action bans on consumer protection law, it also could have significant implications for the continued use of class actions in the civil rights context—where they have been an indispensable tool for promoting equal opportunity.

"Civil rights and class actions have an historic partnership." Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 Ariz. L. Rev. 575, 577 (1997). Thanks to landmark class actions, ranging from *Brown v. Board of Education*, 347 U.S. 483 (1954), to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), our nation has made significant progress toward the Constitutional aspiration of a "more perfect Union." Yet discrimination undeniably persists. A brief survey of class litigation

in the past two decades challenging discrimination by large employers, mortgage lenders, insurers, and vehicle financing companies illustrates this fact. These types of cases merit attention here because they arose in contexts where class-action bans could be incorporated into contracts between the pertinent parties, thereby preventing similar actions in the future.

The reasoning that courts have used to invalidate class-action bans under the ordinary contract law of California and nineteen other states applies with particular force to civil rights. Contrary to the assertions of AT&T Mobility and its amici, isolated individual claims do not provide a meaningful alternative to class treatment. Class actions offer remedies for civil rights violations in circumstances where individuals are unlikely to proceed on their own because they lack timely notice, have insufficient resources, or fear retaliation. Not only are individual claims often too time- and resource-intensive to be realistic, but they rarely provide relief that extends beyond the named plaintiffs. By contrast, class actions serve broader public interests by effectively remedying and deterring civil rights violations and especially systemic discrimination. Public enforcement is also an inadequate substitute for class proceedings. Government regulators lack the capacity to prosecute the vast majority of cases brought to them. Moreover, their enforcement priorities shift over time.

Sophisticated businesses make decisions based on their bottom lines. If individuals who experience discrimination lack viable recourse to class actions, companies may determine that allowing widespread

civil rights violations to persist is less costly than taking corrective action. Simply put: eliminating the risk of liability for aggregated civil rights violations means that some number of those injuries will remain unredressed. The result is a less just society.

Federal law does not preclude application of ordinary state contract law to strike down class-action bans in certain circumstances. To the contrary, the Federal Rules of Civil Procedure, federal antidiscrimination statutes, and this Court have all recognized the importance of class actions to vigorous enforcement by private attorneys general, especially in the civil rights context.

Nor does the Federal Arbitration Act (FAA) preempt a court's invalidation of a class-action ban under generally applicable state law, where, as here, that ban is embedded in a standard-form arbitration agreement. The FAA provides that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Interpreting this provision, this Court has held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). California contract law, which the Ninth Circuit simply followed, does not treat a class-action ban in an arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). The FAA therefore provides no grounds for reversal.

ARGUMENT

I. Class actions help ensure our nation's continued progress toward equal opportunity.

There is a "special dependence of civil rights (and other public rights) litigation on the device of the class action." Hon. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184 (1989) (hereinafter "Carter, *Federal Rules*"). Although we have made great strides as a nation, class actions remain essential to remedy the discrimination that unfortunately still persists. This is particularly apparent in employment, lending, and other contexts where class-action bans could be inserted into standard-form contracts to forestall future class proceedings.[2]

A. Many significant civil rights advances have resulted from class actions.

This Court's 1954 decision in *Brown* is but one example of how civil rights class actions have contributed to dismantling segregation and promoting equal opportunity for all Americans, regardless of their birth or background.[3] Civil rights class actions

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[2] In discussing the relationship between class actions and effective enforcement of civil rights, this amicus brief focuses primarily on race discrimination, but the arguments apply equally to combating inequities based on gender, religion, disability, and other protected categories.

[3] Three of the cases consolidated before the Supreme Court in *Brown* were federal class actions; the fourth was brought in Delaware state court. 347 U.S. at 486 n.1, 495; *see also Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) (class action decided on the same day and same grounds as *Brown*). "In the face of massive official resistance to local implementation of the Court's decision in *Brown*," class actions were critical because "the civil

have been indispensable in reducing discrimination in the economic sphere. Indeed, the first case in which this Court recognized the beneficial impact of private attorneys general in securing broad compliance with civil rights laws was a class action that successfully enjoined discrimination against African-American customers at a South Carolina restaurant chain. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 400-02 (1968).

Class actions also led to many of the key employment discrimination precedents that invigorated enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. *See, e.g.*, *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977 (1988); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Franks v. Bowman Transp. Co.,* 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs*, 401 U.S. 424; Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 932-33 (1978). And class actions have exposed and remedied widespread fair housing violations, such as "racial steering" by real estate brokers, *see, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363,

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rights attorney could never count on school officials to construe a court order admitting enumerated individual plaintiffs to a segregated school as an order to desegregate." Carter, *Federal Rules*, at 2186; *cf. Potts v. Flax*, 313 F.2d 284, 289 (5th Cir. 1963) ("[T]o require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the class discrimination.").

366-70 (1982), and "redlining" by lenders who refuse to do business within predominantly minority neighborhoods, *see, e.g.*, *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 325-28 (N.D. Ill. 1995). These victories could have been more difficult to obtain if class-action bans had been commonplace in the last half century.

