No. 09- 09-893 JAN 25 2010

In the Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD M. FALK
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real,
Suite 300
Palo Alto, CA 94306
(650) 331-2000

NEAL BERINHOUT
AT&T Mobility LLC
1025 Lenox Park
Suite 5C42
Atlanta, GA 30319
(404) 986-1427

KENNETH S. GELLER
Counsel of Record
ANDREW J. PINCUS
EVAN M. TAGER
ARCHIS A. PARASHARAMI
KEVIN RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
kgeller@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

CORPORATE DISCLOSURE STATEMENT

Petitioner AT&T Mobility LLC, a limited liability company, has no parent company. Its members are all privately held companies that are either wholly owned subsidiaries of AT&T Inc., which is publicly traded, or are also limited liability companies whose members are wholly owned subsidiaries of AT&T Inc. No other publicly held corporation has a 10% or more ownership interest in AT&T Mobility LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner AT&T Mobility LLC ("ATTM") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 584 F.3d 849. The order of the district court denying ATTM's motion to compel arbitration (*id.* at 17a-54a) is unreported, but is available at 2008 WL 5216255.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2009. App., *infra*, 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution (Art. VI, cl. 2), provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

> arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

STATEMENT

This petition presents a recurring issue of extraordinary importance to the continued viability of tens of millions of arbitration agreements in the State of California (and elsewhere in the country): whether, consistent with the FAA, a State may condition the enforceability of an arbitration agreement on the availability of class-wide arbitration when that procedure is not necessary to ensure that parties to the agreement are able to vindicate their claims. This Court received briefing and heard argument on the broader question whether States may ever superimpose class procedures on arbitration in *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), but could not answer it because the issue had not been presented below. Since then, the need to resolve this issue has increased significantly.

Class-wide arbitration affords none of the benefits of traditional, individual arbitration—it is at least as burdensome, expensive, and time-consuming as litigation—while multiplying the risks enormously because judicial review is so limited. For that reason, hundreds of millions of arbitration agreements require that arbitration proceed on an individual basis.

Most States that have addressed the validity of such agreements have upheld their enforceability, at least when the agreement in question neither imposes substantial costs on the non-drafting party nor limits that party's remedies. Under California law, by contrast, agreements to arbitrate on an individual basis are unenforceable in the consumer context—even when the arbitration provision ensures that the consumer is able to vindicate his or her claims on an individual basis. And the Ninth Circuit has held in this and other cases that the FAA does not preempt that rule because it applies equally to agreements to litigate on an individual basis.

The Ninth Circuit's decision thus effectively invalidates tens of millions of arbitration agreements in California. Moreover, in other cases the Ninth Circuit has extended the impact of its holding to claims by citizens of States other than California, meaning that tens of millions of additional contracts can be avoided by the simple expedient of filing class actions in district courts within this largest of federal circuits. The question whether the FAA preempts state-law rules barring agreements to arbitrate on an individual basis is thus of exceptional importance.

The present case is an ideal vehicle for resolving that long-percolating issue. The courts below found that the Concepcions were "essentially guaranteed" to obtain full relief under ATTM's arbitration provision. App., *infra*, 10a n.9; *see also id.* at 39a-42a. They thus invalidated that provision not because it precluded the Concepcions from vindicating their own claims, but because it precluded them from serving as the agents for the vindication of claims of third parties. Accordingly, no case could better present the question whether the FAA allows States

to superimpose favored procedures—in this case, class actions—on arbitration when those procedures are not necessary to ensure that the parties to the arbitration are able to vindicate their claims. Review by this Court is warranted.

1. The Federal Arbitration Act. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted). In preserving the benefits of arbitration, "Congress * * * had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Indeed, because it "allow[s] parties to avoid the costs of litigation," arbitration benefits individuals with "smaller" claims, such as employees (*Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001)), or "the typical consumer" who otherwise would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery" (*Allied-Bruce*, 513 U.S. at 281).

Section 2 of the FAA commands that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (quoting 9 U.S.C. § 2; emphasis added by the Court). "That is, as a matter of federal law, arbitration agreements and clauses are to be enforced *unless* they are invalid under principles of state law that govern all contracts." *Iberia Credit*

Bureau, Inc. v. *Cingular Wireless LLC*, 379 F.3d 159, 166 (5th Cir. 2004) (emphasis in original).

This Court has identified "fraud, duress, [and] unconscionability" as examples of such state-law grounds. *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). But the fact "[t]hat a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration to special scrutiny." *Iberia Credit Bureau*, 379 F.3d at 167.

In particular, the fact that a state-law rule may apply to both arbitration and judicial proceedings is not enough to bring it within Section 2's savings clause. See *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008) (holding that the FAA preempted a California law that imposed an administrative exhaustion requirement for certain disputes even though that requirement applied to both judicial and arbitral proceedings).

2. California's Unconscionability Law And Its Unique Test For Contracts Requiring That Disputes Be Resolved On An Individual Basis. Under California law, courts "may refuse to enforce" any contract found "to have been unconscionable at the time it was made," or sever or "limit the application of any unconscionable clause" in order "to avoid any unconscionable result." CAL. CIV. CODE § 1670.5(a). The proponent of unconscionability must prove both "procedural" and "substantive" unconscionability. *Armendariz* v. *Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000). Procedural unconscionability focuses on the fairness of the

contracting process, and substantive unconscionability focuses on whether the contract "shock[s] the conscience" (*Belton* v. *Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631, 649-650 (Ct. App. 2007)) or is one that a person would have to be "under delusion" to accept (*Cal. Grocers Ass'n* v. *Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994) (internal quotation marks omitted)).

