No. 25-03687

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY ABERIN, *et al.*,

Plaintiffs-Appellees,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
Case No. 16-cv-04384-JST
Honorable Jon S. Tigar

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly held corporation has an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues including consumer protection and class action fairness. Public Citizen has long sought to promote access to courts for individuals harmed by corporate wrongdoing. Public Citizen encourages the use of class actions to redress consumer harm efficiently and effectively where individual claims are of modest value, and Public Citizen supports fee shifting as a means of ensuring access to justice.

Public Citizen is filing this brief in support of plaintiffs-appellees to emphasize that an award of attorneys' fees that exceeds the monetary benefit to the class can be reasonable and consistent with this Court's decision in *Lowery v. Rhapsody International, Inc.*, 75 F.4th 985 (9th Cir. 2023), where, as here, the case rests on consumer-protection statutes with fee-shifting provisions intended to incentivize socially beneficial litigation. Public Citizen is concerned that a decision of this Court restricting fee awards in the manner suggested by defendant-appellant would undermine the public policy goals served by fee-shifting statutes, encourage

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than amicus and its counsel contributed money intended to fund the brief's preparation or submission.

dilatory defense tactics, and effectively insulate corporate wrongdoing from challenge.

SUMMARY OF ARGUMENT

As plaintiffs-appellees explain, the district court's award of attorneys' fees was a proper exercise of its discretion and a faithful application of this Court's decisions, including *Lowery*. Public Citizen submits this brief to highlight three points. First, consumer-protection statutes with fee-shifting provisions, combined with the class action device, serve the public interest by ensuring that consumers who suffer small harms can access the courts to vindicate their rights and deter corporate misconduct. Second, in cases that rest on consumer-protection statutes with fee-shifting provisions intended to address a market failure, lodestar-based attorneys' fees reasonably may exceed the monetary benefit to the class. In such cases, applying a rule of proportionality or using the value of the class recovery to assess the reasonableness of the fee award would discourage private enforcement and undermine statutory objectives. Here, the district court, applying *Lowery*, correctly ruled that fees do not have to be proportional to the class recovery in consumer-protection cases that vindicate important public policies. Finally, a rule of proportionality would encourage defense tactics that increase plaintiffs' litigation costs, discourage the private enforcement of consumer-protection statutes, and effectively insulate corporate misconduct from challenge.

ARGUMENT

I. Statutory fee-shifting provisions and the class action device serve important policy goals in consumer-protection cases.

As the Supreme Court has long recognized, fee-shifting statutes are designed to ensure access to justice for those whose rights have been violated, to encourage plaintiffs to serve as private attorneys general to enforce important public policies, and to deter misconduct. *See*, *e.g.*, *Fox v. Vice*, 563 U.S. 826, 833 (2011); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). Fee shifting is particularly important in cases where plaintiffs' damages are modest, but the lawsuit seeks to vindicate important rights. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion). In such cases, fee shifting enables plaintiffs to enforce the law "where the amount of damages at stake would not otherwise make it feasible for them to do so." *Id.* at 577.

Although these policies were first articulated in civil rights cases, they are equally applicable to consumer-protection cases. Many consumer-protection statutes have fee-shifting provisions to ensure access to justice for those harmed by corporate misconduct. *See*, *e.g.*, Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2605(f)(3), 2607(d)(5); Truth in Lending Act (TILA), 15 U.S.C. § 1640(a)(3); Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681n(c); 1681*o*(b); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d); Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692k(a)(3); Magnuson-Moss Warranty Act, 15 U.S.C.

