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SUPREME COURT OF THE STATE OF WASHINGTON

CHAD MINNICK, ET AL.

Petitioners,

v.

CLEARWIRE US, LLC; DOES 1 THROUGH 10,

Respondents.

AMICUS CURIAE BRIEF OF THE NATIONAL CONSUMERS LEAGUE

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STATEMENT OF INTEREST OF AMICI CURIAE

The National Consumers League ("NCL"), founded in 1899, is the nation's oldest consumer organization. The mission of the NCL is to promote fairness and economic justice for consumers and workers in the United States and abroad. The NCL appears before legislatures, administrative agencies, and courts across the country, advocating the enactment and vigorous enforcement of laws that protect consumers. The NCL also educates the public in ways to avoid fraud in the marketplace through its National Fraud Center and seeks to increase the public's awareness of and resistance to unfair anti-consumer business practices. Thus, the NCL in April 2009 organized consumers and public interest groups to call on the major cellular telephone carriers to forgive early termination fees on unemployed subscribers.

QUESTION PRESENTED

This case concerns the proper legal classification of Early Termination Fees (ETFs) that Respondent Clearwire US, LLC ("Clearwire"), a provider of internet and telephone services, imposes on customers who seek to discontinue receiving its services. The case comes to the Court on certification from the United States Court of Appeals for the Ninth Circuit, which posed the following question to this Court:

> Does Washington law treat the ETF at issue in this case as an alternative performance provision, or as a liquidated damages clause?

Ninth Cir. No. 10-35228, Order Certifying Question, at 4192.

OVERVIEW AND SUMMARY OF ARGUMENT

The issue before the Court is a question of pressing importance to consumers throughout the State and across the country — whether the law should treat Early Termination Fees ("ETFs") imposed in long-term adhesion contracts (here, for internet service) as "alternative performance" provisions, in which case they could be essentially immune from judicial scrutiny, or as liquidated damages clauses, in which case they would be subject to review under traditional contract principles for substantive unreasonableness and potential invalidation as "penalties."

This Court's resolution of the issue is especially important because of the ubiquity of fees like Clearwire's in contracts for a wide array of commonly-purchased services – including cable and satellite television, cellular phone service, and fitness club memberships – and because this is, we believe, the first state high court to be presented with the issue.

As Appellants well explain, Clearwire's proposed rule – that such fees are properly viewed as subscribers' "alternate" means of "performance," fails under blackletter contract law principles: "[T]he primary object of an alternative contract is performance, and it thus looks to a continuation of the relationship between the parties, rather than to its termination, whereas a liquidated damages provision provides for an agreed result to follow from nonperformance." 24 Williston on Contracts Sec. 65:7 (4th ed. 2002).

Despite the feats of lawyerly circumlocution that often mark proponents' efforts to recharacterize them, by any realistic measure of the substance of these arrangements, they are – viewed in the *most favorable* realistic light – a form of liquidated damages applicable when a customer brings a contractual relationship (and the parties' reciprocal obligations) to an end before a specificed term has expired. *Cf. Chandler v. Doran*, 44 Wn.2d 396, 400, 267 P.2d 907, 910 (1954) "'As the question of liquidated damages or penalty is based on equitable principles, it cannot depend on the form of the transaction, but rather on its substance.'") (quoting 3 Williston on Contracts (Rev Ed. 2194 (Sec. 781)); *In Re Cellphone Fee Termination Cases*, 122 Cal. Rptr 3d 726, 734 (2011), reh'g denied (Mar. 24, 2011) (observing, in case that unlike this one had proceeded through discovery and trial, that "Plaintiff introduced contemporaneous Sprint internal documents referring to the ETF as a '$150 contract penalty fee,' and as a 'Penalty or Contract Cancellation Fee.'"). As such, they merit scrutiny for reasonableness, and for compensatory rather than punitive effect.

The need to adhere to those traditional rules subjecting liquidated damages provisions to meaningful scrutiny is especially strong in light of the practical realities of telecommunications service contracts like those between plaintiffs and defendants here: the character of the product and market and the impracticalities of breach-of-contract litigation by individual consumers make it highly likely (1) that a provider will seek to immunize itself from (justified) customer dissatisfaction over poor service by imposing onerous liabilities on those who wish to sever their contractual relationship; and (2) that the onus of these penalties will fall disproportionately on the poor, the young, and the commercially unsophisticated, and the "product" sold – here, internet access – is of a type that can be provided, at a minimal marginal cost, to as many customers as can be induced to click "agree."

