American Bar Association
www.supremecourtpreview.org

No. 14-462

IN THE
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF WILLIAM R. WEINSTEIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

WILLIAM R. WEINSTEIN
Counsel of Record
LAW OFFICES OF WILLIAM R. WEINSTEIN
199 Main Street, 4th Floor
White Plains, New York 10601
(914) 997-2205
wrw@wweinsteinlaw.com

Amicus Curiae

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Page

Page

Cited Authorities

Page

Constitution and Statutes:

Page

Page

Other Authorities:

INTEREST OF *AMICUS CURIAE*[1]

Amicus is a private practitioner whose practice over the past fifteen years has substantially involved the prosecution of consumer class actions, and over the past ten years has evolved and is now firmly located at the intersection of the constitutional and common law contract principles implicated by the Federal Arbitration Act ("FAA"). Several of the matters litigated by *amicus* in recent years confirm his strong interest in the proper resolution of the issues presented in this case.

Amicus was lead counsel for the consumers in *Litman v. Cellco P'shp d/b/a Verizon Wireless,* 655 F.3d 225 (3d Cir. 2011), which was relied on by DIRECTV and distinguished by the California Court of Appeal in its opinion now the subject of these proceedings. Pet. App. 11a. In *Litman,* the Third Circuit originally held that the class action waiver in Verizon's arbitration agreement was unconscionable and unenforceable under the New Jersey law incorporated by the agreement's choice-of-law provision—specifically the New Jersey Supreme Court's decision in *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006). *Litman v. Cellco P'shp d/b/a Verizon Wireless,* 381 F. App'x 140 (3d Cir. 2010). Verizon petitioned this Court for a writ of certiorari, and after the issuance of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Court granted Verizon's petition, vacated the Third Circuit's decision and remanded for further consideration

1. *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* made a monetary contribution intended to fund the preparation or submission of the brief. The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office.

in light of *Concepcion*. *Cellco P'shp d/b/a Verizon Wireless v. Litman,* No. 10-398, 131 S. Ct. 2872 (2011). On the same day, the Court also granted certiorari on Litman's cross-petition for which *amicus* was counsel of record, and which presented the following question substantially similar to the question presented in this matter:

> Whether the [FAA] requires the enforcement of a drafting party's express agreement not to arbitrate but to litigate in court if the class action ban in the arbitration agreement is unenforceable, where that party incorporates state law under its choice-of-law provision that contractual class action bans are unenforceable.

Litman v. Cellco P'shp d/b/a Verizon Wireless, No. 10-551, 131 S. Ct. 2873 (2011). On remand, the Third Circuit rejected Litman's argument that the application of the common law principles of contract construction to determine the intent of the parties at contract formation rendered the class action waiver unenforceable under New Jersey law. *Litman,* 655 F.3d 225, 231 n.8 (3d Cir. 2011). Litman's subsequent petition for a writ of certiorari filed by *amicus* as counsel of record and presenting the same question as before was denied by the Court. *Litman v. Cellco P'shp d/b/a Verizon Wireless,* No. 11-644, 132 S. Ct. 1046 (2012).

Amicus also was lead appellate counsel for the consumers in *Shroyer v. New Cingular Wireless Servs., Inc.,* 498 F.3d 976 (9th Cir. 2007), in which the Ninth Circuit upheld the application of *Discover Bank* to render the class action waiver in the arbitration agreement unconscionable and unenforceable, and held that *Discover*

Bank was not preempted by the FAA. *Shroyer* provided the essential precedential basis for the Ninth Circuit's decision in *Laster v. AT&T Mobility LLC,* 584 F.3d 849 (9th Cir. 2009), which was reversed by *Concepcion. See Concepcion,* 131 S. Ct. at 1745 (citing *Shroyer*).

Amicus also has been lead counsel for the past ten years in *Emilio v. Sprint Spectrum L.P. d/b/a Sprint PCS*. *Emilio* was commenced as class action arbitration in 2005, and the gateway issue was the enforceability of the class action waiver in the arbitration agreement under the Kansas law incorporated by the agreement's choice-of-law provision—specifically, the Kansas Consumer Protection Act ("KCPA"), which (like the California Consumers Legal Remedies Act) expressly provides an aggrieved consumer with the right to pursue the "private remedy" of a class action for violations of the act, and expressly precludes the waiver by the consumer of the rights or benefits of the act. *See* KCPA 50-634 & KCPA 50-625, respectively. In 2006, the arbitrator—who was delegated the authority to decide jurisdictional, arbitrability and all other disputes by the arbitration agreement and the incorporated arbitration forum rules—decided that the class action waiver was unenforceable because of the unwaivable right under the KCPA to pursue the class action remedy. After substantial subsequent proceedings, Sprint moved in 2010 for reconsideration of the arbitrator's 2006 ruling in light of this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662 (2010). In her final award the arbitrator adhered to her prior ruling under the KCPA, and held that: (i) under *Stolt-Nielsen,* Sprint could not be compelled to engage in class-wide arbitration to which it did not agree; (ii) under the KCPA, Emilio could not be compelled to engage in bilateral arbitration to which

he did not agree; and (iii) therefore, the matter was not arbitrable, and Emilio must be given the opportunity to pursue his class claims in a court action. Emilio petitioned the District Court under 9 U.S.C. §9 to confirm the award in its entirety, and Sprint cross-petitioned under 9 U.S.C. §10 to partially vacate the part of the award favoring Emilio. The award ultimately was confirmed in its entirety by the District Court, and its decision was affirmed by the Second Circuit, substantially based on the deferential standard required under *Oxford Health Plans LLC v. Sutter,* 133 S. Ct. 2064 (2013). *Emilio v. Sprint Spectrum L.P. d/b/a Sprint PCS,* No. 11-cv-3041, 2014 WL 902564 (S.D.N.Y. Feb. 11, 2014), *aff'd,* 582 F. App'x 63 (2d Cir. Nov. 12, 2014). Sprint's subsequent petition for a writ of certiorari regarding the Second Circuit's affirmance was denied by this Court on March 23, 2015, the same day that certiorari was granted in this case. *Sprint Spectrum L.P. d/b/a Sprint PCS v. Emilio,* No. 14-988, 135 S. Ct. 1569 (2015). *Emilio* is now in discovery proceedings in the District Court.