§ 2310(d)(2). Similarly, each of the state consumer-protection statutes at issue in this case has a fee-shifting provision. *See* California Consumer Legal Remedies Act, Cal. Civ. Code § 1780(e); Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-634(e); New York General Business Law § 349(h); Washington Consumer Protection Act, Wash. Rev. Code Ann. § 19.86.090. Particularly in cases that provide for statutory damages, fee-shifting is critical to enable injured consumers to vindicate their rights and to effectuate the deterrent value of those consumer-protection laws. *See, e.g.*, 15 U.S.C. § 1692k(a)(2)(A) (providing for $1,000 statutory damages award for certain FDCPA violations); 15 U.S.C. § 1681n (providing for $100 to $1,000 statutory damages awards for certain FCRA violations). In such cases, fee-shifting is a "means of fulfilling Congress's intent that the Act should be enforced by [consumers] acting as private attorneys general." *Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995) (addressing the FDCPA and quoting *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991)); *id.* ("A plaintiff who brings an FDCPA action seeks to vindicate important rights that cannot be valued solely in monetary terms, and Congress has determined that the public as a whole has an interest in the vindication of the statutory rights." (cleaned up)).

The same is often true in cases concerning actual damages under consumer protection statutes. For example, "TILA awards will rarely be enough to cover the costs of representation; in most cases, they scarcely will cover the costs of filing a

claim. Only with fee shifting does the prosecution of a typical individual TILA claim become an economically sensible possibility." *Nigh v. Koons Buick Pontiac GMC, Inc.*, 478 F.3d 183, 188 (4th Cir. 2007) (internal citation omitted).

The class action device furthers the goals of consumer-protection statutes with fee-shifting provisions because the aggregation of low value claims makes socially beneficial relief—such as disgorgement of ill-gotten gains and deterrence of future misconduct—possible.[2] Such relief would be unattainable through a series of individual suits for damages, even where a legislative body has provided a fee-shifting remedy to encourage private enforcement actions. *See Carnegie v. Household Int'l, Inc*., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

II. Attorneys' fees awarded pursuant to a consumer-protection statute with a fee-shifting provision need not be proportionate to the monetary benefit to the class.

In a class action based on statutes with fee-shifting provisions to incentivize socially beneficial litigation, like the consumer-protection statutes at issue here, fees are properly calculated using the lodestar method rather than the percentage-of-recovery method. The percentage-of-recovery method assumes that damages are

[2] *See* 7 *Newberg and Rubenstein on Class Actions* §§ 21:1–21:8 (6th ed., Dec. 2025 update) (surveying the frequency with which cases under the leading federal consumer-protection statutes are pursued as class actions).

high enough that a contingency fee based on the class recovery will attract competent counsel. In cases brought under consumer protection statutes, however, this assumption is generally not true. Applying the percentage-of-recovery method, then, would impede the functioning of the statutes, which provide for fee shifting to correct for a market failure by ensuring that plaintiffs' counsel can obtain a reasonable fee award upon success. Thus, in fee-shifting cases under consumer protection statutes, the court should expect that lodestar-based attorneys' fees will exceed the amount of a reasonable contingency percentage. *See City of Riverside*, 477 U.S. at 581 (rejecting a rule that attorneys' fees awarded pursuant to a fee-shifting statute be proportionate to the damages recovered). In such cases, reducing a fee award below the lodestar simply because the damages obtained are small would conflict with the statute's purpose. *See Quesada v. Thomason*, 850 F.2d 537, 540 (9th Cir. 1988) ("Permitting such reductions would create an incentive to bring only those civil-rights cases that would produce large damage awards. This incentive conflicts with the purposes of [fee-shifting statutes]."); *see also Morales v. City of San Rafael*, 96 F.3d 359, 365 (9th Cir. 1996) (holding that litigation resulting in a modest damages award served a significant public policy interest by deterring future misconduct and ordering the district court to consider the benefit to society when determining a fee award).

This Court's decision in *Lowery* recognized the point. *Lowery* notes that "it is unreasonable to award attorneys' fees that exceed the amount recovered for the class, absent meaningful nonmonetary relief or other sufficient justification." 75 F.4th at 994. But *Lowery* goes on to explain that "fees do not have to be proportional to the monetary recovery in some cases," *id.*, such as those where damages are small but the lawsuit provides "considerable benefit to society," *id.* at 995. Here, as the district court determined, proportionality was not needed because consumer-protection cases, like civil rights cases, depend on fee shifting to correct a market failure and attract qualified counsel and, like civil rights cases, provide considerable societal benefits. 1 ER 23–25. Thus, the district court concluded that lodestar-based attorneys' fees were reasonable, and there was no reason to "reduce the fee award based on *Lowery* or a percentage-of-recovery cross-check." *Id.* at 26.