B. Recent cases demonstrate that class actions are still a vital tool for vindicating civil rights.

In recent years, civil rights class actions have continued to play an important role, particularly in redressing the subtle and sophisticated types of discrimination that have proved most difficult to eliminate. *Cf. Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996) ("Discrimination continues . . . and is often simply masked in more subtle forms."). Below, we provide an illustrative but non-exhaustive survey of the ongoing impact of class actions over the past two decades in employment, lending, insurance, and vehicle financing—all contexts in which class-action bans are becoming more prevalent and thus could be particularly detrimental to robust enforcement of our civil rights laws. *See, e.g.*, Br. of Amici Am. Bankers Ass'n. et al. 3 (noting prevalence of class-action bans in banks' consumer contracts); Br. of Amicus Equal Employment Advisory Council 2 (noting that member employers have adopted class-action bans for employment disputes); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 418 (2005) ("[M]any contemporary civil-rights cases, while not bottomed on contractual theories, implicate contrac-

tual relationships that are capable of communicating effective collective action waivers.").

1. Class-action bans could dramatically curtail relief for employment discrimination, which persists in far too many industries and occupations. *See, e.g.*, Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 Am. Soc. Rev. 777, 792-93 (2009) (finding that African-American applicants were half as likely as equally qualified white applicants to receive a callback interview or job offer, and minority applicants *without* criminal records fared no better than white applicants *with* records); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991, 992 (2004) (finding that applicants with distinctively white-sounding names received 50% more callbacks for interviews than equally qualified applicants with distinctively African-American names, and the gap widened for applicants with better resumes).

Over the past two decades, class actions have exposed institution-wide discrimination, won significant monetary relief for thousands of minority and female employees, and led to comprehensive and innovative reforms of employment policies at a number of leading corporations, including Abercrombie & Fitch, Coca-Cola, Eastman Kodak, FedEx, Home Depot, Morgan Stanley, Sodexho Marriott Services, Walgreens, and Xerox.[4] For instance, in a case liti-

[4] *See, e.g.*, *Davis v. Eastman Kodak Co.*, Nos. 6:04-cv-6098, 6:07-cv-6512 (W.D.N.Y. Sept. 3, 2010) (approving class settlement on behalf of over 3,000 current and former African-American employees); *Curtis-Bauer v. Morgan Stanley & Co.*,

gated by amicus LDF, a district court certified a class action that resulted in significant remedies for "allegations of an overt policy of blatant racial discrimination and retaliation" at the Shoney's restaurant chain that was "developed and directed" by "top Shoney's management" and "implemented by all-white supervisory and management personnel." *Haynes v. Shoney's, Inc.*, No. 3:89-cv-30093, 1992 WL

No. 3:06-cv-3903, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) (approving class settlement on behalf of over 1,300 African-American and Latino financial advisors); *Warren v. Xerox Corp.*, No. 1:01-cv-2909, 2008 WL 4371367 (E.D.N.Y. Sept. 19, 2008) (approving class settlement on behalf of nearly 1,500 African-American sales representatives); *Tucker v. Walgreen Co.*, Nos. 3:05-cv-440, 3:07-cv-172 (S.D. Ill. Mar. 24, 2008) (approving consent decree on behalf of 10,000 African-American employees); *Satchell v. FedEx Corp.*, Nos. 3:03-cv-2659, 3:03-cv-2878 (N.D. Cal. Aug. 14, 2007) (approving class settlement on behalf of 20,000 African-American and Latino employees); *Satchell v. FedEx Corp.*, Nos. 3:03-cv-2659, 3:03-cv-2878, 2005 WL 2397522 (N.D. Cal. Sept. 28, 2005) (certifying class action); *McReynolds v. Sodexho Marriott Servs., Inc.*, No. 1:01-cv-0510 (D.D.C. Aug. 10, 2005) (approving consent judgment on behalf of 2,600 current and former African-American managers); *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 1 (D.D.C. 2004) (denying in part motion for summary judgment); *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, Nos. 3:04-cv-2817, 3:04-cv-4730, 3:04-cv-4731 (N.D. Cal. Apr. 15, 2005) (approving consent decree settling claims of systemic discrimination against Latino, African-American, Asian-American, and female applicants and employees); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (approving class settlement on behalf of 2,200 current and former African-American employees); *Butler v. Home Depot, Inc.*, No. 3:94-cv-4335 (N.D. Cal. Jan. 14, 1998) (approving consent decree on behalf of 17,000 current and former female employees and 200,000 unsuccessful applicants); *Butler v. Home Depot, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996) (certifying class action).

752127, at *2, 20 (N.D. Fla. June 22, 1992) (certifying class action); *see also Haynes v. Shoney's, Inc.*, No. 3:89-cv-30093, 1993 WL 19915, at *6-7 (N.D. Fla. Jan. 25, 1993) (approving consent decree requiring, *inter alia*, $105 million in relief to class members and significant corporation-wide reforms).

Another recent example is *McClain v. Lufkin Industries, Inc.*, where the Fifth Circuit affirmed a district court's conclusion that a large Texas manufacturing plant's "practice of delegating subjective decision-making authority to its white managers with respect to . . . promotions resulted in a disparate impact on [a class of over 700] black employees in violation of Title VII." 519 F.3d 264, 272 (5th Cir. 2008). Among the district court's findings was that "white employees have a significant advantage in gaining the skills and abilities needed to qualify them for promotion. . . . [whereas] Black employees are more likely to be placed in dead-end positions and left to seek training on their own." *McClain v. Lufkin Indus.*, No. 9:97-cv-63, 2005 U.S. Dist. LEXIS 42545, at *32-33 (E.D. Tex. Jan. 13, 2005), *aff'd in relevant part*, 519 F.3d 264 (5th Cir. 2008).

