

No. S113725

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IN THE SUPREME COURT OF CALIFORNIA

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DISCOVER BANK,

*Defendant-Petitioner,*

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

*Respondent,*

CHRISTOPHER BOEHR,

*Plaintiff-Real Party in Interest.*

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After an Order by the Court of Appeal, Second Appellate District,  
Division One, Case No. B161305, on Writ of Mandate from  
The Superior Court of Los Angeles County, Case No. BC256167,  
The Honorable Carolyn Kuhl Presiding

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**APPLICATION OF THE CHAMBER OF COMMERCE OF THE  
UNITED STATES FOR PERMISSION TO FILE *AMICUS CURIAE*  
BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF  
DEFENDANT-PETITIONER**

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**APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-PETITIONER**

To the Honorable Ronald M. George, Chief Justice:

The Chamber of Commerce of the United States (the “Chamber”) respectfully moves for leave to file a brief as *amicus curiae* in this matter in support of the defendant-petitioner. 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. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has 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 members, constituent organizations, and affiliates have adopted as standard features of their business 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 consumers and other contracting parties. Many of those advantages would be forfeited if the class action device were superimposed on arbitration; as a result, arbitration

agreements frequently preclude the parties from seeking to arbitrate their disputes on a class-wide basis.

The plaintiff in this litigation seeks a rule that such class-arbitration waivers are unconscionable under California law. Because the use of unconscionability principles to invalidate the class-action waiver in Discover's arbitration provision would wreak havoc on countless arbitration provisions in contracts entered into by the Chamber's members, the Chamber has a strong interest in having its views on the validity of class-action waivers considered by the Court. Moreover, because the Chamber has filed amicus briefs in numerous cases in the U.S. Supreme Court and elsewhere involving issues pertaining to the enforceability of arbitration provisions (including most recently in *Green Tree Financial Corp. v. Bazzle* (2003) 123 S. Ct. 2402, and *PacifiCare Health Systems, Inc. v. Book* (2003) 123 S. Ct. 1531), we respectfully submit that the Chamber's familiarity with arbitration law and doctrine may be of assistance to the Court in resolving the issues in this case.

## CONCLUSION

For the foregoing reasons, the application should be granted and the accompanying *amicus curiae* brief filed.

Respectfully submitted,

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## INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States (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. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has 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 members, constituent organizations, and affiliates have adopted as standard features of their business 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 consumers and other contracting parties. Many of those advantages would be forfeited if the class action device were superimposed on arbitration. Accordingly, arbitration agreements frequently preclude the parties from seeking to arbitrate their disputes on a class-wide basis. Because the use of unconscionability principles to invalidate the class-action waiver in Discover’s arbitration provision would wreak havoc on countless arbitration provisions in con-

tracts entered into by the Chamber's members, the Chamber has a strong interest in having its views on the validity of class-action waivers considered by the Court.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiff asks this Court to manipulate the law of unconscionability so as to condemn the prohibition against class-wide arbitration in his cardholder agreement and thereby nullify the agreement to arbitrate that was a condition of the extension of credit. The *ad hoc* creation of unconscionability doctrine in order to defeat arbitration is impermissible under any circumstances. But in this case it is particularly uncalled for. Though plaintiff presents his arguments as consumer advocacy, this is a typical case in which the members of the putative "consumer" class are destined to get nothing of value and the only ones who stand to recover a substantial amount of money are the plaintiff's lawyers. From all appearances, Mr. Boehr's claim (which purportedly is representative of the claims of the members of the putative class) is worth somewhere between thirty-three and eighty-six *cents* (*see* Answer Brief 8 n.5) — the amount he allegedly was overcharged under his contract with Discover. The thrust of his argument is that the only way for him and others like him to obtain redress for this *de minimis* loss is through a class action and that the modes of dispute resolution to which he contractually agreed — either small claims court or traditional one-on-one arbitration — are so inherently in-

traditional one-on-one arbitration — are so inherently inadequate as to be unconscionable.

The arguments advanced to support this thinly disguised venture to generate a nice attorneys' fee award are flawed in several important respects. For example, they are premised on the assumption that any time an individual or group of individuals might have a small claim against an entity with whom they have contracted, California law *must* authorize them to bring a class action to recover on that claim — even if the parties have otherwise agreed to arbitrate all disputes. But allowing claims of this tiny magnitude to be litigated will inure to the benefit of no one except for plaintiffs' attorneys themselves, who at the end of the day likely will be the only people to gain a cent from the litigation. And to the extent claims of this kind have any merit, the California Attorney General is fully empowered to require defendants to alter their practices. It is simply absurd to assert that California law, despite its recognition of the many benefits of arbitration, should view the right to bring a claim for thirty-three cents to be so fundamental as to defeat the parties' agreement to arbitrate individually rather than *en masse*. The guiding principle of plaintiff's argument seems to be that the less there is of a claim, the more the courts should interfere with the agreed-upon mechanism for its resolution.

Rather than repeat the reasons that Discover has given for why plaintiff's arguments should be rejected out of hand — starting with the fact that

the litigation is governed exclusively by Delaware law, which undeniably allows waivers of class actions — in this brief we make several related but distinct points to demonstrate to this Court why the court of appeal’s decision below is correct.

