No. 09-893

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates regularly employ agreements to arbitrate in their business contracts with their customers and employees. By agreeing to arbitrate with their counterparties, they avoid costly and time-consuming litigation when disputes arise. In its place, they adopt a dispute resolution mechanism that is speedy, fair, inexpensive, and effective. Based on the legislative policy reflected in the Federal Arbitration Act and this Court's consistent endorsement of arbitration over the past several decades, Chamber members have

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both petitioner and respondents received timely notice of *amicus*'s intent to file the brief, and consented to it.

structured millions of contractual relationships around arbitration agreements.

A class-action waiver is a key component of many Chamber members' arbitration agreements. Decisions like the opinion below, which invalidated a class-action waiver in an arbitration agreement, frustrate the parties' intent, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation. Because so many of the advantages of arbitration would be lost if the Ninth Circuit's decision were allowed to stand, the Chamber has a strong interest in review by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's ruling is the latest in a growing line that invalidates class-action-waiver clauses in arbitration agreements as "unconscionable" under California law. See, *e.g.*, *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100 (Cal. 2005). The cases in this line all rest on a new conception of unconscionability, one that grants courts the power to strike down contracts because of a perceived injustice to non-parties, even when the agreements are unquestionably equitable as between the parties themselves. As the Ninth Circuit's latest ruling demonstrates, California's new conception of unconscionability doctrine even extends to invalidate contracts (like AT&T Mobility's arbitration agreement) that incontrovertibly favor the party with less bargaining power.

This approach to unconscionability does not comport with the Federal Arbitration Act (FAA),

9 U.S.C. §§ 1 *et seq.*, which requires that arbitration agreements be enforced according to their terms. A court may disregard or invalidate an arbitration agreement only if the agreement could be revoked "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Ninth Circuit's decisions in this area have put it at odds with the Supremacy Clause and, unsurprisingly, with many federal and state courts. Of more practical concern, manipulating the unconscionability doctrine to invalidate class-action waivers threatens to rob companies and consumers alike of the benefits of arbitration that the FAA was intended to safeguard and promote.

I. Given the consequences of the Ninth Circuit's ruling, this Court need not and should not await further disagreement among courts to address the power of the States to invalidate class-action waivers in arbitration agreements. Individual arbitration serves the needs of consumers in a way that class actions cannot. If even one jurisdiction—especially a jurisdiction as large as California—invalidates individual arbitration agreements simply because they *are* individual arbitration agreements, the costs to consumers of goods and services will increase, while their ability to obtain full and speedy redress for their injuries will decrease. Companies, for their part, will lose the certainty and efficiency that comes with having a single set of rules applicable to disputes with all consumers. Because of the extremely pro-consumer terms of the AT&T Mobility arbitration agreement at issue in this dispute, this case presents an ideal starting point for the Court in this area; it can rule on the preemptive effect of the FAA without the need to test the limits of how far state law may go in invalidating

contracts less favorable to the party claiming "unconscionability."

II. The Ninth Circuit's decision and the California decisions it follows conflict with the FAA. The particular brand of unconscionability the California courts have crafted for arbitration agreements with class-action waivers is not the sort the FAA respects. The Court should grant certiorari to correct the Ninth Circuit's misunderstanding of Section 2 of the FAA.

ARGUMENT

I. A Decision From This Court Reviewing A Class-Action Waiver In An Arbitration Clause Is Necessary To Prevent Harm To Companies And Consumers, And This Case Is The Ideal Vehicle

Most state and federal courts disagree with California and the Ninth Circuit about the validity of class-action waivers in arbitration agreements. See *Spann* v. *American Express Travel Related Servs. Co.*, 224 S.W.3d 698, 715 (Tenn. Ct. App. 2006) (stating that "the overwhelming majority view on this issue" is that agreements to arbitrate individually are enforceable); 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, 776–777 (2005); Pet. App. 63a–69a (listing cases). Despite the disagreement of other courts, California has given no indication that it will conform, and the Ninth Circuit seems to believe that other States should or will follow California's rule rather than the majority rule. See *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1218–1219 (9th Cir.), cert. denied, 129 S. Ct. 45 (2008). Although different States of course are al-

lowed to have different unconscionability doctrines as a general proposition, something is deeply suspect when case law generates conflicts over an arbitration-specific question, not traceable to any non-arbitration doctrinal difference between the States reaching different outcomes.