In this case, *amicus* respectfully submits that the anti-waiver provision of the California Consumers Legal Remedies Act—enacted by the People of California in furtherance of the State police power to prevent and remedy consumer fraud—is enforceable and not preempted under: (i) fundamental common law principles precluding the formation of illegal contracts violating consumer protection statutes; (ii) the text and legislative history of the FAA analyzed under the pertinent rules of statutory construction; and (iii) federalism principles analyzed under interrelated standards that the Court has applied for more than 100 years. Thus, the Court should affirm the opinion of the California Court of Appeal.

INTRODUCTION

In determining the enforceability of an arbitration agreement, certain fundamental principles are firmly ingrained within the "body of federal substantive law of arbitrability" created by the Court's FAA jurisprudence. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24 (1983).

One fundamental principle is that, "as with any other contract, the parties' intentions [and expectations] control." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985). *See also Concepcion,* 131 S. Ct. at 1752-53; *Stolt-Nielsen,* 559 U.S. at 682 (quoting *Mitsubishi*). Furthermore, in determining the parties' intentions and expectations, courts should "appl[y] general state-law principles of contract interpretation." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 475 (1989). *See also Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 62-63 (1995) (applying common law rules of construction that ambiguity is resolved against drafter, and that arbitration agreement "should be read to give effect to all its provisions and to render them consistent with each other").

Second, "[c]ourts generally … should apply ordinary state-law principles that govern the formation of contracts" when deciding whether an agreement to arbitrate a certain matter exists. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 79 (2010) (quoting *First Options*). *See also Perry v. Thomas,* 482 U.S. 483, 492 n.9 (1987) ("state law … is applicable *if* that law arose to govern issues concerning the validity, revocability,

and enforceability of contracts generally") (emphasis in original). *Cf. Concepcion,* 131 S. Ct. at 1753, 1754-55 (Thomas, J., concurring) ("Reading §§2 & 4 harmoniously, the 'grounds ... for the revocation' preserved in §2 would mean grounds related to the making of the [arbitration] agreement" under §4 and "the formation of the agreement to arbitrate," i.e., grounds relating to "defects in the making of an agreement").

Here, §1781 of the California Consumers Legal Remedies Act ("CLRA"), enacted in 1970 (and included in Chapter 4 of the act, entitled "Remedies and Procedures"), expressly authorizes the consumer to pursue the remedy of a class action "if the unlawful method, act, or practice has caused damage to other consumers similarly situated." And CLRA §1751, also enacted in 1970, prohibits the waiver by the consumer of any and all of the provisions of the CLRA: "Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." *See* Cal. Stats. 1970, Ch. 1550; *see also* CLRA §1756 (provisions are "appl[icable] to actions filed on or after January 1, 1971"). (Select provisions of the CLRA are included in the Appendix to this brief.)

The parties' arbitration agreement (Section 9 of the Customer Agreement), however, includes a class action waiver; it also includes a "revocation clause" stating that "[i]f … the law of your state would find [the class action waiver] unenforceable, then this entire [arbitration agreement] is unenforceable." Jt. App. 128-29 (Customer Agreement §9(c)(ii)). The choice-of-law provision in the Customer Agreement adds ambiguity (if not confusion) by stating that "[n]otwithstanding the [applicability of the laws of the state and local area where Service is provided

to you], Section 9 shall be governed by the [FAA]." Jt. App. 129 (Customer Agreement §10(b)).[2]

Under a reasonable reading of the plain language of the revocation clause, because the anti-waiver provision of CLRA §1751 renders the class action waiver unenforceable, the entire arbitration agreement is unenforceable. The California Court of Appeal applied general state-law principles of contract construction, as prescribed by the relevant decisions of the Court, to determine the parties' intentions regarding the meaning of the revocation clause in relation to CLRA §1751—concluding that the parties intended the CLRA to apply, and did not intend the revocation clause to be nullified by this Court's subsequently issued decision under the FAA in *Concepcion*. Pet. App. 6a-11a.

By contrast, the Ninth Circuit used the word "intention" only once in reaching a contrary conclusion about the proper construction of the same provision, *Murphy,* 724 F.3d at 1227, and determined that "many of the parties' various contract interpretation arguments are

2. When *Concepcion* was decided, the revocation clause was known as a "blowout clause." *See* Tr. of *Concepcion* Oral Arg. at 33 (argued Nov. 9, 2010) (JUSTICE KENNEDY: "Suppose that this doesn't have what's called a blowout clause."). Although the Ninth Circuit refers to it as the "jettison clause," *Murphy v. DIRECTV, Inc.,* 724 F.3d 1218, 1224 (9th Cir. 2013), *amicus* is unaware of any other case using similar nomenclature. In any event, given the language of the saving clause of 9 U.S.C. §2, it is appropriate to call it what it is: a "revocation clause" that revokes the arbitration agreement and makes it "unenforceable" when the prescribed condition regarding the unenforceability of the class action waiver under "the law of your state" is satisfied.

largely irrelevant to our analysis," *id.* at 1228. Under the holding of the Ninth Circuit, the parties could *only* intend for the FAA to apply under the language of the revocation clause regardless of the narrower, more specific reference to "the law of your state"—even if the application of "general state-law principles of contract interpretation" would support a different, narrower construction. *Id.* at 1225-26. Stated differently, according to the Ninth Circuit, the revocation clause makes the agreement "irrevocable."

