No. S141502

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROBERT GENTRY,

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

CIRCUIT CITY STORES, INC.,

Real Party in Interest.

After a Decision by the Court of Appeal, Second Appellate District, Division Five, Case No. B169805
Superior Court of Los Angeles County, Case No. BC280631,
The Honorable Thomas L. Wilhite, Jr., Presiding

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL INDUSTRY LEADERS ASSOCIATION FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Robin S. Conrad (*pro hac vice* admission pending)
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

W. Stephen Cannon (*pro hac vice* admission pending)
Raymond C. Fay (*pro hac vice* admission pending)
CONSTANTINE CANNON, P.C.
1627 Eye Street, NW, 10th Floor
Washington, DC 20006
(202) 204-3500

Donald M. Falk (Bar # 150256)
MAYER, BROWN, ROWE & MAW LLP
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Attorneys for the Amici Curiae

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL INDUSTRY LEADERS ASSOCIATION FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

To the Honorable Ronald M. George, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber") and the Retail Industry Leaders Association ("RILA") respectfully apply for permission to file the accompanying brief as *amici curiae* in this matter in support of the respondent.

The Chamber is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

RILA is the world's leading alliance of retailers and their product and service providers. RILA's members represent more than $1.5 trillion in annual sales and provide millions of jobs through the operation of more than 100,000 stores, manufacturing facilities, and distribution centers throughout the United States.

A central function of both the Chamber and RILA is to represent the interests of their members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber and RILA each have

filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Many of the Chamber's and RILA's members, constituent organizations, and affiliates have adopted, as standard features of their contracts, provisions that mandate the arbitration of disputes arising from or related to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with employees, consumers, and other contracting parties. Because many of those advantages would be lost if the class-action device were superimposed on arbitration, the Chamber's and RILA's members' arbitration agreements frequently preclude the parties from seeking to arbitrate their disputes on a class-wide basis.

Petitioner in this wage-and-hour class action asks this Court to determine that class-arbitration waivers are unenforceable under California law because they are unconscionable and violate Civil Code Section 1668's ban on improper exculpatory clauses. That rule would invalidate, or nullify the benefits of, countless arbitration provisions in contracts entered into by the Chamber's and RILA's members.

More broadly, Chamber and RILA members—like other participants in the modern economy—routinely use form contracts to provide order to their affairs. Petitioner advances a notion that form contracts are unconscionable even when employees or consumers have an opportunity to opt

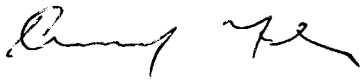
out of supposedly burdensome terms. That rule of *per se* unconscionability strikes at the heart of modern contracting practice.

Not only do the Chamber and RILA therefore have a strong interest in the proper resolution of this case, their familiarity with arbitration law and doctrine may be of assistance to the Court. The Chamber has filed amicus briefs in numerous cases in this Court, in the United States Supreme Court, and elsewhere involving issues pertaining to the enforceability of arbitration provisions. *See, e.g.*, *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148; *Green Tree Fin. Corp. v. Bazzle* (2003) 539 U.S. 444; *PacifiCare Health Sys., Inc. v. Book* (2003) 538 U.S. 401. The Chamber and RILA therefore respectfully request that their views be heard.

CONCLUSION

The application for permission to file brief as *amici curiae* in support of the respondents should be granted.

Respectfully submitted.



Donald M. Falk (Bar # 150256)
MAYER, BROWN, ROWE & MAW LLP
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

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NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

W. Stephen Cannon (*pro hac vice* admission pending)
Raymond C. Fay (*pro hac vice* admission pending)
CONSTANTINE CANNON, P.C.
1627 Eye Street, NW, 10th Floor
Washington, DC 20006
(202) 204-3500

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INTEREST OF THE AMICI CURIAE

The interest of the *amici* is described more thoroughly in their application for leave, *ante*.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

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provisions that mandate the arbitration of disputes arising from or related to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with employees, consumers, and other contracting parties. Because many of those advantages would be lost if the class-action device were superimposed on arbitration, the Chamber's and RILA's members' arbitration agreements frequently preclude the parties from seeking to arbitrate their disputes on a class-wide basis. As a consequence, the Chamber and RILA have a strong interest in having their views on the validity of class-arbitration waivers considered by the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In order to avoid arbitrating his wage-and-hour dispute, petitioner Gentry mounts a frontal attack on the enforceability of form contracts in general and of form arbitration agreements in particular. In Gentry's view, any provision in a form contract is procedurally unconscionable even if a consumer or employee may opt out of the provision and receives full disclosure of its details. Moreover, Gentry argues that an arbitration clause requiring traditional, individual arbitration rather than litigation-heavy class procedures is flatly unenforceable, even if individual arbitration is cost-free to employees and potentially remunerative to their attorneys.

The doctrine of conflict preemption precludes the use of state-law doctrines to require class arbitration. If this Court were to determine that

state law precludes enforcement of any agreement to arbitrate individually, whether or not limited to the employment context, the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, would preempt that determination. Any state-law rule that flatly conditions the enforcement of arbitration provisions—no matter how employee-friendly—on the defendant's amenability to class-wide arbitration would severely curtail, if not eliminate, employee arbitration in California. For the employer, class arbitration removes the principal benefits of individual arbitration, yet multiplies the risks exponentially. For this reason, few businesses would—or could—willingly consent to class-wide arbitration. Given the choice between risking classwide decisions before a single arbitrator without meaningful appellate review or abandoning arbitration altogether, many businesses would stop using arbitration in their employment and sales contracts alike. Nothing could more frustrate the purposes of the FAA.

Such a clash with federal law is both unnecessary and inappropriate. The doctrine of unconscionability is supposed to reach exceptional situations, not routine ones. Not only does the ability to opt out after 30 days of reflection negate surprise and oppression, but it is in conformity with the treatment of arbitral agreements in California in other contexts. In particular, the Legislature has endorsed the use of opt-out procedures in obtaining the consent to arbitration provisions in form contracts, specifically instructing that those procedures are not unconscionable.