Notwithstanding the sanguine account offered by Clearwire here, in practice ETFs often operate as anti-choice provisions that can "lock in" customers and ensure their payment for sustained periods of time, despite (as the facts here suggest) poor or entirely absent service. Likewise, ETFs can effectively shelter businesses from the competitive market forces that would otherwise induce them to provide quality goods and services and and be attentive to their customers' concerns and complaints. Because ETFs are commonly imposed in settings where individual consumers have so little practical after-the-fact recourse when service is inadequate or nonexistent (and where nonpayment of legally unjustified ETF charges can result in lasting damage to an individual's credit score), it is critical that there be meaningful judicial scrutiny.

ETFs like those at issue here have none of the hallmarks of true "alternative performance" provisions: they are not freely negotiated or openly advertised and they are imposed, not with a view to continuation of the contractual relationship, but as a sanction for the purchaser's ending it. They are typically imposed in settings with sorely insufficient non-market mechanisms – legal rights or regulation – to provide contractually satisfactory service: A consumer of a service like Clearwire's does not have a realistic ability to resort to judicial remedies to adjudicate a claim of breach by the company. Moreover, ETFs would appear to be wholly disproportionate in amount to any damage the provider suffers – direct/out of pocket costs or even opportunity costs; instead, their evident purpose is the *in terrorem* effect of liability for a substantial lump sum payment, on top of costs of procuring necessary service elsewhere. Finally, again, lawyerly divagations aside, commercial reality and confirms what consumers' common sense tells them: that these fees not an opportunity for alternative performance are penalties designed to force them to stay in contracts that they would otherwise leave. And under Clearwire's reasoning, it is difficult to see what liquidated damages clause or contractual penalty could not be reclassified as a provision for "alternative performance."

ARGUMENT

ETFs, WHICH AFFECT MILLIONS OF CONSUMERS AND CARRY SIGNIFICANT POTENTIAL FOR ABUSE, SHOULD BE SUBJECTED TO THE CAREFUL JUDICIAL SCRUTINY TRADITIONALLY ACCORDED TO OTHER LIQUIDATED DAMAGES PROVISIONS

Early termination fee provisions like the ones at issue here are an unwelcome fact of life for millions of American consumers. Though by no means the only industry which imposes ETFs, most telecommunications subscription contracts, including those for internet, cellular phone, cable television, and numerous other services, include such provisions as standard and non-negotiable. As of December 2009, for example, 91% of the U.S population subscribed to wireless phone service,[1] and more than 54% of cell phone customers were subject to ETFs.[2] The numbers are comparable for internet service.

[1] GAO Report, GAO-10-779, Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry (July 27, 2010), at 14, *available at* www.gao.gov/products/GAO-10-779.

[2] Fifty-four percent reported being subject to an ETF, and another 18% were unsure. *See, e.g.*, John Horrigan & Ellen Satterwhite, FCC Paper, American's Perspectives on Early Termination Fees and Bill Shock (May

A. The Services Carrying ETFs Include Necessities of Modern Life.

Telecommunication services —internet access and cellular phone services, for example — are no longer a luxury; in the twenty-first century, they are essential to full participation in the economic and social life of the country.[3] According to the Census Bureau, a full 76.68% of American households subscribed to an internet service in 2009, and internet service providers ("ISPs"), comprise an industry boasting revenues of $40,809,700,000 in 2010.[4]

Similarly, over 85% of adults own cellular phones, a figure that increases to 95% among young adults.[5] As of 2010, fully 25% of households *only* had wireless phone service, with that number at 51% for those headed by young adults.[6] Much like electricity did a century ago,

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26, 2010) (hereinafter, "Perpectives"), at 4, *available at* www.fcc.gov/encyclopedia/early-termination-fees.

[3] FCC, Report, Connecting America: The National Broadband Plan (Mar. 16, 2010) (NBP), at 3-6 (discussing the importance of high-speed internet access)..

[4] ISBWorld Report, Internet Service Providers in the U.S. (July 15, 2011), *available at* www.ibisworld.com/industry/default.aspx?indid=1901.