Under California's "sliding scale" approach to unconscionability, if "the procedural unconscionability, although extant, [is] not great," the party attacking the term must prove "a greater degree of substantive unfairness." *Marin Storage & Trucking, Inc.* v. *Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 656-657 (Ct. App. 2001).

In the particular context of agreements to resolve disputes on an individual basis, however, the California Supreme Court has adopted a three-part test that bears no resemblance to the foregoing generally applicable unconscionability principles. Under that novel test, such an agreement is unenforceable if it "[(i)] is found in a consumer contract of adhesion [(ii)] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [(iii)] when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005).

3. ATTM's Arbitration Provision. ATTM, which was known as Cingular Wireless until January 2007, provides wireless service to over 80 million subscribers, with over 10 million in California alone. The wireless service agreements between ATTM and

its customers long have required the parties to resolve any disputes they may have in individual arbitration. The agreements expressly prohibit arbitrators from conducting class-wide proceedings. See App., *infra*, 3a, 57a, 61a.

ATTM has revised its arbitration provision over time in order to make individual arbitration a realistic and effective dispute-resolution mechanism for consumers. The version at issue in this case was promulgated in late 2006.[1] A veteran district judge in one of the Nation's busiest districts recently observed that this version of ATTM's arbitration clause "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski* v. *AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009) (enforcing provision in an individual lawsuit).

The arbitration provision affords customers fair, inexpensive, and convenient procedures and, in addition, provides them with affirmative incentives to pursue even small claims on an individual basis.

The procedural safeguards include:

- **The AAA Rules Apply:** Arbitration is conducted under the American Arbitration Association's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;
- **Convenience:** Arbitration takes place "in the county * * * of [the customer's] billing address,"

[1] The arbitration provision is set forth in Appendix C. See App., *infra*, 55a-62a.

and for claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator."

- **Cost-free arbitration for non-frivolous claims:** "[ATTM] will pay all [American Arbitration Association ("AAA")] filing, administration and arbitrator fees" unless the arbitrator determines that the claim "is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))";[2]
- **Small claims court option:** Either party may bring a claim in small claims court in lieu of arbitration; and
- **Full remedies available:** The arbitrator may award the claimant any form of individual relief (including punitive damages and injunctions) that a court could award.

The special incentives to pursue claims through individual arbitration include:

- **$7,500 minimum recovery if arbitral award exceeds ATTM's last settlement offer:** If the arbitrator awards a California customer relief that is greater than ATTM's last "written settlement offer made before an arbitrator was selected" but less than $7,500, ATTM will pay the

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[2] Even if an arbitrator concludes that a consumer's claim is frivolous, the AAA's consumer arbitration rules would cap a consumer's arbitration costs at $125. App., *infra*, 21a n.2.

customer $7,500 rather than the smaller arbitral award;[3]

- **Double attorneys' fees:** If the arbitrator awards the customer more than ATTM's last written settlement offer, then ATTM will "pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";[4] and
- **ATTM disclaims right to seek attorneys' fees:** "Although under some laws [ATTM] may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, [ATTM] agrees that it will not seek such an award [from the customer]."

Moreover, ATTM has made its arbitration procedures easy to use. A customer need only fill out and mail a one-page Notice of Dispute form that ATTM has posted on its web site. App., *infra*, 22a-23a.

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[3] Under the 2006 provision, the amount of the minimum payment is tied to the jurisdictional maximum of the customer's local small claims court. App., *infra*, 60a. In California, the jurisdictional limit for small claims court is $7,500. CAL. CODE CIV. PROC. § 116.221. In 2009, ATTM revised this aspect of its arbitration provision to make the minimum payment a uniform amount—$10,000—across the country. See http://www.att.com/disputeresolution.

[4] This contractual right to double attorneys' fees "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." App., *infra*, 61a. Thus, a customer who does not qualify for this contractual award is entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

ATTM's legal department generally responds to a notice of dispute with a written settlement offer. *Id.* at 23a. If the dispute is not resolved within 30 days, the customer may invoke the arbitration process by filling out a one-page Demand for Arbitration form (also available on ATTM's web site) and sending copies to the AAA and to ATTM. To further assist its customers, ATTM's web site includes a layperson's guide on how to arbitrate a claim. *Ibid.*

4. The Concepcions' Lawsuit. Customers of most wireless carriers, including ATTM, typically purchase cell phones and subscribe to wireless service as a bundled transaction, in which the phone is free or steeply discounted in exchange for a commitment to subscribe to service for a specified term (usually one or two years). App., *infra*, 18a-19a.

The respondents, Vincent and Liza Concepcion, are ATTM customers who filed a putative class action against ATTM in the United States District Court for the Southern District of California. App., *infra*, 20a. They allege that they entered into a bundled transaction for wireless service and free or heavily discounted phones. *Id.* at 18a-19a. California requires that sales tax be paid on the full retail value of a phone when it is sold as part of a bundled transaction. CAL. CODE REGS. tit. 18, §§ 1585(a)(4), (b)(3). Despite this requirement, the Concepcions allege that when ATTM charged them sales tax based on the full retail price of phones that were free or discounted, it violated California's unfair competition and false advertising laws (CAL. BUS. & PROF. CODE §§ 17200 *et seq.*; *id.* §§ 17500 *et seq.*) and Consumer Legal Remedies Act (CAL. CIV. CODE §§ 1750 *et seq.*).

App., *infra*, 17a-18a; ER 363-370.[5] They also allege that ATTM committed fraud and unjustly enriched itself. ER 370-372.