A decision in this area is necessary to ensure that California and the Ninth Circuit appropriately construe the preemptive force of the FAA. By preventing those courts from distorting California's generally applicable unconscionability doctrine in order to target arbitration agreements, this Court will also protect the benefits individual arbitration provides to companies and consumers alike. Moreover, a decision reversing the Ninth Circuit will reduce the likelihood that other jurisdictions will take a similarly unconstrained approach to the interpretation of the standard contract doctrines of other States when deciding arbitration cases.

The extremely consumer-friendly provisions of AT&T Mobility's arbitration agreement (Pet. 6–10) make this case a particularly good vehicle for clarifying the limits of the contract defenses available under Section 2. AT&T Mobility's arbitration agreement does not "shock the conscience" or share any of the characteristics that would be required for California to deem a contract unconscionable in any other context, bringing into sharp relief the discriminatory treatment California and the Ninth Circuit give to arbitration agreements containing class-action waivers. The Ninth Circuit may believe it has done consumers a good turn by striking down AT&T Mobility's arbitration agreement, but it likely has left them worse off.

A. Individual Arbitration Lowers Dispute Resolution Costs And Resolves Problems Class Actions Cannot

1. There should no longer be any question that individual arbitration benefits both companies and consumers. Most immediately, arbitration provides consumers with "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280–281 (1995), and helps them avoid the "delays, expense, uncertainties, loss of control, * * * and animosities that frequently accompany litigation," Y2K Act, Pub. L. No. 106-37, §§ 2(a)(3)(B)(iv), 2(b)(3), 113 Stat. 185, 186–187 (1999) (encouraging businesses and users of technology to use "alternative dispute mechanisms" to avoid "costly and time-consuming litigation"); see also Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 767 (2003) ("Arbitration is also less expensive than litigation.").

In addition, through arbitration, consumers benefit from a greater flexibility in achieving the resolution of their claims than courts can provide. Under the American Arbitration Association's (AAA) rules for consumer disputes, "[t]he arbitrator may grant any remedy, relief or outcome that the parties could have received in court."[2] AAA, Consumer-Related Disputes Supplementary Procedures, Rule C-7(c), available at http://www.adr.org/sp.asp?id=22014#C7. But consumers are freed from complying with the

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[2] AT&T Mobility's arbitration agreement provides that arbitration will be conducted under the American Arbitration Association's rules and allows for attorney's fees, punitive damages, injunctions, and any form of individual relief that a court could provide. See Pet. App. 11a n.10.

procedural and evidentiary requirements that courts impose on plaintiffs. See, *e.g.*, JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY ¶ 1.3.1, at 5–6 (Nat'l Inst. for Trial Advocacy ed., 1997) ("Arbitration, while having some of the evidential and procedural regularity of court adjudication, is conducted in a less formal and less rigorous setting, thereby enhancing the potential for more expeditious resolution.").

Consumers are not the only ones who save when arbitration substitutes for litigation. Companies save, too, and competition ensures that those savings are passed along to consumers. See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 260 (2006); see also *Carnival Cruise Lines, Inc.* v. *Shute* 499 U.S. 585, 594 (1991) (acknowledging that passengers benefit from savings "that the cruise line enjoys by limiting the fora in which it may be sued"). The savings most likely will take the form of lower prices, but they also manifest themselves as extended warranties or other improvements in quality. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93 (2001).

On top of all this, evidence suggests that "consumers are likely to fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation." Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1712 (2005). One

inquiry into consumer arbitration cases between January and August 2007 reported that consumers settled or voluntarily withdrew 60% of consumer-initiated arbitrations, and prevailed in 48% of the cases that were decided by the arbitrator. See AAA, Analysis of the American Arbitration Association's Consumer Arbitration Caseload (2007), available at http://www.adr.org/si.asp?id=5027. Another found that consumers win relief in 53.3% of the cases they file before the AAA. See Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association* 68 (2009), available at http://www.searlearbitration.org/p/full_report.pdf.