Moreover, requiring individual rather than class arbitration is not substantively unconscionable so long as the dispute resolution system allows individuals a realistic means to vindicate their claims. Gentry has the right to arbitrate free of costs and fees. He may recover the same remedies that he could receive in court. And he would be reimbursed for his attorneys' fees if he prevails. Rather than confront his actual situation, Gentry tries to attack superseded versions of Circuit City's arbitration rules that would never apply to him. Engaging in that hypothetical analysis would artificially tilt the balance against enforcement of the arbitration agreement, rather than in its favor. But state and federal policy alike favor enforcement rather than evasion of arbitration agreements. With respect to the rules that do apply, Gentry has not explained how he would be in any better position if he were permitted to proceed as a class representative. Nor could he, as the available data suggest that employees fare better in individual arbitration than in litigation.

ARGUMENT

I. THE FAA WOULD PREEMPT ANY APPLICATION OF UNCONSCIONABILITY PRINCIPLES ACROSS THE BOARD TO INVALIDATE AREEMENTS TO ARBITRATE INDIVIDUALLY.

Though this Court concluded in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 163, that its unconscionability holding in that case did not run afoul of the express-preemption provision in Section 2 of the

FAA. 9 U.S.C. § 2, the Court did not address conflict preemption. *See Geier v. Am. Honda Motor Co.* (2000) 529 U.S. 861, 869 (express-preemption provision does not "bar the ordinary working of conflict preemption principles"). Indeed, a holding that flatly precluded class-action waivers in employee arbitration provisions would not satisfy Section 2 because it would not be a ground "for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

Simply using the language of unconscionability or exculpation would not be enough to save the holding from preemption. "[S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny." *Iberia Credit Bureau Inc. v. Cingular Wireless LLC* (5th Cir. 2004) 379 F.3d 159, 167. Nor can a court manufacture new principles in the context of thwarting an arbitration agreement. To put it bluntly, "no state can apply to arbitration (when governed by the [FAA]) any novel rule." *Oblix, Inc. v. Winiecki* (7th Cir. 2004) 374 F.3d 488, 492. As explained below (at pages 20–31), to hold a system of fee-free individual dispute resolution substantively unconscionable would depart from traditional principles of unconscionability. Those principles reach only the extremes of contractual imbalance—not every provision that may afford one party more benefits than another.

Setting aside preemption under Section 2, however, the refusal to enforce arbitration agreements providing fee-free individual dispute resolution

merely because they bar class actions would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" in enacting the FAA and therefore would fall within the scope of conflict preemption. *United States v. Locke* (2000) 529 U.S. 89, 109 (internal quotation marks and citation omitted). When federal law encourages private parties to engage in or refrain from a certain activity, state laws producing contrary incentives must yield.[1] Requiring companies to permit class-wide arbitrations would provide strong incentives to abandon arbitration altogether.

When a business decides whether to include an arbitration provision in its agreements with its customers, it must consider the advantages and disadvantages of doing so. Arbitration "saves time, saves trouble, saves money." *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary* (1924) 68th Cong., 1st Sess. 7 (statement of

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[1] *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (1989) 489 U.S. 141, 157 (state-law protection of unpatentable inventions was preempted because it "could essentially redirect inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years"); *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 635 (holding that federal securities laws preempt state tender-offer regulation, which "furnish[ed] incumbent management with a powerful tool to combat tender offers," because "*[t]hese consequences are precisely what Congress determined should be avoided*") (emphasis added); *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995) 514 U.S. 645, 668 (ERISA, which has the purpose of promoting regulated plans' flexibility in providing coverage, would preempt a state law that "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage").

Charles Bernheimer, N.Y. Chamber of Commerce); *see also* H.R. Rep. No. 97-542 (1982) 13 (arbitration usually is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling"). The risks are that the arbitrator will get it wrong and that the decision will be essentially unreviewable. *See, e.g., Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.* (10th Cir. 2005) 430 F.3d 1269, 1275 (standard for vacating an arbitral award is "among the narrowest known to law"). Many businesses are willing to take that risk because of the cost savings and the desire to have a less adversarial way of resolving disputes with employees or customers.

The calculus changes dramatically, however, if businesses must engraft time-consuming and expensive class-action procedures onto their arbitral proceedings. To begin with, class-action procedures eliminate the benefits that arbitration was designed to achieve—speed, simplicity, cost savings, informality, and reduced adversariality (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628). These complex matters invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including depositions of all class representatives (and often other witnesses) for purposes of determining such statutory prerequisites as typicality and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification

issue: (iii) an evidentiary hearing; (iv) a written ruling; and often (v) a writ petition seeking review of any order granting or denying class certification.

If, after all of that, a class is certified, there would have to be full and adequate notice to class members and an opportunity to opt out. Discovery commensurate with the now-increased stakes of the litigation would then begin and likely continue for years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, there would need to be another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And if the defendant chooses not to settle, there would need to be a class-wide trial—one in which the plaintiffs are required to establish any individualized elements of their claims and the defendant is afforded the opportunity to put on any individualized defenses.

All of the procedures necessary to the fair administration of a class action make arbitration more expensive and more time-consuming—and, in the process, eradicate the distinction between arbitration and litigation.[2] In

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[2] This Court implicitly recognized the unsuitability of the arbitral forum to class determinations when it devised a "hybrid procedure" that would literally move part of an arbitrable dispute to a judicial forum. *Discover*, 36 Cal.4th at 157. The Court envisioned a "greater degree of judicial involvement than is normally associated with arbitration," in which a court, not an arbitrator, not only would "make initial determinations regarding certification and notice to the class," but also would "exercise a measure of external supervision" as the arbitration continued. *Id.* (quoting *Keating v. Superior Court* (1982) 31 Cal.3d 584, 613).

fact, some commentators believe that "class arbitration may actually prove *more* burdensome than class litigation." Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action* (2004) 23 QUINNIPIAC L. REV. 737, 774 (emphasis added); *see also* Androski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 649 (hybrid class arbitration "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration").