In construing the parties' arbitration agreement, both the California Court of Appeal and the Ninth Circuit took as a given that *Concepcion* nullified the CLRA anti-waiver provision—the principal contract issue was whether the revocation clause should be construed to include or exclude *Concepcion's* holding. But *amicus* respectfully submits that *Concepcion* does not control with respect to the exercise of the State police power by the People of California to prevent and remedy consumer fraud, and that the FAA does not preempt their decision to declare void and unenforceable *any* waiver by a consumer of the provisions of the CLRA—including but not limited to a waiver of the express statutory right to pursue the class action remedy for consumer fraud committed within the State that damages "other consumers similarly situated."

SUMMARY OF ARGUMENT

Offer, acceptance, consideration, capacity, and *legality*—essential elements for the formation of a contract.

That the anti-waiver provision of the CLRA, §1751, is enforceable and not preempted by the FAA is established

by the correlation and reconciliation of: (i) fundamental common law principles precluding the formation of illegal contracts, including those violating consumer protection statutes; (ii) the text of the FAA, including its saving clause contained in 9 U.S.C. §2, and the FAA legislative history; and (iii) federalism principles that require the State's exercise of its historic consumer fraud police power to be sustained when "plausible" against challenges under both constitutional provisions and acts of Congress.

The right of the State to render contracts illegal, void, unenforceable and revocable at formation in the exercise of its police power, including the police power to prevent and remedy consumer fraud, is a fundamental principle of the common law of contracts firmly established under an entire body of law by this Court when the FAA was enacted in 1925. Congress is presumed to legislate with "an expectation that [common law principles] will apply except when a statutory purpose to the contrary is evident," and "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotations and citations omitted). Here, there is no need to "presume" that Congress intended the common law of illegal contracts to apply—the saving clause of 9 U.S.C. §2 incorporates it. The FAA legislative history also supports this conclusion. And because the FAA has nothing whatsoever to do with the State police power or consumer fraud, it cannot reasonably be read as abrogating the common law of illegal contracts in violation of statutes enacted in furtherance of that police power.

The "adherence to the common law" of illegal contracts under the FAA is mirrored and extended by federalism

principles based on the constitutional requirement of great deference to the exercise of the State police power, including the police power to render contracts in violation of consumer fraud statutes void, unenforceable and revocable. When the FAA was enacted in 1925, the right of the State to render contracts violating statutes enacted under the police power (including consumer fraud statutes) void, unenforceable and revocable at formation had been upheld a number of times by this Court against constitutional challenges based on "liberty of contract" under the Fourteenth Amendment (Amendment XIV, §1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"). And both before and after the passage of the FAA, the State police power to impair contracts *after* formation also was upheld by the Court against challenges under the Contract Clause (Article I, §10, cl. 1: "No State shall … pass any … Law impairing the Obligation of Contracts"). *See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Manigault v. Springs,* 199 U.S. 473 (1905).

The Court's modern federalism cases similarly counsel substantial deference to the exercise of the State police power, and assume that it is not to be preempted unless that is the "clear and manifest purpose of Congress." *See, e.g., Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996). *See also CTS Corp. v. Waldburger,* 134 S. Ct. 2175, 2189 (2014) (Kennedy, J.) (preemption in areas traditionally governed by state police powers should presumptively be narrowly interpreted "where plausible"). Furthermore, "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily

contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). The FAA regulates and preempts arbitration agreements, and the CLRA prohibits consumer fraud. There is no "proximity" between the statutes or any relationship whatsoever that could support a finding of Congress' intent to preempt California's exercise of the State police power to prevent and remedy consumer fraud.

Finally, *Concepcion* does not control the enforceability of the CLRA anti-waiver provision under the FAA, *inter alia,* because *Concepcion* did not involve or address (i) the fundamental common law principle that contracts violating statutes enacted under the State police power are illegal, void, unenforceable and revocable at contract formation, and (ii) the overriding federalism principles that favor upholding statutes enacted under the State's historical police powers. *E.g., Cohens v. Virginia,* 19 U.S. 264, 399 (1821). And because the FAA and its text have nothing to do with the State police power, the implied "purposes and objectives" conflict preemption on which *Concepcion's* holding is based, 131 S. Ct at 1753, is too far removed from, and thus cannot override the primacy of, the State consumer fraud police power over contracts that was firmly established when the FAA was enacted in 1925 and was preserved by Congress under 9 U.S.C. §2.

Insulating DIRECTV's revocation clause from the democratic exercise of the State police power by the People of California under the CLRA cannot be reconciled with Congress' intent in enacting the FAA and its fundamental purpose and design, which are reflected in the words of the statute as interpreted under the applicable rules of statutory construction, its historical context and federalism principles.