5. Proceedings In The District Court. ATTM responded to the Concepcions' complaint by moving to compel arbitration. The Concepcions opposed ATTM's motion, contending principally that ATTM's arbitration provision is unconscionable under California law because it requires arbitration on an individual (as opposed to class-wide) basis. App., *infra*, 30a-35a. The district court agreed, holding that, despite its pro-consumer features, the provision failed *Discover Bank*'s three-pronged test for such provisions. *Id.* at 35a, 42a-46a.

In applying the first element of this test, the court found that the Concepcions' arbitration agreement was a "contract of adhesion." App., *infra*, 35a. Although the court therefore deemed the agreement to be procedurally unconscionable, it held that the agreement "is on the low end of the spectrum of procedural unconscionability." *Id.* at 36a (internal quotation marks omitted).

The district court next held that the Concepcions could not satisfy the second element of the test—*i.e.*, that "predictably small amounts of damages" are at issue. App., *infra*, 36a-42a. The court explained that, although ATTM's arbitration provision "does not change the amount of actual damages at issue ($30), it does exponentially change the amount of potential recovery in arbitration." *Id.* at 37a. Because ATTM has committed to pay all arbitration costs and

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[5] "ER __" refers to the Excerpts of Record in the court of appeals.

makes special premiums available in arbitration, the district court found that the provision "prompts ATTM to *accept liability*"—and to offer to settle for many times the customer's actual damages—"during the *informal claims process*" that precedes arbitration, "even for claims of questionable merit." *Id.* at 39a (emphasis in original). Indeed, "under the revised arbitration provision, nearly all consumers who pursue the informal claims process are very likely to be compensated promptly and in full." *Id.* at 40a-41a.

"In contrast," the court found, "consumers who are members of a class do not fare as well." *Id.* at 41a. The court cited "studies that show [that] class members rarely receive more than pennies on the dollar for their claims, and that few class members (approximately 1-3%) bother to file a claim when the amount they would receive is small," and noted that the Concepcions "do not dispute these statistics." *Ibid.*

The court observed that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Id.* at 42a. The court thus concluded that ATTM's revised arbitration provision "sufficiently incentivizes consumers" to pursue "small dollar" claims (*id.* at 39a) and "is an adequate substitute for class arbitration as to this prong of *Discover Bank*" (*id.* at 42a).

The district court nonetheless held that ATTM's arbitration provision is unenforceable under California law because ATTM had not satisfied the third element of the *Discover Bank* test. As the district

court interpreted that aspect of *Discover Bank*, ATTM was required to demonstrate that "the arbitration provision is an adequate substitute for the deterrent effect of the class action mechanism." App., *infra*, 45a. The court noted that ATTM had submitted evidence that it dispensed over $1.3 billion in credits in one year to resolve customers' disputes. *Id.* at 44a. But, reversing the ordinary burden of proof in unconscionability challenges, the court held that ATTM had not shown that its arbitration provision was an adequate substitute for class actions in deterring ATTM from engaging in wrongdoing of the nature alleged by the Concepcions. *Ibid.*[6] The court proceeded to hold that, although the Concepcions "arguably would be better off" in arbitration, "[f]aithful adherence to California's stated policy of favoring class litigation and [class] arbitration to deter alleged fraudulent conduct * * * compels the Court to invalidate" ATTM's revised arbitration provision. *Id.* at 46a & n.10.

Finally, the district court rejected ATTM's argument that "the FAA preempts any holding that ATTM's arbitration provision is unenforceable under California law." App., *infra*, 46a n.11.

6. The Ninth Circuit's Decision. The Ninth Circuit affirmed, holding that ATTM's arbitration provision is unconscionable under the California Supreme Court's *Discover Bank* test because it requires customers to arbitrate small consumer claims on an individual basis. App., *infra*, 2a. The panel recog-

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[6] In so holding, the court merely accepted, at face value, the Concepcions' assertion that class actions are necessary for deterrence.

nized that ATTM's provision "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim." *Id.* at 10a n.9. It thereby effectively acknowledged that requiring the Concepcions to arbitrate under this provision does not shock the conscience. But the panel continued that "the problem with [the provision] under California law—as we read that law—is that not *every* aggrieved customer will file a claim." *Ibid.* (emphasis added).

The panel rejected ATTM's FAA preemption argument, declaring that its earlier decision in "*Shroyer* [v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007)] controls this case because [ATTM] makes the same [preemption] arguments we rejected there." App., *infra*, 11a. In *Shroyer*, Judge Reinhardt, joined by Judges Nelson and Rymer, held that the FAA does not preempt the *Discover Bank* rule because, in their view, "class proceedings will [not] reduce the efficiency and expeditiousness of arbitration in general." 498 F.3d at 990. The *Shroyer* court also maintained that the *Discover Bank* rule "is simply a refinement of the unconscionability analysis applicable to contracts generally in California." *Id.* at 987.

The panel further held that this Court's recent decision in *Preston* did not "undercut[] the rationale of *Shroyer*." App., *infra*, 16a.