The procedures for class arbitrations promulgated by the nation's largest arbitration provider, the American Arbitration Association ("AAA"), bear out the distinctly non-arbitral character of class arbitration. Those rules first require the arbitrator to make a written "class determination award" addressing a long list of criteria equivalent to those identified in Section 382 of the Code of Civil Procedure. The AAA rules then call for a proceeding in court to confirm or vacate that award. In the next step, the arbitrator presides over the notification of class members. And the rules ultimately anticipate full-blown proceedings on the merits and a carefully reasoned "final award" once the class determination award becomes final and class members have been given notice and an opportunity to opt out.

Like a federal court, the arbitrator also is given strict standards for reviewing and approving any settlement once a class has been certified.[3]

Moreover, while the stakes of class-wide arbitration are exponentially higher than those of an individual arbitration, any class-wide arbitral award would remain reviewable only for fraud, bias, or "manifest disregard" of the law. *See* 9 U.S.C. § 10; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros* (6th Cir. 1995) 70 F.3d 418, 421. No business could afford to embrace the risk that an arbitrator subject to only very limited judicial review—and thus only loosely bound by substantive rules of law—would render a massive class award. As one United States Supreme Court Justice observed at oral argument in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, "[y]ou might not want to put your company's entire future in the hands of one arbitrator." Tr. of Oral Argument, *available at* 2003 WL 1989562, at *29. *See also* Wilson, *supra*, 23 QUINNIPIAC L. REV. at 778 ("Class arbitration just seems to present too many risks.").

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[3] *See* AAA, *American Arbitration Association Policy on Class Arbitrations* (July 14, 2005), *at* http://www.adr.org/Classarbitrationpolicy. In short, the process is every bit as burdensome as a judicial class action. *See also* Rheingold, *Proposed Revisions to NACA [National Association of Consumer Advocates] Guidelines for Litigation and Settling Consumer Class Actions (Oct. 2005)* (2006) 1533 PLI/Corp. 491, 560 ("If consumer class actions are to be held in arbitration, then absent class members must receive the same due process and procedural protections as they would in court before they can be bound by a judgment.").

In short, the inevitable consequence of conditioning the enforcement of arbitration provisions on the availability of class-wide arbitration is that businesses will stop including arbitration provisions in their contracts with their employees and their customers—two categories that each represent a large proportion of all contracts. Nothing could more clearly "frustrate the purpose" (*Livadas v. Bradshaw* (1994) 512 U.S. 107, 116) of the FAA.

The Ninth Circuit's recent application of conflict-preemption principles in *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119, is highly pertinent here. In *Grunwald*, the court held that the Securities Exchange Act of 1934 impliedly preempts the imposition of state ethics standards on arbitrators for the National Association of Securities Dealers (NASD). The Court explained that the challenged state standards would "mak[e] arbitration more costly for investors and employees," might "deter well-qualified individuals from serving as NASD arbitrators," and would increase the "complexity, cost, and uncertainty" of arbitration, all in conflict with the '34 Act's policy favoring arbitration. *Id.* at 1135.

Several courts around the country have agreed that the FAA would preempt any state law that superimposed class actions on arbitration. For example, the Tennessee Court of Appeals has held that, regardless of any state-law concern about "the unavailability of class action relief," "the Supremacy Clause of the Federal Constitution * * * preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA

simply because a plaintiff cannot maintain a class action." *Pyburn v. Bill Heard Chevrolet* (Tenn. Ct. App. 2001) 63 S.W.3d 351, 365.[4] Similarly, a federal district court in West Virginia rejected the state supreme court's holding that arbitration provisions containing class waivers are unconscionable when the damages sought are small, finding that holding to be preempted by the FAA. *Schultz v. AT&T Wireless Servs., Inc.* (N.D. W. Va. 2005) 376 F. Supp. 2d 685, 691.

Many other courts, in holding that requiring individual rather than class arbitration was not unconscionable under the laws of different states, have done so in part out of concern that a contrary ruling would run afoul of the FAA.[5] In particular, two federal courts of appeals, while not using

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[4] The Tennessee Supreme Court denied the plaintiff's petition for review in that case and ordered the court of appeals' decision published (63 S.W.3d at 351), which means that the decision "may be relied upon by the bench and bar of [Tennessee] as representing the present state of the law with the same confidence and reliability as the published opinions of [the Tennessee Supreme] Court." *Meadows v. State* (Tenn. 1993) 849 S.W.2d 748, 752.

[5] *See Adkins v. Labor Ready, Inc.* (4th Cir. 2002) 303 F.3d 496, 501–03 (a plaintiff's "inability to bring a class action * * * cannot by itself suffice to defeat the strong congressional preference [in the FAA] for an arbitral forum") (West Virginia Law); *Hutcherson v. Sears Roebuck & Co.* (Ill. App. Ct. 2003) 793 N.E. 2d 886, 895 (Arizona law) ("Congress, in contemplating passage of the FAA, recognized the potential benefit of enforcing arbitration agreements[, namely,] the 'expedited resolution of disputes.'" (quoting *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 220); *Wilson v. Mike Steven Motors, Inc.* (Kan. Ct. App. May 27, 2005) 111 P.3d 1076 (table), 2005 WL 1277948, at *7 ("If the legislature cannot prohibit arbitration of consumer protection claims where the FAA applies, then we see no way in which a judicially declared public policy prohibition could

the term "preemption," have expressed the view that a state-law rule conditioning the enforceability of an arbitration provision on the availability of class-wide arbitration is incompatible with the objectives of arbitration. Most significantly, the Fifth Circuit rejected a claim that a class-arbitration prohibition was unconscionable, explaining that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia*, 379 F.3d at 174 (quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 31); *see also id.* at 176 (for parties to demand "all of the procedural accoutrements that accompany a