[5] Kathryn Zickuhr, Pew Internet & American Life Project, Report, Generations and Their Gadgets (Feb. 3, 2011), at 7, *available at* http://pewinternet.org/Reports/2011/Generations-and-gadgets/Report/Cell-phones.aspx.

[6] *Id.*

these have become "general purpose technolog[ies]"[7] that citizens cannot practicably live without. Employers increasingly accept only electronic job applications; there are now political parties that conduct all primary voting online; ever more payment for goods and services must be submitted online, and even the federal government now prefers to interact with citizens through the internet, such as by encouraging the filing of tax returns and copyright applications online.[8] And increasingly, cellular phone service is necessary for navigating the world.

The industry is one dominated by a few, massive companies, with the largest four commanding 90% of the market, and the largest two, AT&T and Verizon Wireless, holding a full 62% of subscribers.[9] And for broadband internet access — which the FCC considers to be critical to both individual and national welfare [10] — 96% of consumers have no more than two providers in their geographic area.[11]

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[7] FCC, Report and Order No. 10-201, In the Matter of Preserving the Open Internet, Broadband Industry Practices (December 23, 2010), at 5 (hereinafter FCC 10-201).
[8] *Cf.* Aaron Smith, Pew Internet & American Life Project, Report, Government Online (Apr. 27, 2010).
[9] FCC, Report FCC 11-103, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services (June 27, 2011), at 27, *available at* http://wireless.fcc.gov/index.htm?job=cmrs_reports.
[10] *See* NBP, *supra*, note 3
[11] *See, e.g.*, Christopher Mitchell, New Rules Project, *Breaking the Broadband Monopoly: How Communities Are Building the Networks They*

As many have observed, the companies that offer these services are essentially fulfilling the role of public utilities, operating as the sole or one of the few providers of a necessary service that the vast majority of Americans purchase,[12] but are not regulated remotely like public utilities, whose dealings with customers have historically been subject to substantial regulatory oversight.

Individual consumers do not have any meaningful ability to negotiate individualized terms for internet service contracts. In practice, if they want internet access, they must sign contracts of adhesion with ISPs for lengthy terms , contractsthat subject them to costly ETFs if they are terminated or (in the opinion of the provider) breached for any reason whatsoever. As the facts alleged here suggest, the quandary ETFs pose for consumers who receive substandard performance or outright nonperformance is very real. Because litigation costs would usually be prohibitive, most such consumers do not have a meaningful ability to seek redress by suing providers for violating their service contract.

Need (May 2010), at 2, *available at* www.muninetworks.org/reports/breaking-broadband-monopoly; NBP, supra note 3.

[12] *Accord* Sascha D. Meinrath et al., *Digital Feudalism: Enclosures and Erasures From Digital Rights Management To The Digital Divide*, 19 Comm. L. Conspectus 423, 477 (2011) ("High-speed access should no longer be considered a commodity, but rather a critical utility on par with water and electricity.")

B. ETFs Can Trap Consumers in Service Arrangements They Justifiably Want to Leave.

From *consumers*' perspective, it risks understatement to say that EFTs are not regarded as a freely-bargained, choice-enhancing feature of the marketplace for communications services. To the contrary, the vast majority — 90% of customers — consider these fees to be "penalt[ies] to discourage switching . . . companies."[13] Numerous lawsuits challenging ETFs on various grounds and in a variety of different industries have prevailed.[14] The Federal Communications Commission (FCC) has conducted inquiries into the practice of charging such fees,[15] concluding that ETFs are seldom well understood by consumers;[16] and importantly affect their decisionmaking regarding switching service providers.[17] As a

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[13] Edmund Mierzwinski et al., CALPIRG Education Fund, *Locked In A Cell: How Cell Phone Early Termination Fees Hurt Consumers* (Aug. 2005), at 2, *available at* cdn.publicinterestnetwork.org/assets/.../lockedinacell05.pdf.

[14] *See, e.g.*, *Mitchell v. Ford Motor Credit*, 702 F.Supp.2d 1356 (M.D. Fla. 2010) (rejecting enforcement of an ETF in an auto lease because it resulted in a windfall to the lessor); *In re A.J. Lane & Co., Inc.*, 113 B.R. 821 (D. Mass. 1990) (refusing enforcement of an ETF in a bankruptcy proceeding because the fee was an unconscionable penalty).