In addition to providing effective remedies for class members and company-wide reforms, these recent examples of major class actions deter further wrongdoing by signaling to the market that employment discrimination is harmful economically and to the corporate brand. Such beneficial impacts were recently acknowledged by a federal district court after it approved an "imaginative" nationwide class settlement to resolve allegations that Texaco pervasively discriminated against African-American employees and concealed evidence pertinent to the

litigation. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 189-93, 198 (S.D.N.Y. 1997) (adopting special master's report summarizing the settlement, valued at $172 million, which included, *inter alia*, the creation of a Task Force on Equity and Fairness charged with "initiating and determining the effectiveness of improvements and additions to Texaco's human resources programs and helping to monitor the progress made in such programs toward creating opportunity for African-Americans, diversity in the Texaco workforce and equal opportunity for all Texaco employees"). The court adopted the special master's conclusion that the case highlighted "the importance of private attorneys general in enforcement of the proscriptions against racial discrimination in the workplace" and "may well have important ameliorative impact not only at Texaco but in the corporate context as a whole." *Id.* at 189, 197-98.

2. Contractually based bans on class actions also could severely impede efforts to eradicate persistent discrimination in mortgage lending, insurance, and vehicle financing.

For instance, there is ample research that predatory mortgage lending has exacerbated the current economic crisis and contributed to higher foreclosure rates for African-American and Latino homeowners. *See, e.g.*, Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 Am. Soc. Rev. 629, 632-34, 644-46 (2010); Debbie Gruenstein Bocian et al., *Race, Ethnicity and Subprime Home Loan Pricing*, 60 J. Econ. & Bus. 110, 121-23 (2008). A number of cases targeting such predatory practices have survived motions to dis-

miss,[5] and less than three months ago, a district court certified a nationwide class of African-American and Hispanic borrowers who allege that a mortgage lender violated the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, and the Fair Housing Act (FHA), 42 U.S.C. § 3605, "by giving its authorized brokers discretion to mark up the price of wholesale mortgage loans, a policy that led minority borrowers to be charged disproportionately high rates compared to similarly situated whites." *Ramirez v. Greenpoint Mortgage Funding, Inc.*, No. 3:08-cv-369, 2010 WL 2867068, at *1 (N.D. Cal. July 20, 2010); *see also Ramirez v. Greenpoint Mortgage Funding, Inc.*, 633 F. Supp. 2d 922, 924 (N.D. Cal. 2008) (denying mortgage company's motion to dismiss).

Recent class actions also have sought to redress pervasive discrimination in the sale of insurance. For instance, a district court recognized the "substantial and beneficial" results of a nationwide class action on behalf of approximately five million African-American and Latino customers of a leading insurance company that charged minority policyholders higher premiums for automobile and homeowners' insurance than it charged similarly situated white policyholders. *DeHoyos v. Allstate Corp.*, 240

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[5] *See, e.g.*, *Guerra v. GMAC LLC*, No. 2:08-cv-1297, 2009 WL 449153, at *1 (E.D. Pa. Feb. 20, 2009); *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 253 (D. Mass. 2008); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1064 (S.D. Cal. 2008); Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev. 375, 404-27 (2010) (summarizing pending litigation).

F.R.D. 269, 275, 331 (W.D. Tex. 2007). The class settlement included not only monetary relief but also a "change in the [company's] credit scoring formula, an educational outreach program, multi-cultural marketing, [and] an improved appeals process." *Id.* at 330-31; *see also DeHoyos v. Allstate Corp.*, 345 F.3d 290 (5th Cir. 2003) (affirming denial of the insurer's motion to dismiss). Other class actions have brought relief to thousands of individuals adversely affected by the previously widespread practice in the life insurance industry of targeting African Americans for policies with higher premiums and lower benefits than those offered to white customers.[6]

Contractually based bans on class actions also could have adversely affected another set of recent class actions, which exposed financial arrangements between leading vehicle financing companies and car dealerships that resulted in systematically higher mark-ups on financing for African-American and Latino purchasers than for similarly situated whites. *See, e.g.*, Caroline E. Mayer, *Car-Loan Rates Marked Up More for Blacks, Report Says,* Wash. Post, Oct. 1, 2003, at E01 (reporting study findings that "African Americans were almost three times as likely as whites to be charged mark-ups on loans financed by

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[6] *See, e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411-13 (5th Cir. 2004) (reversing denial of class certification); *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1211-12 (11th Cir. 2001) (affirming denial of insurer's motion for judgment on the pleadings); *Norflet v. John Hancock Life Ins. Co.*, 658 F. Supp. 2d 350, 353 (D. Conn. 2009) (approving class settlement); *Williams v. Nat'l Sec. Ins. Co.*, 237 F.R.D. 685, 687 (M.D. Ala. 2006) (approving class settlement); *Thompson v. Metro. Life Ins. Co.*, 149 F. Supp. 2d 38, 40-41 (S.D.N.Y. 2001) (denying insurer's summary judgment motion).

General Motors Acceptance Corp." and that this disparity could not be explained by creditworthiness or other legitimate business factors). These class actions led to industry-wide reforms, including caps on dealer mark-ups, as well as pre-approved financing for minority customers and consumer education initiatives.[7] *See also* Part II.C. *infra.*

From this brief, non-exhaustive survey, it is evident that class-action bans could prove extremely detrimental in many spheres where class actions have been successful over the past two decades in redressing civil rights violations.