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withstand federal preemption.") (Kansas law); *Walther v. Sovereign Bank* (Md. 2005) 872 A.2d 735, 751 ("We cannot ignore the strong policy, made clear in * * * federal * * * law, that favors the enforcement of arbitration provisions.") (Maryland law); *AutoNation USA Corp. v. Leroy* (Tex. Ct. App. 2003) 105 S.W.3d 190, 200 (Texas law) ("[The assertion of unconscionability] assumes that the right to proceed on a class-wide basis supercedes [sic] a contracting party's right to arbitrate under the FAA. However, the primary purpose of the FAA is to overcome courts' refusals to enforce agreements to arbitrate and to ensure that private agreements to arbitrate are enforced according to their terms."); *Dale v. Comcast Corp.* (N.D. Ga. 2006) 453 F. Supp. 2d 1367, 1376 ("this court must take into account the federal policy favoring arbitration as a method for dispute resolution") (Georgia law); *Edwards v. Blockbuster, Inc.* (E.D. Okla. 2005) 400 F.Supp.2d 1305, 1308–09 ("It is well established that the FAA embodies a liberal federal policy favoring arbitration.") (internal quotation marks omitted) (Oklahoma law); *Vigil v. Sears Nat'l Bank* (E.D. La. 2002) 205 F. Supp. 2d 566, 573 ("While the Court is sympathetic to the plaintiff's desire to pursue her claim as a class, the Court is bound by the strong presumption in favor of affirming arbitration clauses.") (Arizona law).

judicial proceeding" would undermine "the point of arbitration"). More recently, the Eleventh Circuit explained that a prohibition of class arbitration is "consistent with the goals of 'simplicity, informality, and expedition' touted by the Supreme Court in *Gilmer*." *Caley v. Gulfstream Aerospace Corp.* (11th Cir. 2005) 428 F.3d 1359, 1378 (quoting *Gilmer*, 500 U.S. at 31), *cert. denied* (2006) 126 S.Ct. 2020. To say that a prohibition of class arbitration is consistent with the goals of the FAA is the same thing as saying that a state-law rule that bans such provisions, despite the parties' agreement to them, is inconsistent with the goals of the FAA and hence is preempted.

Because the categorical state-law bar on class waivers in employment contracts that Gentry requests would create an actual conflict with the objectives of the FAA, the state law would have to yield. This Court should not take the course that Gentry requests, a course that (we explain below) is also inconsistent with California law.

II. THERE IS NOTHING UNCONSCIONABLE ABOUT AN EMPLOYMENT AGREEMENT THAT REQUIRES INDIVIDUAL ARBITRATION BUT PERMITS THE EMPLOYEE TO OPT OUT OF ARBITRATION ALTOGETHER.

This Court need not reach the preemption issue, but rather should construe California unconscionability law to avoid the constitutional difficulties that would result from a clash with the FAA and the Supremacy Clause. *Cf. Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882,

901 (noting avoidance canon in context of statutory construction). Avoidance is not a difficult task here because the relevant arbitration agreement is not unconscionable at all.

This Court has made clear that the defense of unconscionability has two necessary elements: a party seeking to invalidate a contractual provision must show that it is *both* procedurally *and* substantively unconscionable. *See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 114. As explained below, Circuit City's arbitration provision was not procedurally unconscionable. As a consequence, this Court need not inquire into the substance of Circuit City's arbitration provision. *See Crippen v. Cent. Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1167. In any event, Circuit City's arbitration provision is not improperly exculpatory or otherwise substantively unconscionable because it provides individuals with ample means to vindicate their claims.

A. An Opt-Out Provision Accompanied By Full Disclosure Precludes Any Finding Of Procedural Unconscionability.

Procedural unconscionability involves the manner in which the agreement came into existence, focusing on whether there has been "oppression" or "surprise." *Armendariz*, 24 Cal.4th at 114 (internal quotation marks omitted). The opt-out procedure here, which provided a 30-day period for review, reflects neither surprise nor oppression. Unless all form

contracts are procedurally unconscionable—a view that would condemn the great bulk of all contracts at the threshold—the contract here was not.

Gentry had 30 days to decline Circuit City's arbitration program by sending back the one-page form provided to him. That ability to opt out precludes any finding of oppression.

Gentry contends that Circuit City's use of an opt-out rather than an opt-in procedure to enroll in the arbitration program is oppressive. Pet. Br. 49–54. But that cannot be the difference between the permissible and the forbidden. Unconscionability is a term that connotes extreme and atypical unfairness. *See* BLACK'S LAW DICTIONARY (7th ed. 1999) p. 1526 (defining unconscionability as "[e]xtreme unfairness"). As such, procedural unconscionability does not condemn a manner of contract formation that, while consistent with social expectations of a fair bargaining process, deviates from what one party in retrospect deems ideal. Nor does the unconscionability doctrine require a company offering arbitration to its employees to structure its offer in the manner likely to lead to the lowest participation rate. California law generally favors the arrangement of private affairs by contract, and particularly favors agreements to resolve disputes by arbitration.

"Oppression" begins when some defect that is abhorrent to public policy taints the contracting process, such as the duress that may result when sorely needed employment or a necessity of life (such as emergency

medical care) is at stake. *See, e.g., Pardee Constr. Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1087; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174–75. Circuit City's opt-out procedure uncoupled employment from arbitration. Indeed, employees did not even have to make an immediate decision to accept or reject arbitration, but could ponder the issue for up to 30 days. This opt-out procedure does not involve intolerable pressure. *Cf. Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811–14 (concluding that due process permits deeming putative class members who fail to return an opt-out notice to be bound by class judgment).