ARGUMENT

The prohibition against consumer fraud can be traced back more than two millennia, to biblical times. Leviticus 19:35 (New Int'l Version) prohibits the use of "dishonest standards when measuring length, weight or quantity," and Leviticus 19:36 (New Int'l Version) requires the use of "honest scales and honest weights, an honest ephah [dry measure approximating one bushel] and an honest hin [liquid measure approximating five liters]." *See also* http://biblehub.com/proverbs/11-1.htm (collecting biblical references) (last visited July 22, 2015). A consistent "finger on the scale" in the sale of goods (or services) has the capacity to deceive and damage every purchasing consumer, collectively inflicting widespread injury on the community. Prohibiting consumer fraud is not merely "policy," but an essential thread in the fabric of civilized society.

I. In Enacting The FAA, Congress Preserved, And Did Not Preempt, The Common Law That Contracts Violating Statutes Enacted Under The State's Consumer Fraud Police Power Are Illegal, Void, Unenforceable And Revocable At Formation.

A. The State Police Power to Prevent Consumer Fraud, and to Render Contracts in Violation of Consumer Protection Statutes Illegal When Made, Was Firmly Established When Congress Enacted the FAA in 1925.

When the FAA was enacted in 1925, the decisions of this Court firmly established that the State's police power included the power to prevent and remedy consumer

fraud. *See Hebe Co. v. Shaw,* 248 U.S. 297, 303 (1919) (prohibition on substitution of less valuable ingredients in condensed milk even if "improved"); *Hutchinson Ice Cream Co. v. Iowa*, 242 U.S. 153 (1916) (consumer fraud statute prohibiting sale of ice cream with less than prescribed percentage of butter-fat), *id.* at 157 ("[t]he right of the State under the police power to regulate the sale of products with a view to preventing frauds" was conceded by plaintiff-in-error), *id.* at 159 ("Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power."); *Armour & Co. v. North Dakota,* 240 U.S. 510, 511, 513-14 (1916) (statute requiring standard bulk weight sale of lard); *Schmidinger v. City of Chicago*, 226 U.S. 578, 584-85, 587-88 (1913) (statute requiring standard weights and sizes for bread loaves). *Cf. McLean v. Arkansas*, 211 U.S. 539, 548, 550 (1909) (upholding statute prescribing precise methods for compensating miners based on weight or volume of coal actually mined). *See generally Hamilton v. Kentucky Distilleries & Warehouse Co.,* 251 U.S. 146, 156 (1919) (Brandeis, J.) ("That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true.").[3]

3. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See also* The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961) (J. Madison):

> The powers delegated by the proposed Constitution to the federal government are few and defined. … Those which are to remain in the State governments are numerous and indefinite. The powers reserved to the several States will extend to all the objects which,

These same cases also confirm that, when the FAA was enacted, it was a firmly-established, fundamental principle of the common law that illegal contracts in violation of the State's police power, including its power to prevent and remedy consumer fraud, were void, unenforceable and revocable at contract formation. *See also McLean,* 211 U.S. at 543 (upholding statute providing that "any provisions, contract, or agreement between mine owners, lessees, or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified or annulled shall be void and of no effect");[4] *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 197-98, 204-05 (1912) (upholding right of party to agreement for sale of non-alcoholic, non-intoxicating malt liquor to "repudiate [it] at the outset" after learning performance would be unlawful under Mississippi statute enacted as exercise of police power designed, in part, to prohibit defrauding by short measure). As stated by Justice Holmes in *Hudson Cnty. Water Co. v. McCarter,* 209 U.S. 349, 357 (1908):

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter. … [T]he contract, the execution of which is sought to be prevented here, was illegal when it was made.

---

in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

4. The inclusion of an anti-waiver provision like CLRA §1751 in statutes enacted under the State police power extends back more than 100 years.

Accord Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* Canon 48: Penalty/ Illegality Canon, at 295 (2012) ("Scalia-Garner") (party cannot legally enter into contract violating statute with intention of paying penalty) ("Any such contract, being illegal, would be void.").

The law of California has been the same since long before the enactment of the FAA. *See Loving & Evans v. Blick,* 33 Cal. 2d 603, 607 (Cal. 1949) ("it has been repeatedly declared in this state that a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void" (quotation omitted)) (citing, e.g., *Chateau v. Singla,* 114 Cal. 191 (Cal. 1896)). The CLRA is just such a statute— providing an injured consumer with the right under §1780 to bring an action seeking legal and equitable remedies and penalties for violations of the act, including injunctive relief, restitution, actual and minimum damages, punitive damages, treble damages and additional penalties for prescribed violations under certain conditions, and an award of costs and attorneys' fees to a prevailing plaintiff—as well as the class action remedy under §1781. *See* Appendix. *See also* 8 Samuel Williston & Richard Lord, *A Treatise On The Law Of Contracts*, Miscellaneous Illegal Agreements, §19:46 at 550-51 (4th ed. 2010) (contracts that violate "statutes enacted as an exercise of the police powers of the state, designed 'to protect the public against fraud' … are generally held to be void and unenforceable") (quoting *P.M. Palumbo, Jr., M.D., Inc. v. Bennett,* 242 Va. 248, 253 (Va. 1991)).

B. Congress Incorporated, and Did Not Abrogate, the Common Law of Contracts, Including Illegal Contracts, When It Enacted the FAA in 1925.

"[C]ourts may take it as a given that Congress has legislated with an expectation that [common law principles] will apply except when a statutory purpose to the contrary is evident," and "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. at 534 (quotations and citations omitted). *See also* Scalia-Garner, Canon 52: Presumption Against Change in Common Law, at 318 ("A statute will be construed to alter the common law only when that disposition is clear."). Here, there is no need to "presume" that Congress intended the common law of illegal contracts to apply—the saving clause of 9 U.S.C. §2 incorporates it ("save upon such grounds as exist at law or in equity for the revocation of any contract"). And as the consumer fraud police power cases cited above confirm, the common law of illegal contracts involves all of the contract concepts identified in §2: validity, enforceability and revocability.