REASONS FOR GRANTING THE PETITION

In *Southland*, this Court ordered briefing and argument on the question whether, "if State law required" "superimposing class-action procedures on a contract arbitration," the state law "would conflict with the [FAA] and thus violate the Supremacy

Clause." 465 U.S. at 8. The Court ultimately concluded that it could not decide the issue because the appellant "did not contend in the California courts that, and the State courts did not decide whether, State law impos[ing] class action procedures was preempted by federal law." *Ibid.*

Since then, this issue has become "one of the most important—and controversial—issues in modern day class action litigation." Angela C. Zambrano *et al.*, *Wavering Over Consumer Class Actions*, 27 No. 12 BANKING & FIN. SERVS. POL'Y REP. 4, 4 (2008). Literally hundreds of decisions have addressed the enforceability of provisions requiring that arbitration be conducted on an individual basis. Courts applying the laws of 26 States (and the District of Columbia) have held that such provisions are fully enforceable under state law, at least when the arbitration agreement neither imposes high arbitration costs on the consumer nor limits the remedies that can be awarded in arbitration. On the other hand, a few state courts—led by the California Supreme Court—have effectively held that class-action prohibitions in arbitration provisions are categorically unenforceable when the claims are "predictably small." And the Ninth Circuit has determined that such state-law rules "superimposing class-action procedures on a contract arbitration" (*Southland*, 465 U.S. at 8) are not preempted by the FAA. See App., *infra*, 11a-16a; *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1219-1222 (9th Cir.), *cert. denied*, 129 S. Ct. 45 (2008); *Shroyer*, 498 F.3d at 987-991.

This important and frequently recurring issue is fully ripe for resolution. Moreover, this case is a bet-

ter vehicle for resolving the issue than any previous case.[7] Both courts below expressly acknowledged that ATTM's arbitration provision will enable customers to vindicate any claims they may have. See App., *infra,* 10a n.9; *id.* at 42a.[8] Yet both courts also concluded that the arbitration provision is nonetheless unenforceable under California law because it prevents respondents from bringing a class action to

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[7] We are aware that the Court is holding the petition in *American Express Co.* v. *Italian Colors Restaurant*, No. 08-1473, pending its decision in *Stolt-Nielsen S.A.* v. *Animal Feeds International Corp.*, No. 08-1198. That petition raises a somewhat different issue, as the Second Circuit's decision refusing to enforce the requirement that arbitration be conducted on an individual basis was based on federal law, not state law. In any event, that case involved a finding that the respondents could not vindicate their antitrust claims on an individual basis. Here, by contrast, both courts below acknowledged that the Concepcions not only could vindicate their claims on an individual basis, but in fact likely would fare better under ATTM's arbitration provision than as representative plaintiffs in a class action. See pages 12, 14, *supra.*

The present case also is a better vehicle for resolving the preemption issue than *T-Mobile USA, Inc.* v. *Laster*, 128 S. Ct. 2500 (2008), and *T-Mobile USA, Inc.* v. *Lowden*, 129 S. Ct. 45 (2008), in which this Court recently denied certiorari. In both of those cases, the arbitration clause did not allow for recovery of statutory attorneys' fees and accordingly did not provide a realistic means of vindicating small claims on an individual basis.

[8] See also *Makarowski*, 2009 WL 1765661, at *3 (ATTM's arbitration clause "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen"); *Strawn* v. *AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 900 n.6 (S.D. W. Va. 2009) (ATTM's arbitration clause is "unusually consumer-centered"); *Francis* v. *AT&T Mobility LLC*, 2009 WL 416063, at *5 (E.D. Mich. Feb. 18, 2009) (ATTM's clause is "fair" to consumers).

vindicate the rights of others. In other words, both courts held that California's policy favoring class actions trumps the FAA's policy of enforcing private agreements to resolve disputes in a less expensive, less time-consuming, and less adversarial manner than litigation. That holding turns the Supremacy Clause on its head and is impossible to reconcile with this Court's FAA precedents. The time has come to resolve this issue and to put an end to the efforts of California and some other States to exalt their policy preferences for class actions over those of Congress in enacting the FAA.

A. The Case Presents An Exceptionally Important Question As To Which The Lower Courts Are Divided.

There can be little doubt that the issue presented here is an important one. In holding that the FAA does not preempt California's requirement that arbitration provisions allow for class-wide arbitration even when consumers have sufficient incentives to vindicate claims on an individual basis, the Ninth Circuit authorized the invalidation of tens of millions of arbitration contracts in that State. Moreover, the Ninth Circuit's preemption holding applies to contracts governed by the laws of all of the other States in that Circuit, thus permitting invalidation of tens of millions of additional arbitration agreements. To make matters worse, the Ninth Circuit has held in another case that claims by out-of-state customers against California-based companies may be adjudicated under the law of California—even when their contracts call for applying the law of the States in which the customers reside. The upshot is that the Ninth Circuit has permitted California to override the laws of the many other States that have held

that provisions requiring arbitration to take place on an individual basis are enforceable, invalidating tens of millions of additional contracts. Finally, the Ninth Circuit's narrow understanding of FAA preemption, which is at the root of all of these problems, deepens the confusion in the lower courts over when States may refuse to enforce agreements that require arbitration to proceed on an individual basis.

1. The Ninth Circuit's holding that California may refuse to enforce even arbitration provisions like ATTM's, which concededly provide consumers with sufficient incentives to pursue relief on an individual basis, means that no arbitration provision that requires individual arbitration can survive in California. As a result, the Ninth Circuit's decision condemns not just the arbitration provisions in the contracts of some 10 million ATTM customers, but also those in tens of millions of other contracts. Indeed, even before the Ninth Circuit had invalidated ATTM's provision, dozens of federal and state courts applying California law had refused to enforce agreements to arbitrate on an individual basis in the contracts of other wireless carriers, Internet providers, franchisors, computer manufacturers, credit card issuers, mortgage lenders, and major employers.[9]

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[9] See, *e.g.*, *Oestreicher* v. *Alienware Corp.*, 322 F. App'x 489 (9th Cir. 2009) (computer sales agreement); *Douglas* v. *U.S. Dist. Ct.*, 495 F.3d 1062 (9th Cir. 2007) (long-distance telephone service agreement); *Tijerina* v. *Am. First Real Estate Servs., Inc.*, 2008 WL 4855815 (C.D. Cal. Nov. 6, 2008) (mortgage agreement); *Van Slyke* v. *Capital One Bank*, 503 F. Supp. 2d 1353 (N.D. Cal. 2007) (credit cardholder agreement); *Discover Bank* v. *Super. Ct.*, *supra* (same); *Olvera* v. *El Pollo Loco, Inc.*, 93 Cal. Rptr. 3d 65 (Ct. App. 2009) (employment agreement); *Sanchez* v. *W. Pizza Enters., Inc.*, 90 Cal. Rptr. 3d 818 (Ct. App.