Yet another investigation yielded similarly pro-consumer results in lending-related, consumer-initiated cases between 2000 and 2004. Of the arbitrations examined, 55% were resolved in the consumer's favor. See Ernst & Young LLP, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 2 (2004), available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf. When satisfactory settlements and cases dismissed at the claimant's request were considered, consumers prevailed in an impressive 79% of cases.[3] See *ibid.*

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[3] Individual claimants fare similarly well in other contexts. One study, which compared the results of arbitration and litigation in employment disputes, concluded that employee claimants are four times more likely to prevail in arbitration. See Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46–48 (1998). Other studies of employment disputes have less dramatic but nevertheless consistently pro-claimant findings. See, *e.g.*, National Workrights Institute, *Employment Arbitration: What Does the Data Show?*, http://www.workrights.

It should not be surprising, then, that consumers—as opposed to the plaintiffs' bar and certain courts—have largely proven satisfied with arbitration as an alternative to litigation. Consumers are pleased with the fairness and confidentiality of the process, as well as its timeliness. See Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 24–28 (2005), available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf; Ernst & Young LLP, *supra*, *Outcomes of Arbitration* at 11.

2. Consumers do not look on litigation so favorably. As Congress observed a decade ago, many feel litigation is "inaccessible because of its complexity and expense." Y2K Act § 2(a)(3)(B)(iii), 113 Stat. 186. At that time, only one in three Americans believed taking a case to court was affordable. See National Center For State Courts, *How the Public Views the State Courts: A 1999 National Survey* 2, 22 (1999), available at http://ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

Litigation is not just expensive and opaque; it is slow. Between 2000 and 2008, the median delay before reaching a civil trial in a federal district court never fell below twenty months, crossing the two-year mark in 2007 and 2008. See Federal Court Management Statistics, http://www.uscourts.gov/fcmstat/index.html (last visited Feb. 24, 2010). The state courts are no speedier, with the average civil case in 2005 taking between twenty and twenty-six months to get through trial. See Lynn Langton & Thomas H.

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org/current/cd_arbitration.html (last visited Feb. 24, 2010) (finding a 62% success rate for employees in arbitration and only a 43% success rate in litigation).

Cohen, Bureau of Justice Statistics Special Report, *Civil Bench and Jury Trials in State Courts, 2005* 8 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf. Arbitration, by contrast, is rapid. In 2007, AAA arbitrations lasted four to six months, on average. See AAA, Analysis of American Arbitration Association's Consumer Arbitration Caseload (2007), available at http://www.adr.org/si.asp?id=5027.

3. The drawbacks of litigation are exacerbated, not alleviated, in class actions. Class actions drag on for years in pursuit of "relatively paltry potential [individual] recoveries," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997), which may be why Congress has found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed," Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4. Lawyer fees usually consume a substantial chunk of a class's recovery, when there is any money to be had. Coupon-based settlements, in which companies pay class action plaintiffs in vouchers redeemable for goods or services, have been particularly common in consumer class actions. See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 993–994 (2002). Restrictions on the ability to redeem the coupons can reduce the value of coupon-based settlement substantially. See *id.* at 996; see also Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1189 (2009) ("In some settlements, such as 'coupon' settlements, * * * class counsel receive

large fees while class members receive little or nothing of actual value.").[4]

The only people almost certain to profit from class actions are the attorneys who bring them (which likely explains the push for class actions where individual arbitration makes more sense for both parties). See, *e.g.*, Leslie, *supra*, 49 UCLA L. REV. at 993; Jill E. Fisch, *Class Action Reform,* Qui Tam*, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 168 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996). To some, who believe class actions are intended only to aggregate small claims into bigger ones, this is as it should be. But when claimants have the option to obtain their *full* recovery, without having such a large portion first reserved for someone else, class actions become a far less rational alternative.