A stronger reason supports the conclusion that an opt-out procedure like that used here precludes a finding of procedural unconscionability: the Legislature said so. This Court has repeatedly insisted that it is "reluctant to declare contractual provisions void or unenforceable on public policy grounds without firm legislative guidance." *Santisas v. Goodin* (1998) 17 Cal.4th 599, 621.[6] Here, there is clear legislative guidance that arbitration

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[6] *See also People v. Municipal Court* (1978) 20 Cal.3d 523, 528 (the courts' "common law powers ... should never be exercised in such a manner as to ... frustrate legitimate legislative policy") (internal quotation marks and emphasis omitted). Those holdings reflect the general principle that courts should not exercise their common law powers in ways contrary to the legislature's policy judgments. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* (1994) 511 U.S. 164, 180 (looking to "comparable express causes of action" as a "model" for contours of inferred cause of action for securities fraud); *City of Milwaukee v. Illinois* (1981) 451 U.S. 304, 317–32 (refusing to create common-law nuisance action for damages from pollution because Congress had enacted a

contracts with opt-out provisions are not unconscionable, and indeed are not even contracts of adhesion.

The Legislature *required* the use of an opt-out procedure in the Medical Injury Compensation Reform Act (Code Civ. Proc. § 1295), which prescribes uniform language for arbitration provisions contained in medical service contracts. In addition to minimum disclosure and notification requirements (id. § 1295(a)–(b)), the Act mandates that patients be given the right to reject the arbitration provision "by written notice within 30 days of signature" (*id.* § 1295(c))—just as Circuit City did. The Legislature declared that arbitration provisions using such opt-out procedures are *not* "contract[s] of adhesion, nor unconscionable nor otherwise improper." *Id.* § 1295(e).

That legislative judgment makes perfect sense. Given adequate disclosure, no one can be forced to adhere to a contract provision when she has had a specific opportunity to reject it without rejecting the rest of the con-

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comprehensive regulatory program dealing with discharge of pollutants into national waters); *Mobil Oil Corp. v. Higginbotham* (1978) 436 U.S. 618, 625 (refusing to provide damages for "loss of society" under general maritime common law because Congress had not provided such damages in the Death on the High Seas Act); *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589, 604–06 (rejecting federal common law right of access to Nixon's White House tapes because the Presidential Recording Act constitutes "legislative and executive appraisal of the most appropriate means of assuring public access to the material").

tract. That is why opt-out procedures are accepted in other settings.[7] The pertinence to the present case is clear: if an opt-out procedure is not oppressive even in contracts for medical services with their possibly life-or-death stakes, it cannot be oppressive in the employment context, much less in more routine transactions.

The 30-day review period also negates any suggestion of surprise—as the Legislature concluded in the MICRA provisions discussed above. The copy of the arbitration rules that Circuit City gave Gentry to review disclosed the class waiver. Ct. App. slip op. 2. Moreover, while Gentry complains that Circuit City's written materials and video did not highlight the class waiver or other technical features of the arbitral process (Pet. Br. 54–55), he provides no basis to dispute the Court of Appeal's conclusion that the materials given to him were "written in straightforward language." Ct. App. slip op. 6.

California contract law certainly does not impose a *general* requirement for extended explanations of contract terms. And the FAA prohibits states from "condition[ing] the enforceability of arbitration agreements on compliance with a *special notice requirement* not applicable to contracts generally." *Doctor's Assocs., Inc. v. Casarotto* (1996) 517 U.S. 681, 687

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[7] *See also* Civ. Code § 1781 (authorizing use of opt-out class actions under Consumer Legal Remedies Act); *Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527 (holding that class actions must use opt-out, not opt-in, notification process).

(emphasis added); *see also Hedges v. Carrigan* (2004) 117 Cal.App.4th 578. 585 ("font and point size, notification, and warning requirements" could not "be judicially construed to invalidate the arbitration clause at issue without violating the [FAA]" because they applied "*only to arbitration clauses*") (emphasis in original). That principle equally bars the selective use of generally applicable contract law doctrines, such as unconscionability, to achieve the same forbidden result. *See Iberia*, 379 F.3d at 167 ("state courts are not permitted to employ [unconscionability] * * * in ways that subject arbitration clauses to special scrutiny"). Gentry's effort to impose enhanced obligations of disclosure and explanation on arbitration provisions cannot be justified. His apparent failure to review the materials given to him cannot constitute unfair surprise.

B. Requiring Individual, Fee-Free Arbitration Is Not Substantively Unconscionable.

Circuit City's arbitration agreement also is not substantively unconscionable merely because it requires individual arbitration—at no fee. Gentry tries to deflect the issue by mounting a misguided attack on superseded versions of Circuit City's arbitration rules. But the rules properly under analysis—the ones that would apply to the arbitration of Gentry's dispute—do not shock the conscience and thus are not unconscionable.

1. The Substantive Unconscionability Analysis Properly Focuses On The Terms Actually Applicable To The Present Dispute, Not Superseded Provisions.

Circuit City occasionally has revised its arbitration rules pursuant to the change-in-terms provision in its employees' contracts to make those rules more attractive to its employees. Resp. Br. 45. Some of these changes responded to changes in the law—exactly the type of response that should be encouraged. Circuit City adopted the rules now in effect in 2005. But because Gentry agreed to arbitration in 1995 and the Legislature has directed that the unconscionability of a contract is determined "at the time it was made" (Civ. Code § 1670.5(a)), Gentry insists that his substantive unconscionability challenge "must be judged based on the 1995 rules." Reply Br. 23.

Gentry misconstrues that statutory command, which merely cautions against using hindsight to determine whether a bargain was a good one when it was struck. Thus, a party cannot argue that an option that turned out to be worthless was priced unconscionably high.[8] But when a contract

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[8] *See Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1324 ("Although Morris's transaction with National ultimately provided no value to him, unconscionability is determined as of the time the contract was entered into, not in light of subsequent events."); *see also Geldermann & Co. v. Lane Processing, Inc.* (8th Cir. 1975) 527 F.2d 571, 576 ("It is not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than antici-

allows some of its terms to be changed, as Circuit City's arbitration rules do, there is no reason to suppose that the Legislature intended for the substantive unconscionability inquiry to proceed with reference to contract terms that no longer apply to the parties. Indeed, under Gentry's theory, an unconscionability challenge to the interest rate of a variable rate mortgage could not consider the interest rate after it began to float.