II. Individual claims and public enforcement are inadequate substitutes for civil rights class actions.

In striking down class-action bans under the generally applicable contract law of twenty states, courts have emphasized the broad public interests served by class actions. *See, e.g.*, *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 764 (Mass. 2009) (noting that class-action bans "undermine[ ] the public interest in de-

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[7] *See, e.g.*, *Jones v. Ford Motor Credit Co.*, No. 1:00-cv-8330 (S.D.N.Y. June 5, 2006) (approving class settlement); *Jones v. Ford Motor Credit Co.*, No. 1:00-cv-8330, 2002 WL 88431 (S.D.N.Y. Jan. 22, 2002) (denying company's motion to dismiss); *Smith v. Daimler-Chrysler Servs. N. Am., LLC*, No. 2:00-6003, 2005 WL 2739213 (D.N.J. Oct. 24, 2005) (approving class settlement); *Coleman v. Gen. Motors Acceptance Corp.*, No. 3:98-cv-211 (M.D. Tenn. Mar. 29, 2004) (approving class settlement); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64 (M.D. Tenn. 2004) (certifying nationwide class action); Kenneth J. Rojc & Sara B. Robertson, *Dealer Rate Participation Class Action Settlements: Impact on Automotive Financing*, 61 Bus. Law. 819, 820-26 (2006) (describing settlements).

terring wrongdoing"); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1005 (Wash. 2007) ("Class remedies not only resolve the claims of the individual class members but can also strongly deter future similar wrongful conduct, which benefits the community as a whole."); *Gentry v. Superior Ct.*, 165 P.3d 556, 556-57 (Cal. 2007). This is especially true for civil rights. *See, e.g.*, *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175-76 (9th Cir. 2003) (concluding that a contract prohibiting employment discrimination class actions was unconscionable under California law).

It is unrealistic to expect isolated individual actions or government regulators to fill the gaps in civil rights enforcement that may well arise if judicial review of class-action bans under state contract law is restricted along the lines that AT&T Mobility advocates. *Cf.* Pet'r. Br. 39-45. First, class actions facilitate legal redress in circumstances where individuals are unlikely to pursue claims on their own due to lack of notice, insufficient resources, or fear of retaliation. Second, the class-action device is often more effective than individual case-by-case proceedings in exposing, remedying, and deterring systemic discrimination. Third, public enforcement is an entirely inadequate substitute for class actions, since federal and state regulators have never had the resources or capacity to pursue more than a very small number of the civil rights violations that occur across the nation.

A. Class actions offer redress for individuals who otherwise might not assert their civil rights.

This Court has repeatedly recognized the impor-

tance of class actions in providing legal redress for inequities that may be too time- and resource-intensive to realistically challenge through isolated individual claims. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Even where supposedly plaintiff-friendly procedures for arbitrating individual claims may be available, class actions have key features that often are more advantageous in ensuring effective civil rights remedies.

The class certification process, as well as the public and media attention that class actions generate, broaden awareness about and expand participation in civil rights and other litigation. *See* Fed. R. Civ. P. 23(c)(2), (e). As noted by the Ninth Circuit in the decision under review and other courts reviewing the validity of class-action bans under state contract law, class actions alert potential plaintiffs who otherwise may never realize that the unfair outcomes they experienced were due to a violation of civil rights statutes or other laws, much less that these outcomes were part of a broader pattern including similar infractions of the rights of others. *See* Pet. App. 43a-45a; *Gentry*, 165 P.3d at 566-67; *Scott*, 161 P.3d at 1007; *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 97-98 (N.J. 2006).

Especially in the civil rights context, class actions also help ameliorate individuals' legitimate fears of retaliation, which may discourage them from proceeding on their own. Reflecting on his experience as a civil rights litigator, Judge Robert Carter observed that in cases "seeking to vindicate novel rights in the face of majoritarian hostility, the very ability to proceed required the institution of a class

action" because a "lone plaintiff" may be "extremely vulnerable to the pressure of intimidation." Carter, *Federal Rules*, at 2186; *see also Gentry*, 165 P.3d at 565-67 ("[F]ear of retaliation will often deter employees from individually suing their employers"); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding class certification requirements satisfied where "class members still employed by the [defendant] might be reluctant to file individually for fear of workplace retaliation").

Indeed, for individuals who have experienced discrimination and other civil rights violations, "association for litigation may be the most effective form of political association." *NAACP v. Button*, 371 U.S. 415, 431 (1963); *accord In re Primus*, 436 U.S. 412, 423-26 (1978). For instance, a sense of shared commitment among African-American workers at Duke Power in North Carolina helped catalyze the class action that led to this Court's landmark decision in *Griggs* that Title VII permits workers to challenge both intentional discrimination and "artificial, arbitrary, and unnecessary barriers to employment." 401 U.S. at 431; *see* Robert Samuel Smith, *Race, Labor & Civil Rights: Griggs versus Duke Power and the Struggle for Equal Employment Opportunity* 84-90, 113, 177-81 (2008).

Moreover, class certification prevents an action from becoming moot even if a change in the circumstances of the named plaintiff renders her ineligible for relief. *See, e.g.*, *Franks*, 424 U.S. at 753-56. Class treatment therefore diminishes a defendant's ability to strategically preempt individual claims and thereby avoid implementing structural relief—for instance by making an offer of judgment under

Federal Rule of Civil Procedure 68.[8] *See, e.g.*, *Deposit Guar. Nat'l Bank*, 445 U.S. at 332-40 (discussing the defendant's attempt to moot a putative consumer class action by tendering the maximum recoverable amount to each individual plaintiff prior to an appeal from the denial of class certification).