Because the FAA has nothing whatsoever to do with the State police power or consumer fraud, it cannot reasonably be read as "speaking directly to" or "abrogating" the common law of illegal contracts in violation of consumer fraud and other police power statutes. *United States v. Texas, supra.* Supporting this construction by analogy is *Cipollone,* 505 U.S. at 517:

> [A] variant of the familiar principle of *expressio unius est exclusio alterius* [is that] Congress'

> enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted

A variant on the variant that further supports the construction of §2 proposed by *amicus* is derived from the fact that, although Congress has prescribed four exceptions under 9 U.S.C. §10 to the confirmation of the arbitrator's award required under §9, and has prescribed an exception under §4 precluding a court from issuing an order compelling arbitration unless it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," Congress has stated no exception from the scope of the saving clause of §2 for the State's firmly established police power to render contracts made in violation of consumer fraud statutes void, unenforceable and revocable. As stated in Scalia-Garner, Canon 8, Omitted-Case Canon, at 93:

> [T]he judge [should not] elaborate unprovided-for exceptions to a text, as Justice Blackman noted while a circuit judge: "[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language." (quoting *Petteys v. Butler,* 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting)).

1. The legislative history of the FAA corroborates Congress' intent not to preempt the application of the common law of illegal contracts to arbitration agreements.

In addition to statements and testimony, the FAA's legislative history also incorporates into the record a "brief" on the proposed statute. *Arbitration of Interstate Commercial Disputes, Joint Hearings on H.R. 646 and S. 1005 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess. 33-41 (1924) ("*Joint Hearings*"). The brief was submitted by Julius H. Cohen, the "drafter for the American Bar Association of much of the proposed bill's language." *Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 274 (1995). Included in the brief, *Joint Hearings* 39, is a substantial quotation from the decision by then Judge Cardozo of the New York Court of Appeals in *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 270, 271-72 (1921), which addressed the New York arbitration statute of 1920, from which the FAA was substantially derived:

> We are told that the promise to arbitrate when made was illegal and a nullity. Even before the statute, this was not wholly true. Public policy was thought to forbid that the promise be specifically enforced. Public policy did not forbid an award of damages if it was broken. A promise that differences will be arbitrated is not illegal and a nullity without reference to the law in force when differences arise. … *Of course, we exclude cases where the contract is inherently immoral or in contravention*

> *of a statute.* General contracts of arbitration were never subject to that reproach. (emphasis added)

Amicus submits that there are several reasons why the legislative history's incorporation of *Berkovitz* and Cohen's brief is entitled to substantial probative weight. *Berkovitz* is not "merely" the expressed view of a member of Congress or witness, but a judicial decision by Justice Cardozo on the state-law predecessor of the FAA—and thus, in effect, a part of the existing "common law" of *enforceable* arbitrations agreements (sparse though it may have been). Cohen's brief incorporating *Berkovitz* is a contemporaneous record of the intent and understanding of the individual who is generally regarded as the principal drafter of the FAA. His brief, including its reliance on *Berkovitz* and the above-quoted portion of the decision, is replicated in material part in Cohen's law review article regarding the FAA published the year following the FAA's enactment. Julius H. Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 283-84 (1926). And Cohen's testimony and his article have been relied on by many justices in the arbitration-related decisions of the Court. *See, e.g., Allied-Bruce,* 513 U.S. at 274, 279 (majority decision citing Cohen testimony); *id.* at 288 n.1 (dissenting opinion of Thomas, J., joined by Scalia, J., citing article). *See also Concepcion,* 131 S. Ct. at 1759 (Breyer, J., dissenting) (citing article).

2. Nothing in the FAA abrogates the application of the equitable common law of the class action remedy "to prevent a failure of justice" in connection with consumer fraud.

In addition to the explicit incorporation of the common law of contract formation regarding the validity, enforceability and revocability of an arbitration agreement, the FAA also incorporates the common law of contract construction to determine the intent of the parties, even though not expressly referenced in the statute. *E.g., Volt,* 489 U.S. at 475, *Mastrobuono,* 514 U.S. at 62-63. *See also United States v. Texas, supra.*

The equitable common law of the class action remedy, although not related to the common law of illegal contracts, also was well-established long before the FAA was enacted in 1925. "[C]lass suits were known before the adoption of our judicial system, and were in use in English chancery." *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921), *overruled in part on other grounds by Toucey v. New York Life Ins. Co.,* 314 U.S. 118 (1941). What is generally regarded as the earliest statement by this Court of the propriety of the class suit is found in *Smith v. Swormstedt,* 57 U.S. 288, 302-03 (1853):

> The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

> *To prevent a failure of justice*, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained. … *It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice.* (emphasis added)

Cases decided by this Court contemporaneously with the enactment of the FAA expressly approve the equitable use of the class remedy to bind all members. In *Hartford Life Ins. Co. v. Ibs,* 237 U.S. 662, 671-73 (1915), citing to *Smith v. Swormstedt* and a number of then more recent decisions, the Court determined that the class suit commenced in Connecticut under complete diversity by the plaintiffs "in their own behalf and on behalf of all others similarly situated" could bind all members of the class, including those who had not been parties. And in *Supreme Tribe of Ben-Hur,* issued four years before the enactment of the FAA and also quoting *Smith,* the Court held that, under Equity Rule 38 of the Court (which had been modified so the class decree could bind absent parties), the class decree could bind Indiana class members who otherwise would have destroyed diversity jurisdiction with respect to the Indiana company. 255 U.S. at 364-67.[5]

5. Just as an injunction is an "equitable remedy" generally to prevent irreparable harm, so too is the aggregation of claims

Nothing in §2 or the remainder of the FAA "speaks directly to" or "abrogates" the equitable common law of the class action remedy. Regardless of whether that remedy is itself an independent ground "at law or in equity" for the revocation of any contract, there is no textual support for the preemption of the State's adoption of the class action remedy in the exercise of its police power to prevent and remedy consumer fraud, and its determination to render any waiver of that remedy void and unenforceable. Under the existing rules of statutory construction regarding the incorporation of the common law unaltered, Congress should not be presumed to have preempted a remedy necessary "to prevent the failure of justice" to the public in connection with a consumer fraud statute intended to prevent just such a failure of justice.