Gentry also tries to cut off consideration of Circuit City's arbitration rules at March 2001, when his employment contract with Circuit City ended. Reply Br. 23–25. But those rules, too, have been superseded and would never in fact apply to him. In considering whether it is unconscionable to compel arbitration, a court has to examine the type of arbitration that would be compelled *now*, not some time in the past. Gentry cannot attack the contract on grounds that do not apply to him.

In essence, as many courts nationwide have held, contract amendments that delete potentially burdensome features of an arbitration provision (such as a requirement that the plaintiff pay some of the costs of arbitration) —or even offers to waive those features—moot challenges to those features.[9] Put another way, Gentry cannot avoid his obligation to arbitrate

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pated.").

[9] *See, e.g., Large v. Conseco Fin. Servicing Corp.* (1st Cir. 2002) 292 F.3d 49, 56–57; *Carter v. Countrywide Credit Indus., Inc.* (5th Cir. 2004) 362 F.3d 294, 300; *Anders v. Hometown Mortgage Servs., Inc.* (11th Cir. 2003) 346 F.3d 1024, 1026; *Livingston v. Assocs. Fin., Inc.* (7th Cir. 2003)

under Circuit City's 2005 arbitration rules by attacking superseded rules. *West v. Henderson* (1991) 227 Cal.App.3d 1578, 1588 (refusing to entertain substantive unconscionability challenge to contractual provision based on hypothetical situation that was "irrelevant to this case"). He lacks standing to attack rules that once applied, but cannot affect him now. *See Am. Fruit Growers, Inc. v. W.B. Parker* (1943) 22 Cal.2d 513, 515 ("one who will not be injured by its operation" cannot challenge an order or statute); *Rebney v. Wells Fargo Bank, N.A.* (1990) 220 Cal.App.3d 1117, 1138 fn. 6 (objectors to settlement could not attack agreement on ground that it injured others).

Under Gentry's logic, an individual may rely on a superseded contractual term for the sole purpose of seeking to invalidate the contract of which it is part. The U.S. Supreme Court has explained in a different context that plaintiffs could not avoid arbitration based on the claim "that they agreed to arbitrate future disputes * * * in reliance on [an earlier case] holding that such agreements would be held unenforceable by the courts." *Rod-*

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339 F.3d 553, 557; *Dobbins v. Hawk's Enters.* (8th Cir. 1999) 198 F.3d 715, 717; *Anderson v. Delta Funding Corp.* (N.D. Ohio 2004) 316 F.Supp.2d 554, 567; *Jung v. Ass'n of Am. Med. Colls.* (D.D.C. 2004) 300 F.Supp.2d 119, 148–49; *In re Currency Conversion Fee Antitrust Litig.* (S.D.N.Y. 2003) 265 F.Supp.2d 385, 411–12; *Nelson v. Insignia/ESG, Inc.* (D.D.C. 2002) 215 F.Supp.2d 143, 157; *First Family Fin. Servs., Inc. v. Sanford* (N.D. Miss. 2002) 203 F.Supp.2d 662, 667; *Baugher v. Dekko Heating Techs.* (N.D. Ind. 2002) 202 F.Supp.2d 847, 850; *Phillips v. Assocs. Home Equity Servs., Inc.* (N.D. Ill. 2001) 179 F.Supp.2d 840, 847; *Nur v. K.F.C., USA, Inc.* (D.D.C. 2001) 142 F.Supp.2d 48, 52; *Zuver v. Airtouch Commc'ns, Inc.* (Wash. 2004) 103 P.3d 753, 763 & fn. 7; *Zobrist v. Verizon Wireless* (Ill. Ct. App. 2004) 822 N.E.2d 531, 539.

riguez de Quijas v. Shearson/Am. Express, Inc. (1989) 490 U.S. 477, 485. That holding applies equally to Gentry's effort to avoid arbitration by attacking the terms of arbitration rules that Circuit City has committed not to apply to him.

Moreover, permitting a company to remove alleged obstacles to arbitration (such as arbitration costs) serves the policies favoring the enforcement of arbitration agreements. Hence, although Gentry is not contractually *required* to use the cost-free arbitration procedures that Circuit City has provided for him, he may not avoid arbitration by arguing that superseded arbitration procedures discourage the vindication of small claims, when those features could not be applied to Gentry himself. Indeed, to allow him to evade arbitration on this ground would evince the kind of "judicial hostility to arbitration" that the FAA was enacted to overcome. *See Gilmer*, 500 U.S. at 24.

2. A Rational Employee, Not Under Delusion, Would Agree To Arbitrate Disputes Individually At No Cost To Initiate The Proceeding And With The Prospect Of Winning Attorneys' Fees If He Prevails.

The substantive unconscionability inquiry focuses on whether the contractual term is so "overly harsh" or "one-sided" (*Armendariz*, 24 Cal.4th at 114) as to "shock the conscience." *Coast Plaza Doctors Hosp. v.*

Blue Cross (2000) 83 Cal.App.4th 677, 689.[10] Put another way, the term must be one that "*no man in his senses, and not under delusion* would make on the one hand, and [that] no honest and fair man would accept on the other." *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 484 (emphasis added) (quoting *Odell v. Moss* (1900) 130 Cal. 352, 358 (quoting in turn 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (1836) § 244)); *Cal. Grocers Ass'n v. Bank of Am.* (1994) 22 Cal.App.4th 205, 214; *see also Swanson v. Hempstead* (1944) 64 Cal.App.2d 681, 688 ("the authorities are agreed" on this point).

Though this Court has on occasion limited its description of substantive unconscionability to "overly harsh or one-sided results" (*e.g.*, *Discover*, 36 Cal.4th at 160), that vague formulation provides little guidance. Trying to decide whether a contractual provision is "overly harsh" is akin to trying to decide whether a person is "overly tall." *See* "Vagueness," *Stanford Encyclopedia of Philosophy*, *at* http://plato.stanford.edu/entries/vagueness/. This Court should therefore confirm the vitality of the objective "delusion" standard that it followed in *Herbert*, 9 Cal.2d at 484. At least a dozen other states adhere to that standard.[11]

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[10] *See also Aron v. U-Haul Co.* (2006) 143 Cal.App.4th 796, 809; *Morris*, 128 Cal.App.4th at 1322–23.