First, we explain that both federal and California law require an arbitration provision to be enforced according to its terms unless *generally applicable* doctrines of state law warrant a refusal to enforce that provision. As the court of appeal recognized, this means that neither parties nor courts may manipulate California’s law of unconscionability on an *ad hoc* basis specifically to defeat arbitration — which is what plaintiff asks the Court to do, and is what the Fourth District did in *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, cert. denied (2003) 123 S. Ct. 1258, in striking down the bar on class-wide arbitration in the same arbitration provision as the one involved here. A generalized label cannot save from preemption a common-law rule that has been narrowly tailored to apply only in the arbitration context, and only to alter or invalidate (rather than enforce) the terms of arbitration agreements.

Second, we briefly explain why, in resolving the issues in this case, the Court should reject the hostility to standard form contracts that so evidently underlies plaintiff’s arguments. Form contracts of the sort involved here are critically necessary to the modern economy. As a consequence, any rule of law that categorically impairs the enforceability of form con-

tracts would have devastating implications to both businesses *and* consumers.

Finally, we explain why, under California law, there is nothing unconscionable about an arbitration agreement that waives the right to proceed on a class-wide basis. Class-wide actions for damages represent a relatively recent and normally waivable procedural device; the inability of a party to demand that procedure cannot then be fundamentally unfair or unconscionable. Furthermore, class action procedures are not needed to prevent arbitration from being unfair to consumers. Finally, mandating class procedures actually would *undermine* the very benefits of arbitration that lead parties to enter into arbitration agreements in the first place — inexpensive, streamlined, and expeditious dispute resolution. A procedure that would subvert these goals cannot possibly be an indispensable prerequisite to enforcement of an agreement to arbitrate.

## **ARGUMENT**

### **I. THE FEDERAL ARBITRATION ACT FORBIDS COURTS TO DISTORT THE DOCTRINE OF UNCONSCIONABILITY SPECIFICALLY TO DEFEAT ARBITRATION.**

Plaintiff’s arguments are premised on a fundamental misconception — that, because the doctrine of unconscionability is generally applicable to all contracts, an arbitration agreement may be voided by the simple expedient of making an *ad hoc* determination that one of its provisions is “unconscionable.” In fact, however, the FAA cannot be so easily circumvented.

In enacting the FAA, Congress “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10. The Act’s “basic purpose” is “to put arbitration provisions on ‘the same footing’ as a contract’s other terms.” *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 275 (quoting *Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 511). Accordingly, Section 2 of the FAA “embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate \* \* \* is revocable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’” *Perry v. Thomas* (1987) 482 U.S. 483, 489 (quoting 9 U.S.C. § 2). Unless that savings clause applies, “[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law.*” *Id.* at 492 n.9 (emphasis in original).

Thus, section 2 of the FAA carves out a **limited** role for the states in the regulation of contractual arbitration. An agreement to arbitrate may be invalidated on state-law grounds “*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Perry*, 482 U.S. at 493 n.9 (emphasis in original). Accordingly, Section 2 gives the states, for example, “a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision.” *Allied-Bruce*, 513 U.S. at 281. However, “[a] state-law principle

that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.” *Perry*, 482 U.S. at 493 n.9. “Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what \* \* \* the state legislature cannot.” *Id.*

In sum, as the Supreme Court has ruled:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.

*Allied-Bruce*, 513 U.S. at 281.

Plaintiff’s arguments in this case are a particularly clear example of the burgeoning strategy of seeking the invalidation of arbitration agreements based on state-law rules that are described under the rubric of general contract law, but in fact have been fashioned solely to deal with arbitration agreements. Specifically, the premise of the attack on the court of appeal’s decision is that contractual waivers of class actions are unconscionable. Yet as of this moment, California has no across-the-board rule prohibiting such waivers. Instead, it has only a very specific prohibition against waiving the right to pursue a claim under the California Consumer Legal Remedies Act (“CLRA”), Civ. Code § 1750 *et seq.*, on a class-wide basis. *See*

*America Online, Inc v. Superior Court* (2001) 90 Cal.App.4th 1, 17; *see also* Answer Brief at 44. Accordingly, plaintiff at bottom asks this Court to declare a new principle of unconscionability and then to apply it in the same case to strike down an arbitration provision. That kind of *ad hoc* manipulation of unconscionability doctrine is utterly inconsistent with the Supreme Court’s admonition that state-law contract defenses may be used to void arbitration provisions only if they “*arose* to govern issues concerning the validity, revocability, and enforceability of contracts *generally*” (*Perry*, 482 U.S. at 493 n.9 (emphasis added)). Indeed, Congress’s rationale for authorizing contract-law exceptions to the general rule that arbitration provisions are enforceable — that there can be no impermissible animosity toward arbitration when a court is merely applying an *extant*, generally applicable contract-law defense — loses all force when, as here, the party seeking to avoid arbitration is trying to make up unconscionability doctrine as it goes along.

The approach embodied in plaintiff’s arguments would make the validity of arbitration agreements entirely a matter of various courts’ *ad hoc* articulations of law, diluting the strong policies favoring enforcement of arbitration agreements. Instead, this Court should instruct the California courts about the appropriate role of state common law in determining the validity of contractual arbitration clauses. As the U.S. Supreme Court has made clear, no “state-law principle that takes its meaning precisely from the

fact that a contract to arbitrate is at issue” can be used to preclude or limit agreed-upon arbitration. *Perry*, 482 U.S. at 493 n.9.

## **II. FORM CONTRACTS ARE ESSENTIAL TO THE MODERN ECONOMY.**

Another fallacy in plaintiff’s argument is its unspoken premise that standard form contracts are inherently deleterious for consumers and that arbitration provisions should be viewed with greater skepticism when contained in such a contract. *See* Opening Brief 12-13. The idea that the existence of a form contract is a thumb on the scale in the unconscionability analysis is neither warranted by California law nor consistent with modern commercial realities.