---

for class adjudication an "equitable remedy" "to prevent a failure of justice." The use of either remedy is subject to prescribed procedural rules and standards, but when those are satisfied, the remedy will issue—in a class suit class-wide relief pursuant to a binding judgment. The true nature of the class suit as an equitable remedy has become blurred since the merger of equity and law into "one form of action—the civil action" after the adoption of the Federal Rules of Civil Procedure in 1937 and the current Fed. R. Civ. P. 23. *See also* Kansas Consumer Protection Act 50-634 (including right to pursue class action within "private remedies").

II. Federalism Principles Require The FAA To Be Construed Narrowly To Not Preempt California's Exercise Of The Police Power To Prevent And Remedy Consumer Fraud Committed Within Its Borders.

A. The Primacy of the State Consumer Fraud Police Power over "Liberty of Contract" Challenges under the Fourteenth Amendment Was Well-Established When the FAA Was Enacted.

Ironically, because the decision so frequently has been discredited by the Court—sometimes twice on the same day, *see Obergefell v. Hodges,* --- S. Ct. ---, 2015 WL 2473451 at *29-*30 (U.S. June 26, 2015) (Roberts, C. J., dissenting); *Johnson v. United States,* --- S. Ct. ---, 2015 WL 2473450 at *18 (U.S. June 26, 2015) (Thomas, J., concurring in judgment)—and because it was the harbinger of an era in which hundreds of state statutes were struck down, *Lochner v. New York,* 198 U.S. 45 (1905) (striking down statute limiting employment of bakers to sixty hours weekly), actually provides a thorough statement of the standards that should have been applied to determine whether the exercise of the State police power would be preserved in the face of challenges based on the "liberty of contract" under the Fourteenth Amendment:

> The State … has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not

> prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. *Id.* at 53-54.
>
> [W]here legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts[.] *Id.* at 56.
>
> This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. *Id.* at 56-57.

It is of great importance that, even though *Lochner* and its progeny far too frequently found the limits of the State police power exceeded, a number of cases prior to the enactment of the FAA during the *Lochner* era *upheld* the State's exercise of the police power to prevent consumer fraud. *See Hebe Co., supra; Hutchinson Ice Cream Co., supra; Armour & Co., supra*; *Schmidinger,* 226 U.S. at 588 ("courts may only interfere with laws or ordinances

passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred"). Not all consumer fraud statutes, however, escaped *Lochner*'s arbitrary reach. *Compare Jay Burns Baking Co. v. Bryan,* 264 U.S. 504 (1924) (striking down statute prescribing excess tolerance of two ounces for bread loaves at all allowable weights) *with Schmidinger, supra* (upholding statute requiring standard weights and sizes for bread loaves).

That the State's exercise of the police power to prevent and remedy consumer fraud regularly survived *Lochner* contemporaneously with the enactment of the FAA confirms the essential role of the State consumer fraud police power in our federal system, and undermines an implication that Congress intended under §2 to preempt any such legitimate exercise.

B. The State's Exercise of the Police Power to "Impair" Contracts After Formation Notwithstanding the Contract Clause Was Sustained by the Court Before and After the Enactment of the FAA.

Nine years after the passage of the FAA, the State police power to impair contracts *ex post*—after formation—was upheld by the Court against challenge under the Contract Clause. *Blaisdell*, 290 U.S. 398. In rejecting the Contract Clause challenge and finding the Maryland statute at issue to be "appropriate,' "reasonable" and "addressed to a legitimate end," *id.* at 445, *Blaisdell* identifies a number of cases where the exercise of the State police power was upheld notwithstanding having

the effect of impairing contracts. Among many decisions, *Blaisdell* (*id.* at 437) quotes *Manigault v. Springs,* 199 U.S. 473, 480 (1905)—one of a number of cited decisions substantially preceding the FAA's enactment, and a case decided the same year as and reported one volume after *Lochner*—to confirm the primacy of the State police power in connection with contracts between individuals:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Also pertinent is the following from *Blaisdell, id.* at 438 (citations omitted): "[W]here the protective power of the State is exercised in a manner otherwise appropriate in the regulation of a business it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices."

There is a compelling parallel between the constitutional provision that expressly prohibits the States from impairing the obligation of contracts and the fact that "[t]he 'principal purpose' of the FAA is to

'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion,* 131 S. Ct. at 1748 (quoting *Volt*). The parallel extends as well to the "liberty of contract" under the Fourteenth Amendment. Because the State's right to exercise its police power to impair contracts when "appropriate," "reasonable" and "addressed to a legitimate end" was well-established when the FAA was enacted, and when that right has continued to be recognized by the Court thereafter, the historical context should guide this Court's construction of §2's saving clause so as to preserve the CLRA and its anti-waiver provision.