[15] FCC, News Release, FCC Seeks Information On Wireless Early Termination Fees (Jan. 26, 2010), *available at* www.fcc.gov/document/fcc-seeks-information-wireless-early-termination-fees.

[16] *See, e.g.*, Perspectives, supra, note. 2.

[17] FCC, Working Paper, Broadband Decisions: What Drives Consumers to Switch — or Stick With — Their Broadband Internet Provider (Dec. 2010), at 8, *available at*

recent FCC Chairman, Kevin Martin, explained, "[an ETF is] a significant sum for a subscriber to pay who is dissatisfied with the quality of service. In practice, it can lock people into a service they really want to leave."[18] Federal regulation has not been forthcoming, and state law is the key forum for defining the lawful limits of the use of ETFs.

The contexts in which these fees most commonly arise are ones consumers have no realistic ability to avoid. The contracts imposing them are non-negotiable; the markets are often noncompetitive; consumers lack practical means of ascertaining in advance the quality of service they will receive -- and the services being contracted for are not luxuries or readily substitutable, but necessities. These considerations make it especially important for the courts to affirm that there is no "ETF exemption" from the common law's close and practical-minded scrutiny of liquidated damages clauses in contracts. In April 2010, the FCC conducted a study into the effects of ETFs on consumers switching ISPs. A full 58% surveyed reported that ETFs were a factor, with 32% of survey participants stating that "paying termination fees to their current ISP was a

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www.fcc.gov/Daily_Releases/Daily_Business/2010/.../DOC-303264A1.pdf.

[18] *See* Andrew R. Hickey, "FCC Outlines Rules for Wireless Early Termination Fees," June 13, 2008, *available at* www.crn.com/news/networking/208403854/fcc-outlines-rules-for-wireless-early-termination-fees.htm.

major reason for keeping service."[19] For cellular phone service providers' ETFs, 61% of respondents cited the fees as a reason why they did not change wireless phone companies.[20]

Although Clearwire insists that such consumers have the "right" to terminate (or defend a suit for payment of the ETFs), in real life the cost of mounting a suit proving that that the ISP itself (materially) breached its contract by failing to provide adequate internet access -- and doing so against a large corporate adversary – vastly exceed the relief that such a suit would bring. Given the "choice" of challenging a corporate behemoth like Verizon, Comcast, or Clearwire, or paying a $200 termination fee, it will be the rare consumer who has the time, resources, and fortitude to stand on his or her rights.

Indeed, though Appellees repeatedly argue that paying the penalty is a reasonable option, by comparing it to the overall amount due on the

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[19] FCC, Working Paper, Broadband Decisions: What drives consumers to switch — or stick with — their broadband Internet provider (Dec. 2010), at 3, 8 *at* www.fcc.gov/Daily_Releases/Daily_Business/2010/.../DOC-303264A1.pdf.

[20] Perspectives, supra note 3 at 5. A 2005 study by the CALPIRG Educational Fund detailed similar findings in the nearly identical context of ETFs for canceling cellular phone contracts: 36% of respondents in the survey reported that termination fees prevented their switching service providers, 47% said they would consider switching but for the ETFs, and almost 90% stated that ETFs are "penalt[ies] to discourage switching phone companies." Edmund Mierzwinski et al., CALPIRG Education Fund, *Locked In A Cell: How Cell Phone Early Termination Fees Hurt Consumers* (Aug. 2005), at 2.

contract, they ignore entirely the burden that a large lump sum payment represents for consumers already at the financial breaking point – including those who have lost jobs or are on fixed incomes. And it also ignores the reality that, as explained above, internet and cell phone service is for many a practical necessity, meaning that the "alternative" for dissatisfied customers is the significant one-time payment ***plus*** the cost of purchasing service from a reliable provider.

The factual allegations underlying this case suggest how little power consumers can have when interacting with and confronting ISPs. The customer-plaintiffs here include individuals who complain they received no internet access at all from Clearwire; those whose access was distinctly deficient; and those who moved out of Clearwire's service area and were thus categorically unable to receive internet services. See Opening Br. of Appellants 10-13 (describing and quoting plaintiffs' accounts of their experiences as Clearwire customers). All either payid an EFT, continued making monthly payments for the duration of their contacts, or had the unpaid EFT sent to debt collection agencies. Clearwire refers to these options as consumer "choice," a characterization that highlights the power differential between ISPs and internet consumers: The ISP, Clearwire, gets paid — either via ongoing monthly payments or the lump sum ETF — regardless of the quality of service it provides or whether it provides any service at all.

