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| No.: | 16-80090 |
| D.C. No.: | 3:15-cv-03418-EMC |
| Short Title: | Marcus Roberts, et al v. AT&T Mobility LLC |

Dear Appellant/Counsel

This is to acknowledge receipt of your Petition for Permission to Appeal under 1292(b).

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**No. _____**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

MARCUS A. ROBERTS, KENNETH A. CHEWEY, ASHLEY M. CHEWEY and JAMES KRENN, on behalf of themselves and all others similarly situated,

*Plaintiffs–Petitioners*,

v.

AT&T MOBILITY LLC,

*Defendant–Respondent*.

ON PETITION FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
The Honorable Edward M. Chen
No. 3:15-cv-03418-EMC

# PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

LIEFF CABRASER HEIMANN & BERNSTEIN LLP
Michael W. Sobol
275 Battery Street, 29th Floor
San Francisco, California 94111
Telephone (415) 956-1000

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
Alexander H. Schmidt
270 Madison Avenue
New York, New York 10016
Telephone: (212) 545-4600

*Counsel for Plaintiffs-Petitioners*
*(list of additional counsel on signature page)*

# TABLE OF CONTENTS

Page

Table of Authorities ..... ii

I. INTRODUCTION ..... 1

II. JURISDICTIONAL STATEMENT ..... 5

III. QUESTIONS PRESENTED ..... 6

IV. RELIEF SOUGHT ..... 6

V. FACTS NECESSARY TO UNDERSTAND THE QUESTIONS PRESENTED ..... 6

VI. REASONS WHY THE APPEAL IS AUTHORIZED BY 28 U.S.C. § 1292(b) AND SHOULD BE GRANTED ..... 10

A. The Arbitration Order Presents A Controlling Question Of Law ..... 11

B. There Is Substantial Ground For Difference of Opinion ..... 12

1. Reasonable Jurists Could Differ on the *Denver Area* Issue ..... 12

2. Reasonable Jurists Could Differ on the Encouragement Test Issue ..... 17

3. AT&T's Arguments Below were Off Point ..... 19

C. An Interlocutory Appeal May Materially Advance The Ultimate Termination Of The Litigation ..... 20

VII. CONCLUSION ..... 20

# TABLE OF AUTHORITIES

**CASES** **Pages**

*Alliance for Community Media v. FCC*,
56 F.3d 105 (D.C. Cir. 1995) ..... 13, 14

*Allied-Bruce Terminix Cos. v. Dobson*,
513 U.S. 265 (1995) ..... 9

*Am. Mfrs. Mut. Ins. Co. v. Sullivan*,
526 U.S. 40 (1999) ..... 16, 17

*AT&T Mobility LLC v. Concepcion*,
563 U.S. 333 (2011) ..... 7, 9

*Borough of Duryea v. Guarnieri*,
564 U.S. 379 (2011) ..... 8

*In re Cement Antitrust Litig.*,
673 F.2d 1020 (9th Cir. 1982) ..... 11

*Couch v. Telescope Inc.*,
611 F.3d 629 (9th Cir. 2010) ..... 12

*D.H. Overmyer Co. v. Frick Co.*,
405 U.S. 174 (1972) ..... 8

*Denver Area Educ. Telcoms. Consortium v. FCC*,
518 U.S. 727 (1996) ..... *passim*

*Duffield v. Robertson*,
No. C-95-109 EFL, 1997 U.S. Dist. LEXIS 14996
(N.D. Cal. Mar. 13, 1997) ..... 11, 20

*Duffield v. Robertson Stephens & Co.*,
144 F.3d 1182 (9th Cir. 1998) ..... *passim*

*Edward J. DeBartolo Corp. v.*
*Fla. Gulf Coast Bldg. & Constr. Trades Council,*
485 U.S. 568 (1988) ..... 9, 10

*Kuehner v. Dickinson & Co.,*
84 F.3d 316 (9th Cir. 1996) ..... 11, 20

*Lewis v. Epic Sys. Corp.,*
No. 15-2997, 2016 U.S. App. LEXIS 9638
(7th Cir. May 26, 2016) ..... 19

*Lugar v. Edmondson Oil Co.,*
457 U.S. 922 (1982) ..... 16

*Mortensen v. Bresnan Communs., LLC,*
722 F.3d 1151 (9th Cir. 2013) ..... 4, 18, 19