As this Court has explained, “[t]o describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.” *Keating v. Superior Court* (1982) 31 Cal.3d 584, 594 (internal quotation marks and citations omitted), rev’d in part on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1. Although it is incumbent on courts to ensure that form contracts — like any other contract — are not used in such a one-sided fashion as to deny consumers their rights, those contracts are critical to the modern economy, and generic aspersions on them have no place in the law of this or any other state.

The standardization of contractual terms serves the same values as the standardization of goods and services, and is equally “essential to the functioning of the economy.”<sup>1</sup> JOSEPH M. PERILLO, CORBIN ON CONTRACTS (rev. ed. 1993) § 1.4, at 15.<sup>1</sup> Form contracts reduce transaction costs by obviating the need to negotiate and draft a separate agreement for each transaction. Market forces enhance the efficiency of standard-form terms; even form contractual terms that appear unduly advantageous to the drafter benefit consumers *ex ante* by resulting in lower prices due to the drafter’s lower marginal costs. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (5th ed. 1998) 127-29; Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines* (1993) 60 U. CHI. L. REV. 1, 39-40; Ronald H. Coase, *The Choice of the Institutional Framework: A Comment* (1974) 17 J.L. & ECON. 493, 494.

Indeed, without form contracts, significant portions of the modern economy would come to a complete standstill. Were banks required to negotiate individually with consumers each time a consumer applied for a credit card, no one but Bill Gates would *have* a credit card. Were manufac-

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<sup>1</sup> *See also* John J.A. Burke, *Contracts as a Commodity: A Nonfiction Approach* (2000) 24 SETON HALL LEGIS. J. 285, 290 (estimating that standard forms account for more than ninety-nine percent of all contracts); Robert W. Gomulkiewicz, *The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing* (1998) 13 BERKELEY TECH. L.J. 891, 895-900 (noting that standard-form terms make electronic commerce possible).

turers required to negotiate each term in a warranty prior to the sale of an appliance, all televisions would come “as is,” without *any* warranty — or manufacturers would alternatively simply stop making televisions. Were cellular telephone providers required to negotiate each term of their contracts on a customer-by-customer basis, there would be no cell phones available for love or money.

Furthermore, even were it the case that some form contracts contain terms that may be insufficiently protective of the rights of consumers, the marketplace is itself more than adequate to correct such abuses. For example, consumer objections to the early-cancellation fees contained in certain cellular telephone contracts has resulted in at least one company offering a plan that may be canceled at any time without a fee (but under which the company presumably charges more for equipment and/or cellular service). Similarly, if a consumer finds the inclusion of an arbitration provision in his credit card contract to be objectionable, he can find an alternative credit card provider that does not include that term. Indeed, the record in this case contains examples of two such alternatives. Ex. 6K, pp. 113-118; Ex. 6L, pp. 119-122.<sup>2</sup> Moreover, even if there were no such alternatives at present, but if enough consumers were to express their desire to have one, some bank would surely offer it — though, of course, other terms of that no-

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<sup>2</sup> “Ex. \_\_\_” refers to the exhibits to Discover’s mandamus petition.

arbitration credit card might differ, as the provider would have to price the card based on its expected costs, including litigation costs. The marketplace will demonstrate whether consumers are willing to pay a somewhat higher interest rate or annual fee in exchange for a credit card under which all disputes may be resolved in court or via class-wide arbitration; this Court's intervention is unnecessary to achieve that result.

Neither *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, *pet. for cert. pending* (filed May 22, 2003) No. 02-1720, nor *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, supports a contrary conclusion. *Cf.* Opening Brief at 12-13. Both of those cases arose in the unique context of employment contracts, where “the economic pressure exerted by employers on all but the most sought after employees may be particularly acute.” *Armendariz*, 24 Cal.4th at 115. In those circumstances, courts “must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement.” *Id.* Similar concerns do not apply to most contracts between businesses and consumers, where alternative options abound and there is no overarching public policy forbidding waiver of or procedural limitations on claims, as there was in *Armendariz* and *Little*.

Accordingly, this Court should clarify that, merely because a business offers a form contract on a uniform basis to all who seek that busi-

ness’s services — and in particular where that form contract includes a provision mandating the individual arbitration of disputes arising under that contract — such a contract is in no way suspect.

**III. THERE IS NOTHING UNCONSCIONABLE ABOUT AN ARBITRATION AGREEMENT THAT REQUIRES ARBITRATION TO PROCEED ON AN INDIVIDUAL BASIS.**

A final fundamental flaw in plaintiff’s arguments is their underlying assumption that the ability to bring claims on a class-wide basis is a critical feature of California jurisprudence. That effort to elevate class actions to an untouchable stature is neither necessary for the vindication of consumers’ rights nor historically supportable. Although the CLRA precludes contracts from barring class certification of claims *arising under that Act* (see *America Online*, 90 Cal.App.4th at 5), plaintiff has not brought a claim under the CLRA, and thus this Court need not determine whether, under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, an agreement to arbitrate on an individual basis would trump the CLRA.<sup>3</sup> The only question before this Court is whether California law embodies a *general* principle favoring class actions of such force that it overrides contrary arbitral agreements even if they do not raise claims under the CLRA. It does not.

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<sup>3</sup> Although we acknowledge that it might perhaps be a closer question than that raised in the present litigation, we submit that under *Southland Corp. v. Keating* (1984) 465 U.S. 1, an agreement to arbitrate all disputes on an individual basis would be enforceable even as to causes of action arising under the CLRA.