C. ETFs Are Especially Problematic for Poorer and Otherwise Vulnerable Consumers.

While early termination fees can be damaging to consumer interests in general, their weight is borne most by the most vulnerable consumers; those least able to understand the nuances of complicated contracts at the time of subscribing or to pay an approximately $200 cancellation penalty. Large numbers of consumers are caught unaware by ETFs; if not their existence, at least their amount. Indeed, for broadband service, a full 38% do not know whether an ETF would be assessed against them if they tried to cancel their internet service.[21] And even if they do know, the FCC found in 2010 that "[a]mong personal cell phone users who said they were subject to an ETF, 47% did not know what the amount of the fee would be. For home broadband users who said they would have to pay an ETF, 64% did not know the amount of the fee."[22]

Broad arguments that depict ETFs as the freely bargained for choices of market co-equals are especially fanciful given that many consumers of these now essential services are among those least well positioned to strike such bargains. Of the 36% of cellular phone

[21] Perspectives, supra, at 1.
[22] *Id.*

consumers surveyed who said that ETFs prevented them from switching to another service company, a full 26% explained that this was because the fee of $150 or more was unaffordable to them.[23] The FCC reports that "[y]ounger broadband users are more likely to . . . pay an ETF for broadband; 31% of broadband-using adults under the age of 30 say they would have to pay an ETF if they were to switch broadband providers versus 16% of remaining broadband users." Additionally, "[l]ower income broadband users are more likely to say they have an ETF. Some 28% of those living in households whose annual income is $30,000 or below say they would have to pay an ETF versus 17% in households with annual incomes over $75,000 . . . ."[24]

D. ETFs Both Can Harm Competition Among Service Providers and Diminish Incentives to Provide Customer Service

ETFs can mean, in effect, that companies are paid whether or not they provide products or services of good quality which hurts the general public by diminishing service providers' incentive to provide products or services of adequate quality. In addition to locking in individual

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[23] *Id.* at 19.

[24] Perspectives, supra, at 7. Edmund Mierzwinski et al., CALPIRG Education Fund, *Locked In A Cell: How Cell Phone Early Termination Fees Hurt Consumers* (Aug. 2005), at 15 ("T]he lower the household income, the higher the likelihood that the fees would discourage switching companies.").

customers to bad service, ETFs can threaten consumers at large by insulating companies from accountability for the quality of the service they provide, or from competition from companies seeking to attract customers by offering better, more attentive service.

The threats imposed by ETFs on the general public have been noted by numerous government agencies, public interest and consumer advocate groups, and research organizations. As CALPRIG found in assessing the market impact of ETFs on cellular phone consumers, the fees adversely affect the quality of goods and services offered because when "consumer choice is restricted, companies can avoid providing the highest quality service and lowest-possible rates that would otherwise prevail in a highly competitive industry."[25]

Competition is a fundamental ingredient of a healthy, prosperous and democratic economy,[26] and because ETFs often operate to restrict consumer choice, they undercut competition, to the detriment of all. Specifically in the telecommunications industry, not only is competition among ISPs important for quality of service offered to customers, it is also

[25] Edmund Mierzwinski et al., CALPIRG Education Fund, *Locked In A Cell: How Cell Phone Early Termination Fees Hurt Consumers* (Aug. 2005), at 2, *available at* cdn.publicinterestnetwork.org/assets/.../lockedinacell05.pdf.

[26] *Cf.* FCC, News Release, FCC Stresses Need to Consider Competition and Consumer Protection in Developing National Broadband Plan (Sept. 4, 2009), *available at* www.ftc.gov/opa/2009/09/fccnbp.shtm.

critical to keep prices low.[27] Americans pay far greater prices for far lower quality internet access than do other developed nations — averaging $145 per month in 2010 for a typical 50 Mbps connection compared to $29 in South Korea, $60 in Japan, and $38 in Hong Kong.[28]

Telecommunications companies sometimes argue in parallel lawsuits and before regulatory bodies that charging customers ETFs of approximately $200 is justified financially because they allow businesses to recoup the costs of providing service, provide customers with a "choice" of performance, and allow customers to lock-in a fixed rate for the contract's duration that protects from rising prices. While such empirical assertions may sometimes have merit, they should not be