Defendant-appellant seizes on *Lowery*'s observation that "[e]xcept in extraordinary cases, a fee award should not exceed the value that the litigation provided to the class," 75 F.4th at 994, but it takes the "extraordinary cases" phrase out of context. *Lowery* used the phrase with reference to cases other than those that involve fee-shifting provisions that overcome market failure by incentivizing socially beneficial litigation. In cases without that type of fee-shifting provision, it may be that only the "extraordinary" case will justify fees that exceed the class

recovery. This case, however, rests on fee-shifting provisions of the type that justify deviation from a rule of proportionality.

Indeed, the fee award rejected in *Lowery* rested on the fee-shifting provision of the Copyright Act, which differs from those at issue here. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522–27 (1994). Where a fee-shifting provision encourages plaintiffs to act as private attorneys general to enforce important public policies, prevailing plaintiffs ordinarily recover attorneys' fees in the absence of special circumstances that would render such an award unjust, because the plaintiffs have served the public interest. *Id.* at 522–23 (citing *Piggie Park*, 390 U.S. at 402). In contrast, prevailing defendants in such cases are entitled to recover attorneys' fees only if the lawsuit was frivolous or brought in bad faith, because their victory does not advance the policy objective of the statute. *Id.* at 523 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978)). Reflecting that it is not intended to correct for market failure that discourages socially beneficial litigation, the fee-shifting provision of the Copyright Act applies equally to prevailing plaintiffs and defendants. *See id*. ("[A] successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.").

III. A rule of proportionality would undermine the public policy goals served by fee-shifting statutes, encourage dilatory defense tactics, and effectively insulate corporate wrongdoing from challenge.

As explained above, fee-shifting provisions like those at issue here are designed to encourage lawyers to devote the resources needed to vindicate consumer rights where the plaintiffs' damages are too low to allow for a reasonable fee to be paid from the plaintiffs' recovery. A rule of proportionality would undermine that goal because defendants could delay resolution and drive up the number of attorney hours needed to litigate a case until the case no longer made economic sense for plaintiffs' counsel. Over time, such tactics would deprive plaintiffs of access to the courts because lawyers would be discouraged from bringing such cases—the very problem fee-shifting was intended to address. Without private enforcement, consumer-protection statutes would become hollow pronouncements, and corporate wrongdoing would go unaddressed.

Here, "Plaintiffs litigated for eight years in the face of a vigorous defense." 1 ER 26. Although defendant-appellant was entitled to mount such a defense, it should not be heard to complain post-resolution that plaintiffs' counsel devoted considerable time to the case. *See City of Riverside*, 477 U.S. at 580 n.11 (observing that defendants "could have avoided liability for the bulk of the attorney's fees for

which they now find themselves liable by making a reasonable settlement offer in a timely manner").

Equally unavailing is defendant-appellant's argument that a rule of proportionality is needed to prevent plaintiffs' counsel from devoting unnecessary time to a case in the hope of increasing an eventual fee award. Where fees are litigated, the lodestar method already provides a sufficient check on such conduct, because the court must determine the reasonable number of hours expended by counsel and exclude unnecessary time from the lodestar equation. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011). And where parties have settled fees in connection with a class action, the fairness review mandated by Rule of Civil Procedure 23(e) guards against agreements where the lawyers may have minimized the class recovery in favor of higher attorneys' fees. *See id.* at 946–47.

CONCLUSION

For the foregoing reasons and those set forth in plaintiffs-appellees' brief, this Court should affirm the district court's award of attorneys' fees and clarify that fee awards that exceed the monetary benefit to the class can be reasonable where the case rests on consumer-protection statutes with fee-shifting provisions.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. Civ. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 2,278 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Michael T. Kirkpatrick
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