C. The Court's Modern Federalism Cases Prescribe that Congress' Purpose Be "Clear and Manifest" to Find the Exercise of the State Police Power Superseded by the FAA.

The Court's modern federalism cases similarly counsel substantial deference to the exercise of the State police power, and assume that it is not to be preempted unless that is the "clear and manifest purpose of Congress." *See, e.g., Cipollone,* 505 U.S. at 516; *Medtronic, Inc.,* 518 U.S. at 485. *See also CTS Corp.,* 134 S. Ct. at 2189 (preemption in areas traditionally governed by state police powers should presumptively be narrowly interpreted "where plausible"). Furthermore, "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.,* 507 U.S. at 664.[6]

---

6. Although Justice Scalia describes §2 as an "explicit pre-emption" provision, *Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S.

The FAA regulates and preempts arbitration agreements, and the CLRA prohibits consumer fraud. There is no linkage whatsoever between arbitration agreements and the CLRA or its anti-waiver provision—a provision that applies to all of the provisions and remedies in the CLRA, and not just the class action remedy. The application of the CLRA to prevent and remedy consumer fraud is devoid of any "proximity" to the language and prescribed subject preempted under the FAA. "[W]hatever the source of the duty, [the CLRA] imposes [no] obligation in this case because of [arbitration agreements]." *Cipollone, id.* at 554 (Scalia, J., concurring in judgment in part and dissenting in part) (describing "'proximate application' methodology").

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-02 (enacted Feb. 18, 2005), also confirms the "appropriateness," "reasonableness" and "legitimacy" of the exercise of the police power by the People of California under the CLRA to provide consumers with the unwaivable right to pursue all remedies, including the class action remedy, for violations of the act, and firmly supports the "plausibility" of reading 9 U.S.C. §2

22, 37 (1988), *Volt* states that "[t]he FAA contains no express pre-emptive provision." 489 U.S. at 477. However, the FAA's declaration that arbitration agreements shall be "valid, irrevocable and enforceable" clearly displaces state law to the contrary. That this Congressional directive is immediately followed by an express saving clause strongly favors Justice Scalia's characterization over *Volt*'s contrary observation. Based on the saving clause alone, it is necessarily true that Congress has prescribed the limit to the scope of the preemptive reach of the statute, and that the language of §2 should be the primary focus in determining Congress' preemptive intent.

to not preempt that exercise. The findings of Congress in enacting CAFA are stated in §2(a), 119 Stat. 4, and provide in relevant part:

> (a) Findings.—Congress finds the following:
>
> (1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

And CAFA §2(b), 119 Stat. 5, sets out the purposes of CAFA, including to:

> (1) assure fair and prompt recoveries for class members with legitimate claims;
>
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and
>
> (3) benefit society by … lowering consumer prices.

It would be paradoxical for Congress to have exercised its Article III, Section 1, power to vest the federal courts with diversity jurisdiction to adjudicate "an important and valuable part of the legal system" in connection with "interstate cases of national importance" for the express

benefit of consumers, but for this Court to find that the same choice by the People of California to remedy consumer fraud with its borders is preempted by a federal statute that says nothing about and has nothing to do with the State police power. Such a reading would be "implausible."

Congress' "clear and manifest purpose" under the FAA as stated in 9 U.S.C. §2 is elegantly straightforward:

> [T]he Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so."

Volt, 489 U.S. at 478 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 n.12 (1967)). Similarly, the Court has "repeatedly referred to the Act's basic objective as assuring that courts treat arbitration agreements 'like all other contracts.'" *Concepcion,* 131 S. Ct. at 1761 (Breyer, J., dissenting) (citing seven decisions).

Insofar as there is arguable uncertainty under §2, than as stated by Justice Thomas in his dissent in *Allied-Bruce,* 513 U.S. at 292, joined by Justice Scalia (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 460, 464 (1991)):

> [W]e should resolve the uncertainty in light of core principles of federalism … "in areas traditionally regulated by the States." … To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, we must be "absolutely certain" that Congress intended such displacement before we give preemptive effect to a federal statute.

"[T]he domain expressly pre-empted by" the FAA is arbitration agreements, and "the domain expressly" saved is the legal and equitable common law principles rendering any agreement illegal, void, unenforceable and revocable at formation—including as a result of the legislative exercise of State police power to prevent and remedy consumer fraud. *Cipollone,* 505 U.S. at 517. Preservation of the State police power, not preemption, is not merely a "plausible" construction of the FAA, but the only one.

III. *Concepcion* Does Not Control FAA Preemption Of California's Exercise Of The State Police Power To Prevent And Remedy Consumer Fraud.

Concepcion does not control the enforceability of the CLRA anti-waiver provision under the FAA, because *Concepcion* did not involve or address: (i) the fundamental common law principle that contracts violating statutes enacted under the State police power are illegal, void, unenforceable and revocable at contract formation; and (ii) the overriding federalism principles applied since before the FAA was enacted that favor upholding statutes enacted under the State's historic police powers, including in connection with consumer fraud. As stated by Chief Justice Marshall in *Cohens v. Virginia,* 19 U.S. 264, 399 (1821):

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

See also Blaisdell, 290 U.S. at 434 ("broad expressions … beyond the requirements of the decision … are not controlling") (citing *Cohens*).

Again, the text of the FAA lacks any proximity to the consumer fraud domain of the CLRA necessary to support the application of the implied "purposes and objectives" conflict preemption on which *Concepcion's* holding is based, 131 S. Ct at 1753. As a matter of federalism, there simply is no basis in the text of the statute, as supplemented by its legislative history and its historical context, to override the primacy of the State's exercise of its contract-related consumer fraud police power.[7]

Finally, the application of the CLRA and its anti-waiver provision to violations of the statute is materially factually distinguishable from elements of the *Discover Bank* rule that the Court found objectionable in *Concepcion*.