Equally important, class actions serve broader goals of judicial economy by channeling multiple potential suits into a single forum. *See* Fed. R. Civ. P. 23, Advisory Committee's Note to the 1966 Amendment, *reprinted in* 39 F.R.D. 69, 102-03 (1966) (hereinafter "Advisory Committee's Note") (noting the potential for class actions to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated"); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982).

B. Class actions are uniquely effective in remedying and ultimately deterring systemic discrimination.

Class actions provide particular advantages in addressing pervasive and entrenched discrimination that separately filed cases often cannot offer. *See* Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 628 (1988) ("In both adverse-impact and disparate-treatment cases, . . . the difference between the success and failure of a valid claim is often the difference between a class action

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[8] Rule 68 provides that a defendant may serve an offer of judgment on a plaintiff more than ten days before trial begins; if the plaintiff declines the offer and then receives a judgment at trial that "is not more favorable than the unaccepted offer," the plaintiff must pay costs incurred by the defendant after the offer was made. Fed. R. Civ. P. 68(a), (d).

and an individual suit."). "[B]y broadening the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of solutions aimed at systemic reform." Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678 (2003).

In many civil rights cases, most, if not all, pertinent information is within the exclusive province of the defendant—through its agents, employees, records, and documents. Discovery of this evidence—especially in challenges to institution-wide practices of large corporate defendants—is expensive; thus, the ability to spread the costs over a class is key to obtaining redress. *See, e.g.*, *Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 997 (5th Cir. 1984) (reversing judgment against a discrimination plaintiff in order to permit broad discovery in support of a class certification motion, and observing that "[h]ad [the plaintiff]'s class claims prevailed, she would have faced a distinctively less onerous burden at the trial of her individual claim").

Without broad discovery of company-wide statistical and other data that class actions facilitate, it is difficult for civil rights plaintiffs to prove a pervasive pattern and practice of discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) ("In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971))). Establishing such a pattern often contributes to a just outcome because, as this Court has

held, it creates a rebuttable presumption of intentional disparate treatment and thus imposes upon the defendant the burden to establish that this was not the case. *Id.* at 361-62; *see also Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 875-76 (1984); *Franks,* 424 U.S. at 772-73; *Employees Committed for Justice v. Eastman Kodak Co.*, 407 F. Supp. 2d 423, 428 (W.D.N.Y. 2005) ("Class actions are uniquely suitable for litigating discrimination claims under the pattern and practice framework.").[9] Statistical evidence of broad-based practices also facilitates proof of disparate-impact discrimination, especially under Title VII and in other contexts where such proof can establish a prima facie case and thus shift the burden to the defendant to provide a business justification for its practice. *See, e.g.*, *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2197-98 (2010).

Furthermore, a class action is frequently the most effective means of procuring the broad relief necessary to eradicate entrenched discrimination. District courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co.*, 422 U.S. at 418 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). But this Court has held that "the scope of injunctive relief is

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[9] Although this Court has never addressed whether *Teamsters*' burden-shifting method of proof is available in private non-class actions, several courts have held that it is not. *See, e.g.*, *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 967-69 (11th Cir. 2008); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 (5th Cir. 2001).

dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Thus, absent class certification, courts often refrain from granting relief that extends beyond what is necessary to remedy the harms suffered by the individual plaintiffs. *See, e.g., Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefiting an entire class in an *individual* suit, such broad relief is rarely justified. . . ."); *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) ("Ordinarily, classwide relief . . . is appropriate only where there is a properly certified class.").

To be sure, courts must conduct a "rigorous analysis" prior to certifying a class action. *Falcon*, 457 U.S. at 161. But where this hurdle is surmounted, "[t]he impact of class suits in civil rights cases is substantial. Precedent alone never has the effect of a judgment naming a particular class of which a person is a member. Very often, a class action permits the judge to get to the heart of an institutional problem." Hon. Jack Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304 (1973).

C. Civil rights class actions are a necessary supplement to public enforcement.

The California Supreme Court and other courts that have invalidated class-action bans in certain circumstances have rejected the notion that federal and state regulators have the capacity to provide an "adequate substitute" for the deterrent effect of private class actions. *Discover Bank v. Superior Ct.*,

113 P.3d 1100, 1110 (Cal. 2005); *see Gentry*, 165 P.3d at 567, 569. There is no evidentiary basis for the assertions of AT&T Mobility and its amici to the contrary. *Cf.* Pet'r. Br. 45; Br. of Amici South Carolina & Utah 4-6; Br. of Amici Law Professors 30-31; Br. of Amici Am. Bankers Ass'n. et al. 21-29; Br. of Amicus Chamber of Commerce 5-7. 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*, 445 U.S. at 339. While amicus LDF has long advocated for robust government enforcement of civil rights laws, federal and state regulators have faced historic and persistent constraints.