Just as “an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may hinder the prosecution of a \* \* \* nationwide class action” (*Washington Mut. Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 918), so too an agreement to arbitrate on an individual basis may not be disregarded merely because it may hinder the prosecution of a class action.<sup>4</sup>

**A. The Monetary Class Action Is A Recent Innovation That Is Not So Fundamental That Its Unavailability Can Be Deemed To Render An Arbitration Provision Unconscionable.**

Precluding class-wide resolution of disputes is not inherently unfair or unconscionable. The ability to obtain money damages in a class action is a relatively recent development, and the type of representative actions historically available in equity differed fundamentally from modern class ac-

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<sup>4</sup> Plaintiff’s assertion that *America Online* rested not just on the non-waivable nature of class actions under the CLRA, but also on “California’s general policy in favor of the right to class action relief in consumer cases” (Opening Brief 10 n.4), is not a fair reading of that decision. The holding of that case, in the court of appeal’s own words, was that “[e]nforcement of the contractual forum selection and choice of law clauses would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited under California law.” 90 Cal.App.4th at 5. While the decision does contain some broader language praising consumer class actions (*id.* at 17-18), that language responded to an argument that “the elimination of class actions for consumer remedies if the forum selection clause is enforced is a matter of insubstantial moment” (*id.* at 18). Construing this language as an open-ended holding that class actions are too fundamental to be waivable would put *American Online* in conflict with this Court’s unwillingness in *Washington Mutual* to bend the choice-of-law rules to facilitate the desire of the plaintiff’s lawyers to secure class certification. *See* 24 Cal.4th at 918.

tions. A procedure of such recent vintage cannot be so fundamental that its unavailability would make an arbitration agreement unconscionable.

The modern class action is “something out of the ordinary, an essentially new turn in legal events.” Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action* (1977) 77 COLUM. L. REV. 866, 866. Although legal historians at one time viewed the modern class action as a descendant of representative actions in seventeenth-century English chancery, more recent research shows those representative actions to have been more like “archaic remnants of a medieval social and litigative structure” than forerunners of the modern class action. STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987) p.136. “Seventeenth-century group litigation is not about the legal rights of aggregated individuals but about the residual incidents of status flowing from membership in agricultural communities poised at the edge of a market economy.” *Id.* Notably, “none” of those group cases involved “actions for money damages.” *Id.* at 135. Even today, damages are not available in representative actions in England except in limited circumstances. See Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions* (2001) 11 DUKE J. COMP. & INT’L L. 249, 253.

In the United States, what we now think of as class actions did not exist until relatively recently. The United States Supreme Court’s initial

rules of practice for federal courts of equity, promulgated in 1822, did not contain *any* provisions for class actions. *See* (1822) 20 U.S. (7 Wheat.) xvii-xxi. In practice, representative suits were available only as a limited exception to the “necessary parties” rule in equity and could not be relied on to bind absent parties. *See Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 832; JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS (J. Gould 10th rev. ed. 1892) § 97. These limitations largely remained after the Supreme Court provided for “group representative litigation” in Equity Rule 48 ((1843) 42 U.S. (1 How.) xli, lvi), followed by “Representatives of Class” in Equity Rule 38 ((1913) 226 U.S. 630, 659). *See Wabash R.R. v. Adelbert Coll.* (1908) 208 U.S. 38, 58-59; *Christopher v. Brusselback* (1938) 302 U.S. 500, 505. Even the original version of Federal Rule of Civil Procedure 23, promulgated in 1937, did little to promote the use of class actions, in part because the circumstances in which absent parties would be bound by a class action ruling remained unclear. *See Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)* (1967) 81 HARV. L. REV. 356, 381.

“[M]odern class action practice emerged in the 1966 revision of Rule 23” (*Ortiz*, 527 U.S. at 833), which gave federal court class actions their “current shape” (*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 613). Revised Rule 23’s “most adventuresome innovation” was its authorization of “class actions for damages designed to secure judgments

binding all class members save those who affirmatively elected to be excluded.” *Id.* at 614.

Class actions in California state courts are of equally recent vintage. Although Code of Civil Procedure section 382 authorized limited class actions as early as 1872 (*see Hefferman v. Bennett & Armour* (1952) 110 Cal.App.2d 564, 590), for most of the first century afterward the “common relief” doctrine inhibited the availability of class actions for damages in California state courts. *See* 4 BERNARD E. WITKIN, CALIFORNIA PROCEDURE §§ 274-275, at 356-359 (4th ed. 1997). For practical purposes, damages class actions in California state courts were limited to “common fund” situations. Note, *Class Action and Interpleader: California Procedure and the Federal Rules: Class Actions*, (1953) 6 STAN. L. REV. 120, 123-133.

Not until 1967 did this Court squarely reject common relief as a prerequisite to class certification (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 707-708), opening the door to class representation of disparate plaintiffs with minor economic injuries. *See* Michael D. Berk, *Daar v. Yellow Cab Co.: The Advent of the Consumer Class Action in California* (1976) 10 U.S.F. L. REV. 651, 664. And only in 1970 did the Legislature enact the CLRA, which specifies that claims under it may be prosecuted as class actions (*see* Civ. Code §§ 1752, 1781), and which led to the growth of class actions in this State. *See generally Richmond v. Dart Indus.* (1981) 29 Cal.3d 462, 469. Even after the CLRA’s enactment, damages class actions

took years to evolve to their modern form. *See, e.g.,* Janet M. Cooper, Comment, *Determining the Propriety of Small Claims Class Actions* (1978) 66 CAL. L. REV. 215 (criticizing the general unavailability in California state courts of class actions for damages where individual claims are small). And while in the early 1970s this Court instructed California trial courts to apply Federal Rule of Civil Procedure 23 by analogy to cases where parties sought class certification (*see Vasquez v. Superior Court* (1971) 4 Cal.3d 800), it was only on January 1, 2002, that state-wide rules for class actions went into effect. *See* Cal. R. Ct. 1850-1861.