First, as opposed to the *ex post* application of the *Discover Bank* rule (*see* 131 S. Ct. at 1750), the provisions and prohibitions of the CLRA, including the anti-waiver provision, are applicable *ex ante,* at contract formation, and have been for more than four decades, since the CLRA and its class action remedy and anti-waiver provision were first enacted in 1970. *See* Cal. Stats. 1970, Ch. 1550; *see also* CLRA §1756 (provisions "appl[icable] to actions filed

7. In his concurrence in *Concepcion,* Justice Thomas "adhere[ed] to [his] views on purposes-and-objectives pre-emption (citing *Wyeth v. Levine,* 555 U.S. 555, 583 (2009) (opinion concurring in judgment) ("implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution"). 131 S. Ct. at 1754. Thus, Justice Thomas disagreed with its application in *Concepcion*.

on or after January 1, 1971"). *Cf. Hudson Cnty. Water Co.*, 209 U.S. at 357 (Holmes, J.) ("One whose rights … are subject to state restriction, cannot remove them from the power of the State by making a contract about them.").

Second, as opposed to the requirement of the *Discover Bank* rule that "damages be predictably small" which *Concepcion* characterized as "toothless and malleable," and the requirement that "the consumer allege a scheme to cheat consumers" which *Concepcion* characterized as "ha[ving] no limiting effect," 131 S. Ct. at 1750, the CLRA prescribes and identifies in advance in great detail in §1770 specific conduct violating the statute, and violations of the act do not depend on the amount of any one consumer's individual damages. The penalties imposed and remedies provided also are specified in advance, in §§1780-81, as are defenses available to one charged with violating the act, in §1784. *See* Appendix.

To hold that *Concepcion* applies to the CLRA and its anti-waiver provision would deprive the People of the State of California of the product of their democratic exercise of the State police power to decide how to prevent and remedy the commission of consumer fraud within its borders. To do so would violate the fundamental common law principles of illegal contracts that were firmly established when the FAA was enacted and which §2 and its saving clause incorporate. To do so would violate the fundamental federalism principles applicable to the exercise of the State police power established by the decisions of this Court extending back more than 100 years and also firmly established when the FAA was enacted. To do so would contravene Congress' intent in enacting the FAA, and its fundamental purpose and design reflected in the

words of the statute as interpreted under the applicable rules of statutory construction, its legislative history and historical context, and the command of federalism.

It would be *Lochnerian*.

CONCLUSION

For the foregoing reasons, the Court should affirm the opinion of the California Court of Appeal.

Respectfully submitted,

WILLIAM R. WEINSTEIN
Counsel of Record
LAW OFFICES OF WILLIAM R. WEINSTEIN
199 Main Street, 4th Floor
White Plains, New York 10601
(914) 997-2205
wrw@wweinsteinlaw.com

Amicus Curiae

July 24, 2015

APPENDIX

APPENDIX

CALIFORNIA CIVIL CODE SECTIONS 1750 *ET SEQ.* CONSUMERS LEGAL REMEDIES ACT— SELECTED PROVISIONS

CHAPTER 1. GENERAL PROVISIONS

1750. This title may be cited as the Consumers Legal Remedies Act.

1751. Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.

1752. The provisions of this title are not exclusive. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law. Nothing in this title shall limit any other statutory or any common law rights of the Attorney General or any other person to bring class actions. Class actions by consumers brought under the specific provisions of Chapter 3 (commencing with Section 1770) of this title shall be governed exclusively by the provisions of Chapter 4 (commencing with Section 1780); however, this shall not be construed so as to deprive a consumer of any statutory or common law right to bring a class action without resort to this title. If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the consumer may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such law.

1753. If any provision of this title or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the title and the application of such provision to other persons or circumstances shall not be affected thereby.

1756. The substantive and procedural provisions of this title shall only apply to actions filed on or after January 1, 1971.

CHAPTER 2. CONSTRUCTION AND DEFINITIONS

1760. This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

CHAPTER 3. DECEPTIVE PRACTICES

1770. (Excerpt)

(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(1) Passing off goods or services as those of another.

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

(3) Misrepresenting the affiliation, connection, or association with, or certification by, another.
(4) Using deceptive representations or designations of geographic origin in connection with goods or services.
(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.
(6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.
(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

[Subsections 8-23 omitted]

CHAPTER 4. REMEDIES AND PROCEDURES

1780. (Excerpt)

(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against such person to recover or obtain any of the following:

(1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000).

(2) An order enjoining such methods, acts, or practices.

(3) Restitution of property.

(4) Punitive damages.

(5) Any other relief which the court deems proper.

(b) Any consumer who is a senior citizen or a disabled person … may seek and be awarded, in addition to the remedies specified therein, up to five thousand dollars ($5,000) where the trier of fact (1) finds that the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct, (2) makes an affirmative finding [under] Section 3345, and (3) finds that an additional award is appropriate. Judgment in a class action by senior citizens or disabled persons under Section 1781 may award each class member such an additional award where the trier of fact has made the foregoing findings.

* * *

(d) The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith.

Appendix

1781. (Excerpt)

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

1784. No award of damages may be given in any action based on a method, act, or practice declared to be unlawful by Section 1770 if the person alleged to have employed or committed such method, act, or practice

(a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and
(b) makes an appropriate correction, repair or replacement or other remedy of the goods and services according to the provisions of … Section 1782.