For example, the Equal Employment Opportunity Commission (EEOC) has consistently suffered from a shortfall of staffing and resources, resulting in ongoing backlogs in processing employment discrimination charges filed with the agency. *See* EEOC, *FY 2009 Performance and Accountability Report* 20-21 (2009); Steve Vogel, *EEOC Confronts Growing Backlog, Dwindling Staff*, Wash. Post, Feb. 3, 2009, at A13. Consequently, the EEOC has never been able to file suit in more than a "small fraction" of the charges that it receives annually. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002) ("recognizing that the EEOC files suit in less than one percent of the charges filed each year"). The Department of Justice (DOJ) litigates an even smaller number of employment discrimination cases. *See* U.S. Gen. Accounting Office, No. GAO-10-75, *U.S. Department of Justice: Information on Employment Litigation, Housing and Civil Enforcement, Voting,*

and Special Litigation Sections' Enforcement Efforts from Fiscal Years 2001 through 2007, at 30-37 (2009) (hereinafter "U.S. Gen. Accounting Office, *U.S. DOJ*").

State and local fair employment agencies are similarly short-handed. *See* Br. of Amicus Int'l Ass'n of Official Human Rights Agencies Supporting Petitioners 15-16 & app. B, *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010) (No. 08-974). Due to these constraints, "private lawsuits by aggrieved employees" have always been and will surely remain "an important part of [Title VII's] means of enforcement." *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 595 (1981).

Private attorneys general also provide a necessary supplement to public enforcement of fair housing laws. The FHA was originally designed to be enforced primarily by private plaintiffs. *See* 42 U.S.C. § 3601 *et seq.*; *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). Federal enforcement powers were subsequently expanded, *see* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ 810, 812, 814, 102 Stat. 1619, 1625-35 (codified at 42 U.S.C. §§ 3610, 3612, 3614), but agency action remains limited. For instance, the U.S. Department of Housing and Urban Development (HUD), which processes administrative fair housing complaints and adjudicates claims, has a history of backlogs and understaffing. *See* Nat'l Comm'n on Fair Housing & Equal Opportunity, *The Future of Fair Housing* 17 (2008); Nat'l Fair Housing Alliance, *A Step in the Right Direction: 2010 Fair Housing Trends Report* 26-27 (2010) (hereinafter "NFHA, *Step in the Right Direction*"). Moreover, DOJ's fair housing docket is

quite small, especially compared to the total number of fair housing complaints filed. *See id.*, at 20 & tbl.; U.S. Gen. Accounting Office, *U.S. DOJ*, at 49-54. State and local fair housing agencies face similar constraints. *See generally* U.S. Gen. Accounting Office, No. GAO-06-79, *Fair Housing: HUD Needs Better Assurance That Intake and Investigation Processes Are Consistently Thorough* (2006); U.S. Gen. Accounting Office, No. GAO-04-463, *Fair Housing: Opportunities to Improve HUD's Oversight and Management of the Enforcement Process* (2004).

Fair lending violations also have been underpoliced, despite strong evidence of ongoing discrimination in access to credit, especially in recent years. *See* Part I.B *supra*; U.S. Gen. Accounting Office, No. GAO-09-704, *Fair Lending: Data Limitations and the Fragmented U.S. Financial Regulatory Structure Challenge Federal Oversight and Enforcement Efforts* (2009); Binyamin Appelbaum, *Fed Held Back as Evidence Mounted on Subprime Loan Abuses*, Wash. Post, Sept. 27, 2009, at A01. From 2001 to 2009, federal banking regulators referred only 41 cases alleging a pattern and practice of race or national origin discrimination in lending to DOJ, and none of the referrals was from the Office of the Comptroller of the Currency (OCC), which supervises national banks. *See* NFHA, *Step in the Right Direction*, at 14-15.

Some state and local authorities have attempted to redress lending discrimination, but they have been stymied by federal agencies' preemption claims. *See* U.S. Gen. Accounting Office, No. GAO-04-280, *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending*

58-71 (2004) (describing state predatory lending laws and federal preemption claims). While this Court recently rejected the OCC's expansive assertion that federal law authorized it to preempt state prosecutions of national banks for violations of state fair lending laws, the decision did not overturn federal regulators' restrictions on state efforts to obtain information about potential civil rights violations in the absence of a lawsuit. *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2721-22 (2009).[10]

Beyond filling the sizeable gaps in government enforcement, class proceedings focus attention on the scope and magnitude of discriminatory practices and create pressure for government regulators and legislators to address issues they might otherwise ignore. *See* Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev. 375, 426 (2010); Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. Cin. L. Rev. 1, 11-12, 46-48, 50-51, 73 (2009). In addition, judicial or voluntary resolution of class actions allows experimentation with potential remedies, which, if successful, may stimulate regulatory reform. *Id.* at 12, 53-54. For instance, the recent class actions targeting discrimination in vehicle financing, discussed in Part I.B *supra*, prompted legislative reform at the state level, including caps on dealer mark-up rates. *See, e.g.*,

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[10] Congress subsequently clarified relevant preemption standards, but the new law does not preclude all federal preemption claims. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1041-1048, 124 Stat. 1376, 2011-18 (2010).

2005 Cal. Stat. ch. 128, § 5 (Assem. B. 68) (codified at Cal. Civ. Code § 2982.10(a)) (enacting Car Buyer's Bill of Rights); 2004 La. Acts 276 (H.B. 1253) (codified at La. Rev. Stat. 32:1261(2)(k)).