For most of their histories, then, neither the American legal system in general, nor California's legal system in particular, provided for class-wide resolution of individual claims, and class actions for damages of the type so prevalent today took shape no more than 37 years ago. Such a recent innovation can hardly be deemed *essential* to prevent dispute resolution procedures from being unconscionable, even if it is a *desirable* litigation option in certain circumstances.

To the contrary, it is well established that the right to bring a class action is “merely a procedural one \* \* \* that may be waived.” *Johnson v. West Suburban Bank* (3d Cir. 2000) 225 F.3d 366, 369. As this Court recently reiterated, “[c]lass actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends — to sacrifice the goal for the

going.”” *Washington Mutual*, 24 Cal.4th at 918 (quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462). Hence, permitting parties to waive the right to a class action by choosing a different procedure to resolve their disputes — individual arbitration — cannot be fundamentally unfair or unconscionable. “[P]arties are generally free to structure their arbitration agreements as they see fit,” and may “specify by contract the rules under which that arbitration will be conducted.” *Volt Info. Sciences v. Board of Trustees of Leland Stanford Jr. Univ.* (1989) 489 U.S. 468, 479. Just as parties to an arbitration agreement may “stipulate to whatever procedures they want” (*Baravati v. Josephthal, Lyon & Ross, Inc.* (7th Cir. 1994) 28 F.3d 704, 709), they may agree to exclude remedies and procedures they **don’t** want, such as punitive damages (*see Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 58-60) and class actions. Numerous federal and state courts therefore have held that there is nothing unconscionable about arbitration provisions that exclude class actions.<sup>5</sup>

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<sup>5</sup> See, e.g., *Lloyd v. MBNA Am. Bank, N.A.* (3d Cir. 2002) 27 Fed. Appx. 82, 84; *Snowden v. Checkpoint Check Cashing* (4th Cir. 2002) 290 F.3d 631, 638-639, cert. denied (2002) 123 S. Ct. 695; *Randolph v. Green Tree Fin. Corp.* (11th Cir. 2001) 244 F.3d 814, 818-819; *Lomax v. Woodmen of the World Life Ins. Soc’y* (N.D. Ga. 2002) 228 F.Supp.2d 1360, 1365; *Lozano v. AT&T Wireless* (C.D. Cal. 2002) 216 F.Supp.2d 1071, 1076-1077; *Vigil v. Sears Nat’l Bank* (E.D. La. May 10, 2002) 2002 WL 987412, at \*4; *Pick v. Discover Fin. Servs., Inc.* (D. Del. Sept. 28, 2001) 2001 WL 1180278, at \*5; *Arriaga v. Cross Country Bank* (S.D. Cal. 2001)

The opportunity for parties mutually to determine procedures to resolve their disputes is in large part what distinguishes private arbitration from courtroom litigation. Whereas the parties to an action in court cannot escape the rules governing discovery, evidence, and appeals, by agreeing to arbitrate they intentionally relinquish “the procedures and opportunity for review of the courtroom.” *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 31. Indeed, what is an arbitration agreement but a waiver of the right to a trial by jury, a right with a far richer pedigree than the right to proceed on a class-wide basis? Yet, it is well established that arbitration agreements are not unenforceable merely because they waive the right to a jury trial. *E.g., Rodriguez de Quijas v. Shearson/American Express, Inc.* (1989) 490 U.S. 477, 480-481; *American Heritage Life Ins. Co. v. Orr* (5th Cir. 2002) 294 F.3d 702, 710-711, cert. denied (2003) 123 S. Ct. 871. By the same token, agreements to resolve disputes through individual arbitration rather than class action procedures cannot be deemed unconscionable and thus unenforceable. Indeed, the U.S. Supreme Court’s holding in *Gilmer* — that a statute expressly authorizing claims on behalf of “other employees similarly situated” (29 U.S.C. § 216(b)) did not preclude agree-

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163 F.Supp.2d 1189, 1195; *Zawikowski v. Beneficial Nat’l Bank* (N.D. Ill. Jan. 11, 1999) 1999 WL 35304, at \*2; *Rains v. Foundation Health Sys. Life & Health* (Colo. Ct. App. 2001) 23 P.3d 1249, 1253; *Brown v. KFC Nat’l Mgmt. Co.* (Haw. 1996) 921 P.2d 146, 166-167 n.23; *Stein v. Geonerco, Inc.* (Wash. Ct. App. 2001) 17 P.3d 1266, 1270-1271.

ments mandating “individual attempts at conciliation” — cannot be reconciled with any notion that such mandates are *per se* unconscionable. 500 U.S. at 32 (internal quotation marks omitted).

At bottom, plaintiff’s attorneys — as well as courts like the Fourth District in *Szetela* — are seeking to substitute their own views of procedural fairness for Congress’s decision to leave the details of arbitral procedures to the parties. But “unless and until Congress authorizes class certification for purposes of arbitration, [courts] are without the authority to impose it.” *Champ v. Siegel Trading Co.* (7th Cir. 1995) 55 F.3d 269, 278 (Rovner, J., concurring).