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[27] John C. Waclawsky, *Closed Systems, Closed Architectures, & Closed Minds*, 5 Bus. COMMC'N REV. 61 (2004). *See also* Sascha D. Meinrath et al., *Digital Feudalism: Enclosures and Erasures From Digital Rights Management To The Digital Divide*, 19 Comm. L. Conspectus 423, 425-26 (2011) ("The U.S. has plummeted in its international rankings on broadband penetration rates in recent years, indicating that something has undermined the participatory ideal of universal broadband connectivity.). **** [I]n most markets across the U.S., people must choose between one cable provider and one telephone company for their Internet services. This lack of choice and competition is one of the key reasons that U.S. broadband services currently lag behind a growing number of other industrialized countries and why service is often substandard.").

[28] James Losey & Chiehyu Li, New America Foundation, Price Of The Pipe: Comparing The Price Of Broadband Service Around The Globe 1-2 (April 2010), *available at* www.newamerica.net/sites/newamerica.net/files/policydocs/Price%20ofyo 20the% 20Pipe_0.pdf.

accepted without examination and evidence; the mere assertion that some fees are justified is not a valid basis for a per se legal rule that such fees may not even be judicially examined for reasonableness. Indeed, the conception of "free choice" advocated by Appellees is so indiscriminate that it would, if accepted, override traditional common law contract doctrine, which has long held that certain types of arrangements – including penalty clauses – merit close scrutiny from the courts.

One of the primary defenses proffered by telecommunications companies for imposing ETFs is that they *benefit* customers by permitting them to "lock-in" rates by signing up for a two-year fixed-rate monthly contract, which is itself made financially feasible by the ETF provisions. Such claims rest on two highly doubtful premises: (1) that the cost of providing the services is rising or likely to rise, such that "locking-in" a rate for an extended term is beneficial, (2) that ETFs are necessary to make offering internet services economically rational. Neither is accurate.

There is ample evidence that internet industry costs are and have been holding relatively steady, if not falling. According to the U.S. Census Bureau, industry-wide operating expenses for ISPs in 2006 were $14.3 billion, In 2008 they were still less than in 2006, at $13.5 billion.[29] Revenues for ISPs continued to rise during the same period, however,

[29] *Id.*

posting income of $18.4 and $18.8 billion for each year, respectively.[30] Similarly, the cellular industry has seen revenues rise from $104.25 billion in 2004 to $127.11 billion in 2006 to $154.67 billion in 2009.[31]

E. Any Legitimate and Reasonable ETFs Could Survive Judicial Scrutiny under Traditional Doctrine.

Finally, Clearwire (like many other defenders of ETFs) argues that these fees serve valid, non-punitive purposes and should not be condemned by the law. But to the extent that is true, traditional common law analysis of liquidated damages is flexible and pragmatic enough to permit arrangements that serve valid purposes and are reasonable, even as it condemns those that are punitive or abusive. The question here comes down to whether ETFs are effectively immune from judicial scrutiny for reasonableness. The answer to that question must be no – an answer that in no way precludes a company from showing that a particular arrangement is reasonable in the circumstances.

When the facts show that ETFs are bargained-for provisions that rest upon a serious appraisal of difficult-to-assess damages, they could survive scrutiny under traditional standards. But that is not a reason for

[30] Id. at 721, Table 1150 (Dec. 7, 2010).

[31] FCC, Report FCC 11-103, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services (June 27, 2011), at 126 Chart 25, *available at* http://wireless.fcc.gov/index.htm?job=cmrs_reports.

exempting them from judicial scrutiny entirely, and leaving consumers without meaningful ability to challenge terms and practices that are truly abusive. Indeed, ETFs like those at issue in this case are a particularly poor candidate for exemption from scrutiny under traditional standards governing liquidated damages clauses. Practically everything about them militates in favor of *greater* scrutiny than for ordinary liquidated damages clauses, not less. Rejecting the "alternative performance" argument means that the court then proceeds to determine, in keeping with established contract law principles, whether the rates are set to compensate the service provider for actual losses or intended instead to punish or deter (even legally justifiable) termination.

CONCLUSION

This Court should answer the certified question by making clear that the ETFs at issue are liquidated damages provisions demanding careful judicial review for reasonableness.

Respectfully submitted this 11th day of October, 2011.

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