(footnote continued on next page)

And because the Ninth Circuit's erroneous view of FAA preemption is binding throughout that Circuit, that means that eight other States are free to impose blanket bans on agreements to arbitrate on an individual basis. That concern is real: The Ninth Circuit already has expressed the view that Washington law tracks California law on the enforceability of arbitration provisions that preclude class-wide arbitration. See *Lowden*, 512 F.3d at 1218-1219. More troubling still, the Ninth Circuit recently held that California law governs the enforceability of such provisions in the contracts of customers of California-based businesses *even when those contracts choose the law of the customer's home state.* *Masters* v. *DirecTV, Inc.*, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009).

Taken together, the decision below and *Masters* mean that no arbitration provision between a California-based company and its customers throughout the country is enforceable unless it allows for class-wide arbitration. Thus, not only has California (with an assist from the Ninth Circuit) thwarted the policies of the FAA, but it also has trumped the law of the 25 States (and the District of Columbia) that deem contracts prohibiting class-wide arbitration to be enforceable so long as the customer is able to vin-

2009) (same); *Murphy* v. *Check 'N Go of Cal., Inc.*, 67 Cal. Rptr. 3d 120 (Ct. App. 2007) (same); *Gatton* v. *T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Ct. App. 2007) (wireless service agreement); *Cohen* v. *DirecTV, Inc.*, 48 Cal. Rptr. 3d 813 (Ct. App. 2006) (satellite television service agreement); *Klussman* v. *Cross Country Bank*, 36 Cal. Rptr. 3d 728 (Ct. App. 2005) (credit cardholder agreement); *Aral* v. *EarthLink, Inc.*, 36 Cal. Rptr. 3d 229 (Ct. App. 2005) (Internet provider service agreement); *Indep. Ass'n of Mailbox Ctr. Owners, Inc.* v. *Super. Ct.*, 34 Cal. Rptr. 3d 659 (Ct. App. 2005) (franchise agreement).

dicate his or her own rights in individual arbitration. See Appendix D, *infra*. Review is essential now to reaffirm that the FAA precludes States from superimposing procedures on arbitration that are not necessary to ensure that the parties to the arbitration can vindicate their claims.

2. The Court's intervention is warranted for the additional reason that the lower courts are in disarray as to whether and, if so, when, the FAA preempts state-law limitations on class waivers in arbitration provisions.

To begin with, the decision below conflicts with the Third Circuit's decision in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007). The *Gay* court held that the FAA preempts Pennsylvania's rule that provisions waiving the right to bring a class action are unconscionable. *Id.* at 392-395. It explained that "whatever the benefits of class actions, the FAA *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. To the extent, then, that [Pennsylvania cases] hold that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract," they are preempted by Section 2 of the FAA. *Id.* at 394 (citations, alterations, and internal quotation marks omitted; emphasis in original).

To be sure, a subsequent panel of the Third Circuit has distinguished this holding (erroneously, we believe) on the ground that Pennsylvania's rule is limited to arbitration provisions in violation of Section 2 of the FAA, and then held that New Jersey law is not preempted because it applies equally to arbitration provisions and contracts that bar judicial class actions. See *Homa* v. *American Express Co.*,

558 F.3d 225, 229-230 (3d Cir. 2009). Nevertheless, there is little reason to believe that the Third Circuit would jettison *Gay* entirely the next time a case governed by Pennsylvania law is before it. And there is not much likelihood of that happening any time soon anyway, because, whenever the defendant does business nationally, savvy plaintiffs' lawyers will avoid the risk by filing suit in a federal court within the Ninth Circuit, where *Gay* has no force and the preemption ruling in this case governs.

The Ninth Circuit's holding also squarely conflicts with the holding of the Tennessee Court of Appeals that the "Supremacy Clause * * * preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action." *Pyburn* v. *Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001). Because the Tennessee Supreme Court denied the plaintiff's petition for review in *Pyburn* and ordered the court of appeals' decision published (*id.* at 351), "the bench and bar of [Tennessee]" may rely upon that decision "as representing the present state of the law with the same confidence and reliability as the published opinions of the [Tennessee Supreme] Court." *Meadows* v. *State*, 849 S.W.2d 748, 752 (Tenn. 1993).