**B. Arbitral Class Actions Are Not Necessary To Vindicate The Rights Of Consumers.**

Whatever this Court decides with respect to the enforceability of this *specific* class-arbitration waiver in the circumstances of this case, it is imperative that the Court not promulgate a rule precluding such provisions generally. Even if the absence of class action procedures could render an arbitration agreement unconscionable in some circumstances, it is quite another matter to hold that precluding class action arbitrations is always (or even usually) unconscionable. Class action procedures generally are not needed to protect the rights of consumers. Other protections are available that, unlike class actions, comport with arbitration’s consensual framework.

But as we discuss below, plaintiff is mistaken to suggest that the bar is problematic even in the specific circumstances of this case.

1. The U.S. Supreme Court has specifically rejected the contention that the costs of arbitrating make individual consumer arbitration agreements inherently unconscionable. *Green Tree Fin. Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 91-92. It instead has made clear that whether individual arbitration is prohibitively costly is a case-by-case question. *Id.* The answer to that question will vary depending on the claimant's circumstances, the institutional rules governing the arbitration, and the provisions of the applicable agreement. Since then, courts have been fleshing out the precise contours of the claimant's burden to prove that arbitration would be prohibitively expensive. *See, e.g., Little*, 29 Cal.4th 1064; *Morrison v. Circuit City Stores, Inc.* (6th Cir. 2003) 317 F.3d 646; *Bradford v. Rockwell Semiconductor Sys., Inc.* (4th Cir. 2001) 238 F.3d 549, 556.

One plainly important factor is whether, and if so how, the applicable arbitration agreement allocates arbitral costs and fees. Many companies have been experimenting with a variety of cost allocation mechanisms to ensure that filing fees and costs do not present an obstacle to the filing of valid claims. For example, one company's arbitration agreement commits it to advance the remainder of arbitration costs after the claimant pays or obtains a waiver of the \$75 filing fee. *See Luong v. Circuit City Stores, Inc.* (C.D. Cal. Mar. 28, 2001) 2001 WL 935317. In addition, one of the Cham-

ber's members has drafted an arbitration provision under which it undertakes to reimburse the plaintiff for the filing fee, pay the full costs of arbitration, and, if the plaintiff prevails in the arbitration, reimburse his or her attorneys' fees. Another Chamber member offers to pay all but \$100 of the cost of arbitration if the consumer agrees to mediate the dispute prior to arbitrating. Such provisions substantially reduce (if not entirely eliminate) any financial barrier facing an arbitral claimant.

Furthermore, the costs of consumer arbitration have been declining "as arbitration institutions compete to provide low-cost arbitration services." Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 755. The American Arbitration Association ("AAA") caps a consumer's responsibility for arbitrator fees at \$125 on claims of \$10,000 or less, provides for fee waivers or deferrals in hardship cases, and makes arbitrators available to conduct hearings on a pro bono basis. See American Arbitration Ass'n, *Supplementary Procedures for the Resolution of Consumer-Related Disputes* (available at <http://www.adr.org>); American Arbitration Ass'n, *Administrative Fee Waivers and Pro Bono Arbitrators Services* (available at <http://www.adr.org>). Other arbitral institutions have similar provisions. See *Randolph*, 531 U.S. at 95 & n.2 (Ginsburg, J., concurring in part and dissenting in part).

With such contractual and institutional protections available, there is no need to impose class action procedures on arbitration to protect consum-

ers. Nor is there any reason to think that individual arbitration will “choke off the supply of lawyers willing to pursue claims.” *Johnson*, 225 F.3d at 374. Many of the statutes on which consumers base their claims provide for exemplary damages, costs, and attorneys’ fees to a prevailing claimant. *E.g.*, Truth in Lending Act, 15 U.S.C. §§ 1640(a)(2), (3); CLRA, Civ. Code §§ 1780(d), 1783. Unless the parties have agreed to the contrary, arbitrators have the same authority as courts to award that relief. *See American Arbitration Ass’n, AAA Consumer Due Process Protocol, Statement of Principles of the National Consumer Disputes Advisory Committee, Principle 14. Arbitral Remedies* (available at <http://www.adr.org>) (arbitrators may offer “whatever relief would be available in court under law or in equity”).

Indeed, arbitrators have far **greater** flexibility than courts to provide relief on consumer claims. For example, AAA Commercial Arbitration Rule 45 permits an award of “any remedy or relief,” including attorneys’ fees and costs, whereas courts generally may not award exemplary damages for breach of contract or attorneys’ fees without specific contractual or statutory authority. *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.* (2001) 532 U.S. 598, 602 (discussing “American Rule” on attorneys’ fees); *Barnes v. Gorman* (2002) 536 U.S. 181, 187 (“punitive damages \* \* \* are generally not available for breach of contract”). The availability of attorneys’ fees and extracontractual damages in individual arbitrations provides plenty of incentive for lawyers to pursue

valid claims and confirms that class-wide proceedings are not required to ensure vindication of consumer rights.

2. Plaintiff argues that the bar on class-wide arbitration in this specific instance acts as an illegal “exculpatory clause,” because the potential claims of consumers under their theory of injury are *so* small that, without some form of class resolution, no one will bother to seek recovery. *See* Opening Brief 13-18. That argument proves far too much.

First, far from being a “‘get out of jail free’ card” (*id.* at 15 (quoting *Szetela*, 97 Cal.App.4th at 1101)), arbitration contracts such as this one are intended by the parties to cover a wide range of possible disputes, both large and small. The parties reasonably could have decided that the advantages arbitration would provide in the resolution of larger claims might warrant sacrificing the occasional claim for less than fifty cents. As this Court noted in *Armendariz*, the relevant time for determining unconscionability is *ex ante*, “at the time [a contract] was made” (24 Cal.4th at 114 (quoting Civ. Code § 1670.5(a))), not *ex post*, as applied to a specific dispute.