4. Class actions may have the advantage of enabling some plaintiffs to pursue claims that "would be uneconomical to litigate individually," *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985), but individual arbitration has that advantage as well. In one sample of employment disputes resolved in AAA arbitrations, for example, a third of claimants paid

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[4] Although the Class Action Fairness Act contained a provision intended to limit coupon-based settlements, that provision has been criticized as both flawed and easily avoided by collusive class attorneys and defendants. See, *e.g.*, Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1873–1874 (2008); Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1698–1705 (2006).

nothing at all for the arbitration. See Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 802 (2003). As more companies adopt pro-consumer arbitration provisions like those featured in AT&T Mobility's arbitration agreement (see Pet. 6–10), arbitrations that are free for consumers will become still more common.

As this Court has recently recognized, "[p]arties generally favor arbitration precisely because of the economics of dispute resolution," particularly in disputes involving small sums of money. *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1464 (2009). "[A] desire to keep the effort and expense required to resolve a dispute within manageable bounds" motivates parties to opt for the "streamlined proceedings and expeditious results" of arbitration over litigation. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

Arbitration is particularly well suited to resolving the small-scale disputes that routinely arise in commercial relationships like the one between AT&T Mobility and the Concepcions. Many Chamber members enter into long-term contracts with consumers for services provided and paid for on a periodic basis. When disputes arise in that sort of relationship, they tend to involve minor charges or adjustments to monthly bills—claims that would not be worth litigating individually, yet may not be sufficiently generic to meet the commonality requirement of Federal Rule of Civil Procedure 23. See FED. R. CIV. P. 23(a)(2). For those kinds of claims, class actions will not serve, and

arbitration is the only practical alternative—a problem the Ninth Circuit overlooked.[5]

B. When Courts Invalidate Arbitration Agreements In Violation Of The FAA, Companies And Consumers Risk Losing The Benefits Conferred By The Procedure

1. With Section 2 of the FAA, "Congress declared a national policy favoring arbitration." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984). Under that policy, businesses understand that they must conform their arbitration agreements to the generally applicable contract law of the States, but expect that doing so will guarantee the federal enforcement of those agreements.

Decisions like the Ninth Circuit's, which change the usual rules of contract law when (and because)

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[5] Under California's *Discover Bank* rule, many claims that are unsuitable for class litigation will get to court, only to be dismissed at the class certification stage. California's rule empowers plaintiffs to invalidate their arbitration agreements by merely *alleging* that the defendant has carried out a scheme to cheat customers. See Pet. App. 7a. Unless a defendant can prove it did not—a reversal of the usual burden of proof, see *Amchem Prods.*, 521 U.S. at 614, and a tall order—it will soon find itself embroiled in a putative class action in court rather than an individual arbitration. Class certification is appropriate, however, only "if the trial court is satisfied after a rigorous analysis" that common questions of law and fact predominate over questions affecting only individual members. *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982). Most claims that began as individual arbitrations will not survive the court's "close look," *Amchem Prods.*, 521 U.S. at 615, and the plaintiff consumers will soon find themselves left with only the economically senseless prospect of litigating individually.

arbitration agreements are involved (see Pet. App. 4a–7a), upset that expectation. Without confidence that their arbitration agreements will be upheld, some companies may eventually abandon them,[6] which would result in the loss of the benefits of arbitration relative to litigation described in Part I.A, *supra*. Dispute resolution costs for such businesses would increase, and the businesses would pass those costs on to consumers. Dispute resolution would cost more for consumers, too, so many might choose to forgo deserved remedies because they were worth less than it would cost to recover them.[7]

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[6] When arbitration agreements that are as consumer-friendly as AT&T Mobility's are found to be unconscionable, companies may be forgiven for concluding that they will never be able to design an arbitration agreement that satisfies courts in some economically important jurisdictions. Abandoning arbitration agreements is even more likely when the objectionable portion of the arbitration agreement is its requirement that arbitration proceed in the traditional, individual form. Individual arbitration has lower procedural costs than any form of litigation and also provides protection against the risk of being exposed to a massive class-action judgment.