Moreover, the development of a more pronounced disagreement among the lower courts is highly unlikely. Courts generally would have no need to reach the FAA preemption issue unless they first were to conclude that the applicable state law would bar enforcement of the arbitration provision. But 25 States and the District of Columbia already have held that provisions that require arbitration to be conducted on an individual basis are enforceable so long as ar-

bitration is free or inexpensive and individual remedies (including statutory fee-shifting awards) are not limited, so a preemption ruling is unlikely in cases governed by the law of those States.[10]

Nine of the remaining 25 States are in the Ninth Circuit, where the holding in the present case is binding for all cases brought in federal court or removed under the Class Action Fairness Act, 28 U.S.C. § 1332(d). In addition, consumer class actions are rare in nine of the 16 other States.[11] It therefore

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[10] These cases are collected in Appendix D to this Petition. See App., *infra*, 63a-69a. Among these cases are two from federal courts of appeals that, though deciding the issue under State unconscionability law, went on to explain that provisions requiring arbitration to be conducted on an individual basis are consistent with the goals of the FAA. See *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (holding that an agreement to arbitrate on an individual basis was not unconscionable under Georgia law and explaining that a prohibition of class arbitration is "consistent with the goals of 'simplicity, informality, and expedition' touted by the Supreme Court in *Gilmer*") (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)); *Iberia Credit Bureau*, 379 F.3d at 174 (holding that an early version of ATTM's arbitration provision was not unconscionable under Louisiana law merely because it required individual arbitration and explaining that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims") (quoting *Gilmer*, 500 U.S. at 31).

[11] States in this category include Indiana, Iowa, Kentucky, Maine, Minnesota, Nebraska, New Hampshire, Rhode Island, and Wyoming. A recent study of decisions involving state consumer-protection statutes found that, in 2007, these nine States combined to account for only approximately 5% of such decisions nationwide. See Searle Civil Justice Institute, *State Con-*

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is not clear when—if ever—a court applying the law of one of these States would confront the FAA preemption issue. That is especially true given the ability of class-action plaintiffs to bring claims within the Ninth Circuit against virtually any company doing business on a nationwide basis.[12]

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sumer Protection Acts: An Empirical Investigation of Private Litigation Preliminary Report 25 tbl. 1 (Dec. 2009), *at* http://www.law.northwestern.edu/searlecenter/uploads/CPA_Proof_113009_final.pdf. By contrast, California alone accounted for over 22 percent. See *ibid.* Indeed, even though it is broadly acknowledged that the enforceability of class-action waivers in arbitration agreements is the most significant unresolved issue in consumer litigation (see page 24 & note 13, *infra*), there are still no appellate cases addressing this issue under the law of eight of these nine States. The issue is currently pending before the Kentucky Supreme Court. See *Schnuerle* v. *Insight Commc'ns Co.*, No. 2008-SC-000789 (Ky.).

[12] The remaining seven States are Florida, Massachusetts, New Jersey, New Mexico, North Carolina, Pennsylvania, and Wisconsin. As noted above, the Third Circuit has opined that Pennsylvania law barring provisions that require individual arbitration is preempted. The Eleventh Circuit recently certified to the Florida Supreme Court the question whether a requirement that disputes be arbitrated on an individual basis in Sprint's service agreements with its customers either is unconscionable under Florida law or violates Florida's public policy. See *Pendergast v. Sprint Nextel Corp.*, __ F.3d __, 2010 WL 6745 (11th Cir. Jan. 4, 2010). Until the Eleventh Circuit did so, the law had appeared clear that ATTM's arbitration is enforceable under Florida law. See *Cruz* v. *Cingular Wireless, LLC*, 2008 WL 4279690, at *4 (M.D. Fla. Sept. 15, 2008) (rejecting argument that requirement that disputes be arbitrated on an individual basis in ATTM's arbitration provision violates Florida public policy), *appeal pending*, No. 08-16080-C (11th Cir.); *Fonte* v. *AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025-1026 (Fla. Dist. Ct. App. 2005) (requirement that disputes be arbitrated on an individual basis in arbitration provision of one of

(footnote continued on next page)

This Court granted certiorari in *Preston* in the absence of any conflict among the lower courts. That case involved a limited, industry-specific incursion on the FAA's policy mandating the enforcement of arbitration agreements. See *Preston*, 128 S. Ct. at 981 (arbitration of disputes between entertainers and talent agencies).

Here, by contrast, there is broad agreement that "the enforceability of an express class action waiver in a consumer arbitration agreement" is "[o]ne of the most important arbitration questions that has yet to be definitively resolved by the U.S. Supreme Court." Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAW. 775, 775 (2005). Prominent members of the plaintiffs' bar describe it as "one of the most hotly contested issues in all of consumer and employee litigation." F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 393 (2009).[13]

ATTM's predecessors neither is unconscionable nor violates Florida's public policy).

[13] See also, *e.g.*, Zambrano *et al.*, *supra*, 27 No. 12 BANKING & FIN. SERVS. POL'Y REP. at 4 ("the enforceability of class action waivers has become one of the most important—and controversial—issues in modern day class action litigation"); Erin Holmes, *Ross v. Bank of America,* 24 OHIO ST. J. DISP. RESOL. 387, 387-388 (2009) (enforceability of agreements to arbitrate on an individual basis is "an important issue in consumer litigation"); Marc J. Goldstein, *The Federal Arbitration Act and Class Waivers in Consumer Contracts: Are These Waivers Unenforceable?*, 63 DISP. RESOL. J. 55, 55-56 (2008) (enforceability of such agreements is "[o]ne of the most important issues facing" companies); Kathleen M. Scanlon, *Class Arbitration Waivers:*

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The fact that the present case affects a far broader cross-section of the economy is further reason to grant review now rather than waiting years for the possibility that the existing split will materially deepen.

B. Review Is Warranted Because The Decision Below Conflicts With The FAA And This Court's Precedents.

The Ninth Circuit's holding that the FAA does not preempt California's public policy prohibiting parties from agreeing to arbitrate disputes on an individual basis is irreconcilable with three different strands of this Court's FAA jurisprudence.