Second, in challenging the various alternative remedies that Discover lists for resolving a dispute of this size (*see* Answer Brief 25-26; Reply Brief 13-15) plaintiff’s attorneys neglect to acknowledge that *no* option for resolving these claims — including a class action or class-wide arbitration — would be perfect. For example, it is well known that when claims

such as these are brought it is primarily the class *attorneys* who benefit, not the members of the class. See, e.g., Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff* (1997) 60 L & CONTEMP. PROBS. 167, 168; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.* (1995) 80 CORNELL L. REV. 1045, 1138-1151; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement* (1996) 82 VA. L. REV. 1051, 1053-1054.

Finally, state and federal agencies designated to protect consumers “possess sufficient sanctioning power to provide a meaningful deterrent” to misconduct in cases like this one. *Johnson*, 225 F.3d at 369; see also *Gilmer*, 500 U.S. at 32 (relying on EEOC’s broad authority to protect consumers); *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220, 233 (same with respect to SEC). Consumers may submit complaints to the California Attorney General by phone at (916) 322-3360 or online at <http://caag.state.ca.us/consumers/mailform.htm>. Federal agencies generally are at least as readily available to respond to consumer complaints. Thus, the arbitration provision here does not exculpate the defendant from liability for wrongdoing.

**C. Imposing Class Action Treatment On Unwilling Arbitral Parties Would Undermine The Benefits Of Arbitration And Thus Impair Their Federally Protected Choice To Resolve Disputes Informally.**

Imposing class action procedures on arbitrations without the parties' agreement not only would conflict with the consensual basis of arbitration but also would undermine the benefits of arbitration for which the parties did contract.<sup>6</sup> Consumers would pay the price if arbitration were to be transmogrified into litigation with its attendant costly procedures. *See Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585, 594 (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers). The deterrence of arbitration, which inevitably would follow upon a judicial mandate to arbitrate on a class basis, would flatly violate the contrary public policies of California and the United States. *That* — not the parties' agreement to arbitrate without using the class action device — truly would be unconscionable.

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<sup>6</sup> Plaintiff mistakenly asserts (Reply Br. 6-10) that the Supreme Court's recent decision in *Green Tree Financial Corp. v. Bazzle* (2003) 123 S. Ct. 2402, supports reversal of the Court of Appeal in this case. All that the Supreme Court held in *Bazzle* was that, where an arbitration agreement is *silent* as to whether arbitration could proceed on a class-wide basis, the arbitrator must interpret the arbitration provision in the first instance to determine whether the parties *agreed* to allow arbitration to proceed on a class-wide basis. The Court in no way implied that parties are precluded from agreeing to arbitrate only on an individual basis. Indeed, if the Court were of that view there would have been no point in remanding to the arbitrator to determine whether the defendant had consented to class-wide arbitration.

Section 2 of the FAA makes pre-dispute arbitration agreements “valid, irrevocable, and enforceable” because, as one of its framers explained, “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 Charles Bernheimer, N.Y. Chamber of Commerce). Congress later elaborated, noting that arbitration usually is “cheaper and faster than litigation,” has “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling.” H.R. Rep. No. 542 (1982) 97th Cong., 2d Sess. 13. More recently, Congress reaffirmed its view that arbitration helps avoid the “delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation.” Y2K Act of 1999 (1999) Pub. L. No. 106-37, § 2(a)(3)(B)(iv), 113 Stat. 186. The U.S. Supreme Court, too, has recognized the superior “simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* (1985) 473 U.S. 614, 628. It cannot be inherently unfair or unconscionable to preclude use of a procedural device that would destroy these arbitral benefits. Yet those benefits would be lost if parties no longer could agree to arbitrate unless they also agreed to superimpose class action procedures on arbitration.

Arbitration is particularly “helpful to individuals” because it is “a less expensive alternative to litigation.” *Allied-Bruce*, 513 U.S. at 280-281.

It is less expensive in large part because it resolves disputes more quickly: the average length of an AAA arbitration from filing to award is less than six months. *Id.* at 280 (citing AAA Amicus Brief). Arbitration expedites dispute resolution and otherwise reduces costs by eliminating or significantly reducing pre-hearing motion practice and discovery — summary judgment and depositions are rare — and by severely limiting the bases for appeal.

By contrast, class actions take years. Certification of a class, whether in court or arbitration, requires notice to potential class members and inquiry into such issues as the adequacy of the purported representatives, conflicts within the proposed class, the commonality of issues of fact and law, and manageability.

But the certification process would be far from the only source of costly delays. The streamlined procedures traditionally associated with arbitration would not be tolerated if defendants faced liability on thousands or even millions of claims in one proceeding. Far from reflecting a general “hostility to arbitration,” as plaintiff’s attorneys assert (*see* Opening Br. 31), the court of appeal’s comment demonstrates merely its recognition that, with so much at stake, arbitration would either change dramatically or fall into disfavor.

For example, in any case in which arbitration is conducted on an all-or-nothing, class-wide basis, arbitration’s simplicity and informality would

become a thing of the past, as big teams of lawyers engage in elaborate motion practice and searching discovery. Arbitral finality would be replaced by endless appeals. To prepare for those appeals, parties would have to arrange for transcription of hearings and request written opinions (instead of the usual bare-bones awards), driving up costs and arbitrator fees.