[7] Class arbitrations—California's occasional compromise between class actions and individual arbitration, see, *e.g.*, *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1103 (Cal. 2005)—"may actually prove more burdensome than class litigation," Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 774 (2004). They demand the same, onerous class certification determinations that class actions require, with an additional step (court review) to boot. See AAA, Supplementary Rules for Class Arbitrations, Rules 3–5, available at http://www.adr.org/sp.asp?id=21936#3.%20Construction%20of%20the%20Arbitration%20Clause. And class arbitrations come with problems all of

2. For companies that continue to use arbitration agreements, the inconsistent enforcement of those agreements across jurisdictions would decrease the efficiency gained by using them. In addition, those businesses would be forced to contend with forum-shopping counsel, who would bring their cases in the jurisdictions most likely to release their clients from their agreement to arbitrate individually, notwithstanding this Court's attempts to discourage forum shopping in disputes involving arbitration, see, *e.g.*, *Southland*, 465 U.S. at 15 (discounting an interpretation of the FAA because, under that interpretation, the Act would "encourage and reward forum shopping"). Class action plaintiffs' lawyers already know, for instance, that California invalidates class-action waivers in arbitration agreements, and have successfully brought class actions in California on behalf of non-California residents whose home States would have compelled arbitration. See, *e.g.*, *Masters* v. *DirecTV, Inc.*, Nos. 08-55825, 08-55830, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009) (unpublished).

To the extent that out-of-state claimants stay at home (instead of litigating in jurisdictions that do not compel arbitration), residents of jurisdictions like

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their own. Arbitrators are selected by named parties, so absent class members may protest that arbitrators were selected without any input from them, arguably in violation of the bedrock requirement that arbitration be entirely consensual. Others may object to having their claims arbitrated as part of a class at all, given that they signed individual arbitrations agreements, indicating their preference for settling their disputes in that manner. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 113 (2000).

California will enjoy subsidized goods and services at the expense of consumers in jurisdictions where individual arbitration agreements are respected. For several market-based and regulatory reasons, many national and regional companies will be unable to charge residents of some States a higher price to reflect the added litigation costs created by invalidation of arbitration agreements in other States. That means the extra litigation costs will be spread across the companies' entire customer base, even though only some customers enjoy the "benefit" of the abrogation of individual arbitration agreements.

II. The *Discover Bank* Rule Is Not Generally Applicable But Targeted, And Therefore Is Preempted By The FAA

This Court has considered knotty procedural issues pertaining to attempts to bring class actions in situations involving arbitration clauses. See *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003); *Stolt-Nielsen S.A.* v. *Animalfeeds Int'l Corp.*, No. 08-1198 (argued Dec. 9, 2009). But the Court has never decided whether Section 2 of the FAA preempts an attempt to use state "unconscionability" law to invalidate a clause requiring that arbitration proceed on an individual basis. The nature of the inquiry under Section 2 is such that no decision by this Court can address all of the possible ways different States' laws can interact with different waiver clauses. But a reversal in this case would reassure businesses that they can construct their arbitration agreements around the standard principles of contract law in the States in which those agreements are in effect and trust that those agreements will be "enforced according to their terms," as the FAA requires. *Volt Info.*

Scis., Inc. v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). And reversal in this case is appropriate.

Although cast as "simply a refinement of the unconscionability analysis applicable to contracts generally in California," Pet. App. 12a–13a (quoting *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)), the *Discover Bank* rule distorts the traditional analysis profoundly. In place of the usual substantive unconscionability test, the California courts have substituted a test crafted specifically to deal with class-action waiver clauses in arbitration agreements, and the Ninth Circuit has thus far followed it. See Pet. App. 4a–11a. The cases in this line are irreconcilable with Section 2 of the FAA and this Court's cases interpreting it, which permit the invalidation of agreements to arbitrate only "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

1. Unconscionability is, "by its very nature, vaguely defined," Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 74 (2005) (citing JOSEPH M. PERILLO, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION § 29.1 (rev. ed. 2002)), but there are limits to the doctrine's reach. Ordinarily, to find a contract unconscionable, California courts require some combination of "procedural" and "substantive" unconscionability. See *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1108 (Cal. 2005); see also Susan Randall, *Judicial Attitudes Toward Arbitra-*

tion and the Resurgence of Unconscionability, 52 BUFF. L. REV. 185, 191 (2004) (observing that, according to the Uniform Commercial Code, "[c]ourts generally recognize two types of unconscionability * * * and may require the presence of both in order to find a particular agreement unconscionable").