[11] *See, e.g.*, *Bland v. Health Care & Ret. Corp. of Am.* (Fla. Dist. Ct. App. 2006) 927 So.2d 252, 256; *Walther*, 872 A.2d at 744; *Norwest Fin. Mississippi, Inc. v. McDonald* (Miss. 2005) 905 So. 2d 1187, 1193; *Lovey*

It is impossible to conclude that "no man in his senses, and not under delusion" would accept a fully disclosed prohibition of class-wide arbitration in an arbitration provision that, like Circuit City's provision, has other features that combine to make individual arbitration a realistic means of resolving small claims. Employees like Gentry (and consumers in other contexts) have made a trade-off in agreeing to forgo participation in class actions, but certainly not a *delusional* one.

There are many reasons why a reasonable person would accept an arbitration provision that allowed full and cost-free resolution of his own disputes, but deprived him of the ability to bring class actions for *other* employees' benefit. Indeed, Gentry did not carry his burden of demonstrating that he could not realistically vindicate his claims in arbitration.[12] Nor

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v. Regence BlueShield of Idaho (Idaho 2003) 72 P.3d 877, 882; *Conseco Fin. Serv. Corp. v. Wilder* (Ky. Ct. App.2001) 47 S.W.3d 335, 341–42; *Smith v. Mitsubishi Motors Credit of Am., Inc.* (Conn. 1998) 721 A.2d 1187, 1190; *Pinnacle Computer Servs., Inc. v. Ameritech Publ'g, Inc.* (Ind. Ct. App. 1994) 642 N.E.2d 1011, 1017; *Iberlin v. TCI Cablevision, Inc.* (Wyo. 1993) 855 P.2d 716, 728; *Management Enters., Inc. v. Thorncroft Co.* (Va. 1992) 416 S.E.2d 229, 231; *Waters v. Min Ltd.* (Mass. 1992) 587 N.E.2d 231, 234; *Lakeside Boating & Bathing, Inc. v. State* (Iowa 1987) 402 N.W.2d 419, 422; *Society of Lloyd's v. Reinhart* (10th Cir. 2005) 402 F.3d 982, 997 (applying New Mexico law); *Siebert v. Amateur Athletic Union of the United States, Inc.* (D. Minn. 2006) 422 F.Supp.2d 1033, 1041 (applying Minnesota law); *Provencher v. Dell Corp.* (C.D. Cal. 2006) 409 F.Supp.2d 1196, 1204 (applying Texas law); *Truesdell v. State Farm Fire & Cas. Co.* (N.D. Okla. 1997) 960 F.Supp. 1511, 1516 (applying Oklahoma law).

[12] *See Green Tree Fin. Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 92 ("[W]here, as here, a party seeks to invalidate an arbitration agree-

could he. Unlike the arbitration provision condemned in *Discover*, Circuit City's 2005 arbitration rules do not operate as an exculpatory clause.

As Circuit City points out at greater length (Resp. Br. 6–8, 42–44), Circuit City couples its class waiver with pro-employee features that provide employees with equal or greater benefits than the class-action mechanism. Circuit City's arbitration rules specify that Circuit City will pay the cost of arbitration, including the arbitrator's fee. Resp. Br. 6, 7. The rules also permit employees to recover remedies to the full extent that they may be recoverable in court, including any applicable statutory or punitive damages. *Id.* at 7.

Of particular importance, Circuit City's rules require Circuit City to reimburse employees for their attorneys' fees in accordance with applicable law (*id.* at 7), such as section 218.5 of the Labor Code, under which Gentry has sued. Attorney fee provisions provide an especially strong incentive for lawyers to pursue such claims because authorizing the recovery of statutory attorneys' fees implicitly authorizes arbitrators to employ the *same* lodestar method that California courts often employ to compensate *class* counsel. *See, e.g., Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 678; *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 24, 49–50. At the same time, the lawyer does not bear the risk that a lawyer who

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ment on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.").

filed a similar case will be designated class counsel and garner the lion's share of any eventual fee award.

With the general advantages of arbitration reinforced by these features, an employee who wishes to pursue a claim against Circuit City predictably would fare better in individual arbitration than in class-action litigation along *any* dimension of comparison. Though Gentry implies that class actions allow employees to obtain make-whole awards without cost, the reality is that employees who choose to become putative class representatives face a far worse incentive structure than they would in individual arbitration under Circuit City's arbitration provision.

First, the employee's costs would be much lower in arbitration than in litigation. While employees may arbitrate for free, in court, they would be responsible for paying substantial filing fees. For example, the filing fee for cases seeking damages in excess of $25,000, as a class action almost certainly would be, is $320. Gov't Code § 70611. Because it is a class action, the class representative might also have to pay a $550 complex case fee. *Id.* § 70616(a). And if the case were to proceed to even a one-day trial, he would owe other fees, such as jury fees ($150) and court reporter fees ($440). Code Civ. Proc. § 631(b); Gov't Code § 68086(a).

Second, employees who choose individual arbitration enjoy the "simplicity, informality, and expedition" (*Mitsubishi*, 473 U.S. at 628) of the arbitration process. Employees who elect to bring a class action, by

contrast, must invest a substantially greater amount of time in vindicating their claim. A recent study compared the decision time of arbitrations to trials of employment discrimination cases. *See* Eisenberg & Hill, *Employment Arbitration and Litigation: An Empirical Comparison* (Mar. 5, 2003) PUB. L. & LEGAL THEORY RES. PAPER SERIES NO. 65, *at* http://ssrn.com/abstract=389780. While the mean time from claim to award in arbitration was 276 days, state-court trials involved an average delay almost three times as long: 818 days, which is roughly two and a quarter years. *Id.* at 20.