The transaction costs of drafting arbitration agreements also would increase dramatically. If class action and other judicial procedures were to become the default, lengthy negotiations over whether to include or exclude specific procedures would become the norm.

The detrimental impact of imposing class action procedures on arbitration would extend beyond cost. The control that parties now have over the shape of arbitral proceedings would be all but impossible once the door is opened for the class-action bar. Parties now may agree on virtually every aspect of an arbitration, from the scope of discovery to the admissibility of evidence to the nature of witness testimony to the site of the hearing. In class actions, which “tend to be run by, and for the benefit of, the plaintiffs’ attorneys,” by contrast, individual claimants would have to cede their control to class action lawyers. Drahozal, “*Unfair*” *Arbitration Clauses*, *supra*, at 754. And it is no secret that class action attorneys often put their own interests ahead of those of class members, as in “coupon” settlements that provide little benefit to anyone but lawyers. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Con-*

*sumer Class Action Litigation* (2002) 49 U.C.L.A. L. REV. 991, 993 (“In contrast to the class members, \* \* \* the class counsel are paid in cash.”).

Moreover, class-wide arbitration would entail a significantly greater degree of judicial involvement than is normal in arbitration, not only because so much would be at stake, but also because absent class members must be protected. See *Keating*, 31 Cal.3d 584; *Developments in the Law — Class Actions* (1976) 89 HARV. L. REV. 1318, 1389. It is no answer to say that arbitrators can supervise class actions as readily as courts. In many respects, arbitral authority is limited. The permissible scope of arbitral subpoenas, for example, is a controversial issue on which the courts are divided. Compare *In re Sec. Life Ins. Co.* (8th Cir. 2000) 228 F.3d 865, 870-871 (arbitral subpoenas are enforceable against third parties) with *COMSAT Corp. v. Nat’l Science Found.* (4th Cir. 1999) 190 F.3d 269, 270 (arbitral subpoenas are not enforceable against third parties).

Furthermore, arbitrators are generally paid by the hour or day or by the amount at issue and thus, unlike judges, may have a financial incentive to expand the scope of proceedings before them, leading to certifications of inappropriate classes. Courts inevitably would be called on to keep arbitrators in check. Such judicial involvement would multiply proceedings, generate attorneys’ fees, and “impose[] costs on consumers.” Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90. As the U.S. Supreme Court has

explained, constructions of the FAA that foster the “costs and delay” of litigation should be avoided as inconsistent with the goals of arbitration. *Allied-Bruce*, 513 U.S. at 281.

The loss or reduction of all of these benefits would reduce parties’ incentives to agree to arbitrate disputes in the first place. If companies are subject to class actions whether they litigate or arbitrate, many will choose to litigate to obtain the greater procedural protections available in court, including effective appellate review. Selecting the reduced formalities of arbitration would be hard to justify with tens of millions of dollars worth of claims subject to resolution at one fell swoop.<sup>7</sup>

Thus, the actual result of reversing the court of appeal would not be fairer or more efficient arbitration — but rather *more litigation* and *less arbitration*. Plaintiff’s attorneys seek not to improve arbitration but to destroy it by imposing procedures suitable only for litigation. They thereby hope to move the resolution of consumer disputes out of arbitration and into the courts. At bottom, it is arbitration itself, not lack of class procedures, that they find unconscionable. But Congress rejected that viewpoint by

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<sup>7</sup> The threat of class action arbitrations may make foreign parties particularly hesitant to enter into agreements calling for arbitration in the United States. Our research has located no foreign jurisdiction that permits class action arbitrations. *See Mitsubishi*, 473 U.S. at 631 (imposing U.S. standards on arbitration would “imperil the willingness and ability of businessmen to enter into international commercial agreements”) (quoting *Scherk*, 417 U.S. at 516-517).

making agreements to arbitrate individually “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. And “California law, like federal law, favors enforcement of valid arbitration agreements” (*Armendariz*, 24 Cal.4th at 97); indeed, this Court has recognized, “California courts and its Legislature have ‘consistently reflected a friendly policy toward the arbitration process.’” *Id.* at 97-98 (quoting *Keating*, 31 Cal.3d at 601-602).

If class-wide arbitration procedures have benefits in some contexts, parties will agree to them. As demonstrated above, however, in the run of cases class treatment is inimical to arbitration and, if imposed on arbitral agreements not calling for such treatment, would effectively nullify those agreements in the face of strong federal and state policies favoring arbitration. This Court should reject the effort of plaintiff’s counsel to resurrect the centuries-old “suspicion of arbitration” that Congress sought to bury decades ago (*Gilmer*, 500 U.S. at 30), reaffirm the validity and value of individual arbitration, and prevent the courts from being deluged with disputes that the parties contractually agreed to resolve privately.

## CONCLUSION

The judgment of the court of appeal should be affirmed.

Respectfully submitted.

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August 13, 2003

**CERTIFICATE OF COMPLIANCE  
WITH CALIFORNIA RULE OF COURT 14(C)**

Pursuant to California Rule of Court 14(c), I hereby certify that the attached Brief of Amicus Curiae is proportionately spaced, has a typeface of 13 points, and contains 8,010 words.

I declare and certify under the laws of the State of California that the foregoing statement is true and correct and that this certificate was executed on August 13, 2003.

\_\_\_\_\_  
Donald M. Falk

## CERTIFICATE OF SERVICE

I, MIMI SAGMIT, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 555 College Avenue, Palo Alto, CA 94306. On August 13, 2003, I served the within documents:

### **APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-PETITIONER**

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as set forth below.
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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 13, 2003, at Palo Alto, California.

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MIMI SAGMIT