First, this Court's decisions establish that the entire point of the FAA is to enable parties to contract out of the procedural accoutrements of litigation and to tailor the features of arbitration, especially the procedures, to their needs. These cases reject the Ninth Circuit's view that the States are free to impose whatever procedures they want and for whatever reason, so long as those procedures are equally applicable in litigation.

Second, this Court's decisions further establish that Section 2's savings clause applies only to generally applicable principles of state contract law. Here, in holding that arbitration agreements that preclude class actions are unconscionable even when they ensure that the parties can vindicate their claims on an individual basis, the Ninth Circuit severely distorted

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The "Severability" Doctrine and Its Consequences, 62 DISP. RESOL. J. 40, 44 (2007) (enforceability of such agreements is "an extremely important issue in the consumer and employment contexts").

generally applicable unconscionability principles to create a new rule that is applicable only to dispute-resolution provisions (virtually all of which are arbitration provisions). In so doing, the court below ran afoul of Section 2.

Third, this Court has emphasized repeatedly that the FAA embodies a powerful federal policy favoring arbitration as a means of dispute resolution. By holding that the States are free to condition enforcement of arbitration provisions on the availability of class-wide arbitration, the Ninth Circuit has endorsed the functional equivalent of a ban on consumer arbitration provisions. That is because class arbitration eliminates all of the benefits of traditional, individual arbitration, while multiplying the risks exponentially. Businesses will give up on arbitration entirely rather than accept that lose-lose proposition. Needless to say, a state rule that would lead to the wholesale abandonment of arbitration conflicts with the purposes of the FAA and cannot be permitted to stand.

1. This Court has stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trustees*, 489 U.S. 468, 479 (1989); see also *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 453 (2003) (plurality op.); *First Options of Chicago, Inc.* v. *Kaplan,* 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995). To accomplish that end, Section 2 of the FAA provides that "written" arbitration agreements in contracts "evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

Section 2 of the FAA does contain an exception: It authorizes courts to decline to enforce arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract," which the Court has interpreted to include such "generally applicable contract defenses" as "fraud, duress, or unconscionability." *Casarotto*, 517 U.S. at 686-687. But that exception is necessarily a narrow one.

This Court has never held or even hinted that a state policy favoring a particular procedural device could come within Section 2's savings clause so long as that policy applies to both litigation and arbitration. To the contrary, the Court has squarely held that, under the FAA, "parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract *the rules under which that arbitration will be conducted*." *Volt*, 489 U.S. at 479 (citation omitted; emphasis added). The Court has specifically identified "procedure" as one of the "features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

Indeed, the whole point of entering into an arbitration agreement is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, just last Term the Court reiterated that "the recognition that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select

arbitration." *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1471 (2009) (emphasis added).

Precisely because the entire purpose of arbitration is to provide a less expensive, less time-consuming, and less adversarial alternative to litigation, "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve" federal statutory claims. *Ibid.* Rather, "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," there is no basis for refusing to enforce his or her arbitration agreement according to its terms. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (internal quotation marks omitted; second alteration in original). That is so even if "the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Id.* at 32 (internal quotation marks omitted).

The holding below—that Section 2's savings clause authorizes California to condition enforcement of arbitration provisions on the availability of the class-action device *even when a class action is not necessary to vindicate the plaintiff's claims*—is irreconcilable with these precedents.

The Ninth Circuit was of the view that the FAA allows States to impose whatever procedures they want—for whatever policy reasons they want—so long as the procedures apply equally to cases in court and cases in arbitration. But that narrow reading of the FAA's preemptive force is foreclosed by this Court's recent decision in *Preston*. That case involved a provision of the California Talent Agents Act ("TAA") that required disputes under that Act to be submitted to California's Labor Commissioner in

the first instance—prior to either litigation or arbitration.[14]

Noting that "[t]he FAA's displacement of conflicting state law is now 'well-established,'" the Court held that "the FAA supersedes" the California statute. *Preston*, 128 S. Ct. at 983, 987 (quoting *Allied-Bruce*, 513 U.S. at 272). As the Court observed, "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Id.* at 986 (quoting *Mitsubishi Motors*, 473 U.S. at 633). That objective "would be frustrated" by the TAA, the Court explained, because "[r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." *Ibid.*

Here, as in *Preston* (and *Southland*), California has insisted on superimposing its own preferred procedures on a contractual arbitration. In *Preston*, the respondent contended that enforcing his arbitration agreement without the overlay of the TAA's exhaustion requirement "would undermine the Labor Commissioner's ability to stay informed of potentially illegal activity * * * and would deprive artists protected by the TAA of the Labor Commissioner's ex-

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[14] The TAA did contain an exemption to this exhaustion requirement for arbitration agreements between talent agents and their customers if the agreements provided for notice to the Labor Commissioner and an opportunity to attend the hearing. But the Court found this exemption to be "of no utility" to the petitioner, who "would have been required to concede a point fatal to his claim for compensation—*i.e.*, that he is a talent agent, albeit an unlicensed one—and to have drafted his contract in compliance with a statute that he maintains is inapplicable." *Preston*, 128 S. Ct. at 985.

pertise." 128 S. Ct. at 986. This time the proffered rationale is that the agreement to arbitrate on an individual basis interferes with the state policy of using class actions to "deter" corporate misconduct. But as in *Preston*, a state policy that has nothing to do with whether the parties to the dispute can effectively resolve that dispute through arbitration is not a valid basis for adding procedural layers to which the parties did not agree.