Substantive unconscionability (the kind at issue here) "focuses on the actual terms of the agreement and evaluates whether they create 'overly harsh' or 'one-sided' results as to 'shock the conscience.'" *Aron* v. *U-Haul Co.*, 49 Cal. Rptr. 3d 555, 564 (Cal. Ct. App. 2006); accord *Discover Bank*, 113 P.3d at 1108 (observing that the substantive unconscionability test focuses on "overly harsh" or "one-sided" results). In California, as elsewhere, an unconscionable bargain is one such as "no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other." *Odell* v. *Moss*, 62 P. 555, 557 (Cal. 1900) (quoting 1 Story, *Eq. Jur.* §§ 244, *et seq.*); accord *Cal. Grocers Ass'n* v. *Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Cal. Ct. App. 1994).

2. Despite these established principles, California courts and the Ninth Circuit have begun to invoke substantive unconscionability to invalidate arbitration agreements on the basis of the class-action waivers contained in those agreements, even when it is clear that the waivers inflict no harm on the parties appearing before the court. To reach that result, the courts have applied California's *Discover Bank* rule, which was articulated for the first time by the California Supreme Court in a 2005 case addressing "the unconscionability of class action waivers in arbitration agreements." Pet. App. 5a.

Under the *Discover Bank* rule, the unconscionability of class-action waivers turns not on their harshness or one-sidedness, but on three different factors, including whether it is "alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money."[8] Pet. App. 7a. When such allegations have been made, California courts say, invalidation of class-action waivers is necessary to deter companies from enacting policies that inflict small injuries on many people; when each injury is too small for an individual to bother pursuing, the "unscrupulous wrongdoer" will pocket "the benefits of its wrongful conduct." See *Discover Bank*, 113 P.3d at 1106, 1108; see also Pet. App. 46a.

Regardless of the proffered rationale, it is clear that the California courts are not invalidating class-action waivers in arbitration agreements because they are "harsh" or "oppressive" to the contracting parties. As this case demonstrates, courts following the *Discover Bank* rule will invalidate the waivers even when the terms are admittedly those a reasonable person would want. See Pet. App. 4a–5a, 42a (invalidating AT&T Mobility's arbitration agreement because of its class-action waiver even though the district court found that consumers "may well prefer" arbitration to a class action). AT&T Mobility's ex-

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[8] Courts applying the *Discover Bank* rule also consider whether the agreement is a contract of adhesion and whether disputes between the contracting parties are "likely to involve small amounts of damages." Pet. App. 7a. The Ninth Circuit has held that class-action waivers may be unconscionable even if they do not satisfy all three parts of the *Discover Bank* test, but has not had to decide the circumstances under which they would be. See *ibid.*

tremely consumer-friendly arbitration agreement (see Pet. 6–10) makes it impossible to believe that the Ninth Circuit has applied California's traditional unconscionability doctrine without bias against arbitration. At least with regard to class-action waivers, then, it seems "California has created a new brand of unconscionability," one that is "far more demanding" than the norm and "unique to arbitration." McGuinness & Karr, *supra*, 2005 J. DISP. RESOL. at 62; see also Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 39–40 (2006) ("Although ostensibly applying the 'generally applicable' contract defense of unconscionability, in cases involving the validity of arbitration agreements the California courts routinely apply an entirely different test, requiring less of parties seeking to avoid arbitration.").