Even where government agencies do pursue enforcement action, they often file suit only after private class actions are underway. *See, e.g.*, *Tucker v. Walgreen Co.,* Nos. 3:05-cv-440, 3:07-cv-172, 2007 WL 2915578, at *1 (S.D. Ill. Oct. 5, 2007) (noting that the EEOC filed suit almost two years after a private class action commenced). In such circumstances, private class actions play a complementary role; for instance, they provide an avenue for continued participation in the proceedings by individuals who were subjected to the defendant's discriminatory practices, and they may press for comprehensive relief more tenaciously than government regulators. *See, e.g.*, *United States v. U.S. Steel Corp.*, 520 F.2d 1043, 1047-48, 1060 (5th Cir. 1975) (vacating and remanding for the district court to further consider the scope of relief necessary to remedy discrimination against a class of 3,000 African-American steelworkers who continued to pursue the appeal even after the federal government withdrew in favor of a negotiated settlement).

III. Federal law does not preempt courts from invalidating class-action bans under generally applicable state law.

Because of the significant deterrent effect of class actions in civil rights and other contexts, it is entirely appropriate that class-action bans have been held unenforceable in certain circumstances under the generally applicable contract law of California

and nineteen other states. Resp. Br. 17-21 & app. AT&T Mobility and its amici are incorrect that the FAA requires state courts to suspend their usual analysis as to whether a class-action ban is invalid, simply because that ban is inserted into an arbitration agreement. *Cf.* Pet'r. Br. 48-56; Br. of Amicus Chamber of Commerce 20-28. The FAA takes no position on class actions, and it specifically authorizes courts to review the validity of an arbitration agreement just as they would any other contract, which is exactly what the Ninth Circuit did when it applied California law in this case. Pet. App. 4a-11a; 9 U.S.C. § 2.

But AT&T Mobility and its amici also overlook a more fundamental reality: Federal law is far from hostile to class actions. This is especially true in the civil rights context. An animating principle behind the 1966 amendments to Federal Rule of Civil Procedure 23 was to facilitate use of class actions to effectively address civil rights violations. And Congress has often acted to ensure the availability of class actions for vigorous civil rights enforcement. These federal statutes and rules further support the conclusion that the FAA does not preempt judicial determinations that class-action bans are unconscionable in particular circumstances under generally applicable state law.

A. Federal law recognizes the importance of class actions especially for civil rights.

1. Civil rights litigators utilized class actions to combat discrimination in *Brown* and other cases prior to the 1966 amendments to Federal Rule of Civil Procedure 23. But those revisions galvanized

widespread acceptance of class actions as indispensable to vigorous civil rights enforcement. The 1966 amendments added Rule 23(b)(2), which provides for class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The Advisory Committee's Note affirms that civil rights class actions are paradigmatic cases for Rule 23(b)(2) certification.[11] Advisory Committee's Note, 39 F.R.D. at 102 ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class. . . ."). Courts and commentators, including drafters of the 1966 amendments, have acknowledged that Rule 23(b)(2) is especially suitable for class certification in civil rights cases. *See, e.g.*, *Amchem*, 521 U.S. at 614 (recognizing that civil rights cases alleging class-based discrimination are "prime examples" of appropriate Rule 23(b)(2) cases); Deborah R. Hensler et

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[11] The Advisory Committee's Note cited eight race discrimination lawsuits as illustrative of cases intended to be certified under Rule 23(b)(2), each of which was litigated by amicus LDF. *See* Advisory Committee's Note, 39 F.R.D. at 102 (citing *Potts*, 313 F.2d at 286; *Bailey v. Patterson*, 323 F.2d 201, 202 (5th Cir. 1963); *Brunson v. Bd. of Trs. of Sch. Dist. No. 1*, 311 F.2d 107, 107 (4th Cir. 1962); *Green v. Sch. Bd.*, 304 F.2d 118, 119 (4th Cir. 1962); *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156, 157 (5th Cir. 1957); *Mannings v. Bd. of Pub. Instruction*, 277 F.2d 370, 371 (5th Cir. 1960); *Northcross v. Bd. of Educ.*, 302 F.2d 818, 818 (6th Cir. 1962); *Frasier v. Bd. of Trs. of Univ. of N.C.*, 134 F. Supp. 589 (M.D.N.C. 1955) (three-judge court), *aff'd sub nom. Bd. of Trs. of Univ. of N.C. v. Frasier*, 350 U.S. 979, 979 (1956)).

al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 12 (2000) ("[T]he energizing force which motivated the whole rule . . . was the firm determination to create a class action system which could deal with civil rights." (quoting John Frank, Advisory Committee member; citation omitted)); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (Part I)*, 81 Harv. L. Rev. 356, 389 (1967) (explaining that "new subdivision (b)(2) . . . build[s] on experience mainly, but not exclusively, in the civil rights field").

2. In addition to the endorsement of civil rights class actions in the 1966 amendments to Rule 23, Congress has repeatedly recognized the importance of civil rights class actions.

For instance, when Congress amended Title VII in 1972, it expressly affirmed that class actions should be widely available to challenge employment discrimination. As the legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e *et seq*.) reveals, Congress rebuffed an amendment to Title VII that would have restricted private class suits. *See* 118 Cong. Rec. 7168 (1972) (statement of Sen. Williams) ("A provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee."). Rather, Congress "agree[d] with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII." S. Rep. No. 92-415, at 27 (1971), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public

Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 436 (1972); *see also* Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 Colum. Hum. Rts. L. Rev. 1, 5 (1987) (describing the legislative history of the rejected provision).