Indeed, if the rule were otherwise the States' ability to superimpose procedures on arbitration would not end with class actions—or with the consumer context. For example, a State just as easily could assert that the use of arbitration hinders parties situated similarly to the plaintiff from learning of infringements of their legal rights. It accordingly could condition enforcement of arbitration agreements on the requirement that the arbitration decision be published. The scope of the procedures that States could impose on arbitration would be limited only by their imagination, as it is always possible to identify a policy basis for any preferred procedure. In the end, arbitration would be converted into litigation, and the FAA would be rendered a nullity. See *Iberia Credit Bureau*, 379 F.3d at 175-176 ("[T]he plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself. If every arbitration were required to produce a publicly available, 'precedential' decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted under Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding.").

2. The Ninth Circuit's decision—and the California cases it purports to apply—also run headlong into this Court's precedents holding that Section 2 of the FAA prohibits courts from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 128 S. Ct. at 985; see also *Perry*, 482 U.S. at 492 n.9. As noted above, under generally applicable California law, a contractual term must shock the conscience in order to be substantively unconscionable. Moreover, if the degree of procedural unconscionability is low, the degree of substantive unconscionability must be high for the term to be deemed unenforceable. See pages 5-6, *supra*.

An arbitration provision that "a reasonable consumer may well prefer" (App., *infra*, 42a) cannot legitimately be said to be conscience shocking. And it certainly is not so extremely conscience shocking as to make up for it being "on the low end of the spectrum of procedural unconscionability," as the district court found ATTM's arbitration provision to be. *Id.* at 36a.

Thus, it is only by applying a version of unconscionability law that is "not applicable to contracts generally" (*Preston*, 128 S. Ct. at 985), but instead is aimed directly at agreements to resolve disputes, that the courts below could deem ATTM's arbitration provision unenforceable. If allowed to stand, California's distortion of unconscionability doctrine in the context of agreements to arbitrate on an individual basis would enable Section 2's exception to swallow its rule, as States could deem "unconscionable" any arbitration clause that fails to provide for particular favored procedures (such as trials by jury,

plenary discovery, motion practice, or written rulings).

3. Finally, this Court has recognized that the FAA establishes "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive *or procedural* policies to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). The California rule favoring class actions above all else irreconcilably conflicts with the FAA's command that arbitration agreements "shall be valid, irrevocable, and enforceable" (9 U.S.C. § 2) and the federal policy favoring arbitration because businesses will give up on arbitration altogether rather than subject themselves to the risk of a class arbitration.

To begin with, class arbitration involves the same massive stakes as a judicial class action and is every bit as burdensome, expensive, and time-consuming—if not more so.[15] Indeed, class arbitration is the quintessential example of arbitration "mutat[ing] into a private judicial system that looks and costs like the litigation it's supposed to prevent." Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV. 120, 120 (May 1994).

At the same time, class arbitration fails to provide many of the key protections offered to defen-

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[15] Class arbitration may *add* procedural complexity. For example, the AAA's class arbitration procedures largely duplicate the Federal Rules of Civil Procedure—with the exception that they provide that, once the arbitrator issues a "class determination award," the parties may move to vacate or confirm that interim award in the district court. See generally AAA, *Policy on Class Arbitrations*, *at* http://www.adr.org/Classarbitrationpolicy.

dants litigating a class action in court. For one thing, unlike in court, where appellate review of class-certification and merits determinations is robust, the standard for vacating an arbitrator's decision on such issues is "among the narrowest known to law." *Dominion Video Satellite, Inc.* v. *Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Consistent with the "national policy favoring arbitration," the FAA provides only "the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall St. Assocs.*, 128 S. Ct. at 1405. Accordingly, an arbitrator's errors regarding class certification, the scope of any class, the admissibility of expert testimony or other important evidence, whether or not the claim was proven, and the amount of damages can rarely, if ever, be disturbed by a court. Moreover, even if the business wins a class-wide arbitration, it can have no assurance of finality because absent class members may contend that they were not afforded the due process protections necessary to make a class-wide award binding on them. Because arbitrators designated by contracts between private parties are not bound by the U.S. Constitution's due process clauses (see Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 187 n.5 (2006) (citing cases)), courts may well embrace such an argument. See also Edward K.M. Bilich, *Consumer Arbitration: A Class Action Panacea*, 7 CLASS ACTION LITIG. REP. (BNA) 768, 771 (2006) (noting that because of the "deferential standard of review" of arbitrators' decisions there is "no assurance that the 'class' arbitration proceedings would be binding on absent class members").

Given the risks entailed in *class* arbitration and the absence of any offsetting benefits, no reasonable

defendant would willingly subject itself to this worst-of-both-worlds scenario. Indeed, in response to prior decisions of the Ninth Circuit refusing to find California's policy favoring class actions preempted by the FAA, the nation's largest cable company, Comcast Corp., has already abandoned arbitration in California.[16] Accordingly, California's rule conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration is in all practical sense a ban on consumer arbitration agreements. As such, California's rule—and the Ninth Circuit's rejection of ATTM's preemption challenge to that rule—cannot be reconciled with the FAA's policy of promoting arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[16] See Comcast Agreement for Residential Services § 13.k, *at* http://www.comcast.net/terms/subscriber/ ("IF YOU ARE A COMCAST CUSTOMER IN CALIFORNIA, COMCAST WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE.").

Respectfully submitted.

DONALD M. FALK
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real,
Suite 300
Palo Alto, CA 94306
(650) 331-2000

NEAL BERINHOUT
AT&T Mobility LLC
1025 Lenox Park
Suite 5C42
Atlanta, GA 30319
(404) 986-1427

KENNETH S. GELLER
Counsel of Record
ANDREW J. PINCUS
EVAN M. TAGER
ARCHIS A. PARASHARAMI
KEVIN RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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