Third, employees who choose to arbitrate receive greater relief and prevail more often than employees who litigate. While employees who prevail in individual arbitration receive make-whole awards (including reimbursement for attorneys' fees), putative class representatives would likely recover only a fraction of their claims because class actions often settle for pennies on the dollar. Moreover, the class counsel's fees (which routinely approach 30 or 40 percent) often come out of the pockets of the class members.[13]

Even aside from the disparity that results from unfairly structured class-action settlements, employees who arbitrate face better odds than

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[13] *See* Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 911; Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff* (1997) 60 L. & CONTEMP. PROBS. 167, 168; Koniak & Cohen, *Under Cloak of Settlement* (1996) 82 VA. L. REV. 1051, 1051–89.

those who litigate. Studies of employment disputes during the 1990s found that:

- plaintiffs prevailed in 63% of arbitrations but only 43% of court actions;
- median damage awards were similar in arbitration and litigation even though the swifter disposition of claims in arbitration reduces the time for which back-pay awards must be calculated; and
- plaintiffs who arbitrated successfully found attorneys to represent them in cases involving much smaller claims than plaintiffs who sued.[14]

And while unsuccessful litigants are often disillusioned by the judicial system, a study of parties involved in NASD securities arbitrations found that—win or lose—over 93% of the participants agreed that their claims were handled "fairly and without bias."[15]

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[14] Maltby, *Employment Arbitration and Workplace Justice* (2003) 38 U.S.F. L. REV. 105, 108–17. Another study looking at data from 1992 to 1994 found an even starker disparity between employees' win rates in arbitration (68%) and litigation (28%). *See* Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* (Oct.–Dec. 1995) 50 DISP. RESOL. J. 40, 41–43.

[15] Tidwell *et al.*, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* (Aug. 1999) 20, *available at* http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009528.pdf.

Moreover, employees might prefer individual arbitration out of a preference for informal, less adversarial proceedings—or out of general antipathy to class actions. Congress recently expressed concern that endemic "abuses of the class action device" "undermined public respect for the judicial system," pointing specifically to the fact that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed," while class-action lawyers walk away with large fees. Class Action Fairness Act of 2005, Pub. L. No. 109–2, § 2 (codified at 28 U.S.C. § 1711 note).

In any event, an employee who is unwilling to initiate a cost-free arbitration is unlikely to take the time to file a claim after a class action has settled. Studies of consumer class action settlements show that, when the amount that a claimant can expect to receive is small, the percentage of class members who submit claim forms is very low.[16] The reason is not

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[16] *See, e.g.*, Tharin & Blockovich, *Coupons and the Class Action Fairness Act* (2005) 18 GEO. J. LEGAL ETHICS 1443, 1445–46 (noting that redemption rate of class action coupons ranges from 1%–3%); Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation* (2002) 49 U.C.L.A. L. REV. 991, 1035 (reporting study of ten consumer class action settlements in which redemption rates varied from 3% to 13.1%); Hensler, *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000) exec. summ. at 19–20 & ch. 6 at 182–84 (reporting another study in which claims rates often fell below one-third, and noting that more than 40% of claims for one settlement were rejected for insufficient documentation or proof of loss), *available at* http://www.rand.org/pubs/monographreports/MR969/index.html; Hillebrand & Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits* (1988) 28 SANTA CLARA L. REV. 747, 753 (1988) (discussing three settlements in which claims rates were 3%, 10.5%, and 18%); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.* (7th

hard to discern: class action cases often are settled for pennies on the dollar (if that), making it both exasperating and economically irrational for most claimants to research their records and fill out the necessary forms.

In sum, far from exculpating Circuit City from liability, its arbitration agreement offers employees a means of dispute resolution that in many ways is *superior* to that available through class actions. Even if class actions were marginally superior to individual arbitration, many—perhaps most—disputes that an employee may anticipate would not be amenable to class-wide adjudication. An employee therefore may rationally choose to accept an arbitration agreement that offers an advantageous means of resolving his own disputes even if that means sacrificing the ability to bring a class action on behalf of others. Under traditional standards, offering and then enforcing that choice is not unconscionable.

Cir. 2006) 463 F.3d 646, 649–50 (noting that only a "paltry three percent" of class members had filed claims under the settlement).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed.

Respectfully submitted.

Robin S. Conrad (*pro hac vice* admission pending)
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

W. Stephen Cannon (*pro hac vice* admission pending)
Raymond C. Fay (*pro hac vice* admission pending)
CONSTANTINE CANNON, P.C.
1627 Eye Street, NW, 10th Floor
Washington, DC 20006
(202) 204-3500

Donald M. Falk (Bar # 150256)
MAYER, BROWN, ROWE & MAW LLP
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

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Donald M. Falk
Attorney for *Amici Curiae*

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S141502

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Dennis P. Riordan
Riordan & Horgan
523 Octavia Street
San Francisco, CA 94102

Ellen Lake
Law Offices of Ellen Lake
4230 Lakeshore Avenue
Oakland, CA 94610

Matthew Righetti
Righetti & Wynne, P.C.
466 Montgomery Street
14th Floor
San Francisco, CA 94104

Rex D. Berry
Berry & Block, LLP
2150 River Plaza Drive
Suite 415
Sacramento, CA 95833

Steven B. Katz
Jones Day
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071

Michael Rubin
Altshuler, Berzon, Nussbaum,
Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Gretchen Carpenter
Strange & Carpenter
12100 Wilshire Boulevard
Suite 1900
Los Angeles, CA 90025

Henry D. Lederman
Littler Mendelson, P.C.
2175 N. California Boulevard
Suite 835
Walnut Creek, CA 94596

Court of Appeals
Second Appellate District, Div. Five
300 South Spring Street
2nd Floor
Los Angeles, CA 90013

Clerk of Los Angeles Sup. Court
111 North Hill Street
Los Angeles, CA 90012
Attn: Hon. Thomas L. Wilhite, Jr.

Office of the Attorney General
Consumer Law Section
300 South Spring Street
Los Angeles, CA 90013

Office of the District Attorney
210 West Temple Street
18th Floor
Los Angeles, CA 90012

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Kristine Surzynski

Kristine Surzynski