3. The ostensible basis for California's new unconscionability doctrine is a belief that non-arbitral resolution of certain kinds of disputes is necessary to enforce the laws of the State.[9] See *Discover Bank*,

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[9] It is also possible that the California courts are motivated by a "long-standing judicial hostility toward arbitration" of the sort that pervaded before the passage of the FAA. See Randall, *supra*, 52 BUFF. L. REV. at 186. In contrast to their practice twenty years ago, courts—especially California courts—are now nearly twice as likely to find arbitration agreements unconscionable as they are any other contract. See *ibid.*; see also Broome, *supra*, 3 HASTINGS BUS. L.J. at 39 ("While in most jurisdictions the judiciary has long abandoned its historical hostility to arbitration as an alternative to litigation, * * * in California the courts continue to view arbitration agreements critically.").

113 P.3d at 1110; see also Pet. App. 46a. The States are not so much in need of help enforcing their laws that arbitration agreements may be disregarded, however. See, *e.g.*, *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (noting that state law enforcement mechanisms "further tend[] to show" that class-action waivers "[do] not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability"); *cf.* *Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).[10] One of the laws at issue in this case, for example, empowers the state Attorney General and local prosecutors to enforce the act through civil penalties and injunctive relief. See CAL. BUS. & PROF. CODE §§ 17204, 17206. Even without the robust enforcement mechanism available to the State in this case, the individual pursuit of arbitral remedies by consumers can provide just as powerful a deterrent against illegal practices as can a class action. See *Mitsubishi Motors*, 473 U.S. at 637 ("[S]o long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum, the statute

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[10] In *Gilmer*, this Court rejected an argument that arbitration in lieu of agency proceedings would undermine the role of the Equal Employment Opportunity Commission in enforcing the Age Discrimination in Employment Act of 1967. *Gilmer*, 500 U.S. at 28–29. Similarly, in *Preston*, the Court did not mind that arbitration would, in the plaintiff's view, "undermine the Labor Commissioner's ability to stay informed of potential illegal activity." *Preston*, 552 U.S. at 358. Quoting *Gilmer*, the Court said, "The 'mere involvement of an administrative agency in the enforcement of a statute' * * * does not limit private parties' obligation to comply with their arbitration agreements." *Ibid.*

will continue to serve both its remedial and deterrent function.").

4. Under the FAA, arbitration agreements must be enforced and interpreted under the same principles of contract law applicable to contracts generally, placing arbitration agreements "upon the same footing as other contracts." *Volt*, 489 U.S. at 474. For a state contract principle to override an arbitration agreement, it is insufficient that it avoids overt discrimination against arbitration; it must apply universally to "any" and every contract. This means courts may invalidate class-action waivers in arbitration agreements as unconscionable only if they have subjected the waivers to the same unconscionability analysis they would have applied to the terms of any other contract. See *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

The unconscionability standard that the Ninth Circuit and California courts employ against class-action waivers is not a ground for the invalidation of "any" contract, as Section 2 of the FAA requires, but rather a rule applicable only to the subset of contracts that concern resolution of disputes. When parties agree to arbitrate, they agree to resolve any future differences out of court. And when California changes the rules of unconscionability governing agreements to resolve disputes out of court—here by looking beyond the parties before the court to find unconscionability—it changes the rules of unconscionability that govern arbitration agreements. *Cf. Wince* v. *Easterbrooke Cellular Corp.*, No. 2:09-CV-135, 2010 WL 392975, at *4–5 (N.D.W. Va. Feb. 2, 2010) (upholding class-action waiver in arbitration agreement against an unconscionability challenge in

part because to do otherwise would impose "heightened requirements" on agreements to arbitrate).

That is precisely what the FAA prohibits. There is nothing objectionable about saying that a provision of an arbitration agreement may be invalidated because it is unconscionable under state law. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686 (1996). The *ad hoc* manipulation of unconscionability doctrine, however, is inconsistent with this Court's admonition that state-law contract defenses may be used to void arbitration provisions only if they "arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added).

Under the FAA, "States may regulate contracts, including arbitration clauses, under general contract law principles," even invaliding them when state law would permit the revocation of "any" contract. *Allied-Bruce*, 513 U.S. at 281. "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Ibid.* For that reason, neither the *Discover Bank* rule nor the Ninth Circuit's application of that rule in this case is consistent with the FAA.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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