When Congress again strengthened Title VII's protections in the Civil Rights Act of 1991, it rejected concerns about the scope of relief that could result from applying to class actions a new provision allowing for compensatory and punitive damages. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a)(1), (b), 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a(a)(1), (b)); *cf.* H.R. Rep. No. 102-40(II) at 68 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 754 (dissenting views of Rep. Henry Hyde et al.).

Another example is the Equal Credit Opportunity Act (ECOA). *See* Pub. L. No. 93-495, Title V, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. § 1691 *et seq.*). When Congress amended ECOA in 1976 to include race, national origin, and religion among the prohibited categories of discrimination, it strengthened the Act's express class-action enforcement provisions by increasing the ceiling for class-action damages. *See* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, §§ 2, 6, 90 Stat. 251, 253 (codified as amended at 15 U.S.C. §§ 1691, 1691e). Although Congress simultaneously augmented public enforcement resources, the Senate Report emphasized that "the chief enforcement tool . . . will continue to be private actions for actual and punitive damages" and stressed the importance of class treatment in such private actions. S. Rep. No.

94-589, at 13-14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 415-16.

The FAA should be read in light of Congress's subsequent enactment of civil rights laws, the 1966 amendments to the Federal Rules, and judicial decisions interpreting them, which specifically recognize the contribution of class actions to the ongoing work of ensuring equal opportunity. *See, e.g.*, *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (recognizing that "suits alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs").

B. The Federal Arbitration Act does not preclude state-law review of class-action bans in arbitration agreements.

As respondents explain in more detail, the FAA does not preclude a court's application of ordinary state contract law to invalidate a class-action ban, simply because that ban has been embedded in an arbitration agreement. Resp. Br. 12-17; *see also Scott*, 161 P.3d at 1008 ("Clauses that eliminate causes of action, eliminate categories of damages, or otherwise strip away a party's right to vindicate a wrong do not change their character merely because they are found within a clause labeled 'Arbitration.'"). It is important to emphasize that respondents do not claim, and the Ninth Circuit did not hold, that a judicial forum for class litigation must always be available. Rather, the sole question is: whether a ban on class actions in all forums, including both courts and arbitration, can be unconscion-

able under state law in at least some circumstances?[12]

The text of the FAA contains no bar on using class-action procedures in an arbitration, much less in court. *See* 9 U.S.C. § 1 *et seq.*; *cf. Califano*, 442 U.S. at 699-701 (concluding that "a direct expression by Congress of its intent" is necessary to depart from ordinary procedural rules permitting class actions). To the contrary, the FAA permits state courts to decline to enforce class-action bans in arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Of course, state "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs.*, 517 U.S. at 687. But this Court has recognized that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]." *Id.*; *accord Perry*, 482 U.S. at 492. In this case, the Ninth Circuit based its conclusion that the class-action ban was invalid upon generally applicable California contract law that has been applied equally to arbitration and non-arbitration contracts. Pet. App. 11a; *Gentry*, 165

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[12] Here, invalidating AT&T Mobility's class-action ban may cause respondents' class action to proceed in court. Under the "blow-up clause" of AT&T Mobility's standard-form agreement, if the class-action ban is "found to be unenforceable, then the entirety of this arbitration provision shall be null and void." Pet. App. 61a. As a general matter, however, the FAA does not preclude parties from agreeing to classwide arbitration. *See Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

P.3d at 560-70; Resp. Br. 21-24. The FAA therefore provides no grounds for reversal.

It is in no way a departure from generally applicable state contract law for courts in California and elsewhere to consider the "public interest" served by class actions "in deterring wrongdoing" when assessing the validity of class-action bans. *See, e.g.*, *Feeney*, 908 N.E.2d at 764; *Scott*, 161 P.3d at 1005. Class actions are not simply a means of providing individual compensation; rather, "deterrence of corporate wrongdoing is what we can and should expect from class actions." Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 106 (2006). Thus, as the California Supreme Court has recognized and notwithstanding AT&T Mobility's assertions to the contrary, "it makes little sense to focus only on whether the class representative himself or herself would be stymied in the pursuit of an individual arbitration remedy . . . , rather than considering as well the difficulties for the class of [plaintiffs] affected by [the defendant]'s allegedly unlawful practices." *Gentry*, 165 P.3d at 568 n.7; *cf.* Pet'r. Br. 39-48. As explained in Part II *supra*, there is often no effective substitute for a civil rights class action, especially in remedying and ultimately deterring systemic discrimination.

Ultimately, it is AT&T Mobility and its amici, and not the courts of California and other states, who are "singling out" arbitration for the type of "suspect status" that this Court has rejected as inconsistent with Congress's intent underlying the FAA. *Doctor's Assocs.*, 517 U.S. at 687; *Feeney*, 908

N.E.2d at 765. The emphasis that AT&T Mobility and its amici place on the purported flaws of class arbitration suggests that their true priority is not to promote arbitration but to eliminate the potential for class actions by their employees and consumers in any legal forum. *Cf.* Pet'r. Br. 53-56; Br. of Amici Am. Bankers' Ass'n. et al. 13-20. The harm that will result if this goal is achieved is not limited to consumer protection cases such as this one; preserving judicial review of class-action bans under ordinary state contract law is equally critical in the civil rights context.

CONCLUSION

For the foregoing reasons as well as those outlined by respondents, the decision below should be affirmed.

Respectfully submitted,

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October 6, 2010