*Nitro-Lift Techs., L.L.C. v. Howard,*
133 S. Ct. 500 (2012) ..... 8

*Ohno v. Yasuma,*
723 F.3d 984 (9th Cir. 2013) ..... 5, 15

*Swint v. Chambers Cty. Comm'n,*
514 U.S. 35 (1995) ..... 10-11

*United Mine Workers v. Ill. State Bar Ass'n,*
389 U.S. 217 (1967) ..... 8

*United States v. Woodbury,*
263 F.2d 784 (9th Cir. 1959) ..... 11

*Van Dusen v. Swift Transp. Co.,*
544 F. App'x 724 (9th Cir. 2013) ..... 11

*Wellness Int'l Network, Ltd. v. Sharif,*
135 S. Ct. 1932 (2015) ..... 8

**STATUTES AND RULES**

9 U.S.C. § 16(b)..... 11

28 U.S.C. § 1292(b)..... *passim*

28 U.S.C. § 1332(d)..... 5

42 U.S.C. § 1983 ..... 16

Fed. R. App. P. 5 ..... 5

Plaintiffs-Petitioners Marcus A. Roberts, Kenneth A. Chewey, Ashley M. Chewey and James Krenn ("Plaintiffs") request permission to appeal the order of the Northern District of California, entered by Judge Edward M. Chen on April 27, 2016, compelling arbitration of this action (Dkt. No. 25)[1] (the "Arbitration Order") (attached as Addendum A). The District Court certified the Arbitration Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), in an order entered June 27, 2016 (Dkt. No. 69) (the "Certification Order") (attached as Addendum B).

## I. INTRODUCTION

This Petition presents constitutional issues of first impression in this Circuit. Plaintiffs sought to oppose arbitration on First Amendment grounds, arguing that recent judicial constructions of the 1925 Federal Arbitration Act ("FAA") render that statute unconstitutional as applied to Plaintiffs and other consumers who have been subjected to adhesion compulsory arbitration contracts. *See* Dkt. No. 44.

The District Court, however, did not reach the merits of Plaintiffs' First Amendment argument because it determined that Plaintiffs could not meet the threshold "state action" prerequisite to bringing a First Amendment challenge. In the District Court's view, to prove state action, Plaintiffs must demonstrate that the Defendant AT&T Mobility LLC ("AT&T"), a private entity, is a "state actor," a showing which the court held Plaintiffs had not made. Arbitration Order at 2-17.

[1] "Dkt." refers to the District Court docket.

The District Court certified the Arbitration Order for interlocutory appeal to enable this Court to address two state action issues that present "novel and difficult questions of first impression," and which the court concluded qualified for and warranted immediate review under § 1292(b). Certification Order at 3.

The first issue is Plaintiffs' "*Denver Area*" argument: That state action exists here because Plaintiffs' First Amendment challenge is directed against an act of Congress and the Supreme Court's interpretations of that act—both of which were definitively state actions. In this context, proving that AT&T is a state actor is unnecessary under *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), where the Supreme Court unanimously allowed plaintiffs to challenge a statute on First Amendment grounds even though the private entities involved were not state actors. The best reading of *Denver Area* is that the Court reached that result because it was convinced by a dissenting judge below—former chief judge of the D.C. Circuit, Patricia Wald—that acts of Congress that permit private entities to violate other citizens' First Amendment rights should not be immunized from constitutional review simply because the private entities are not state actors. Here, the FAA would be exempt from constitutional scrutiny if Plaintiffs are required to prove that AT&T is a state actor and cannot do so. As a general proposition, it should be unthinkable that a statute that infringes the First Amendment can escape challenge by aggrieved litigants in a court of law.

In the Arbitration Order, the District Court read *Denver Area* narrowly, finding that it did not establish a general rule that the government, rather than the private defendant, is the relevant state actor when a statute is being challenged on constitutional grounds. Arbitration Order at 12. Judge Chen concluded, however, that reasonable judges could disagree on the proper reading of *Denver Area* because the case's state action analysis is unclear. He also acknowledged that Judge Wald's opinion may support Plaintiffs' interpretation of the case. *See* Certification Order at 3 (citing *Alliance for Community Media v. FCC*, 56 F.3d 105, 132 (D.C. Cir. 1995) (Wald, J., dissenting in part)). Because the other section 1292(b) requirements were also met, Judge Chen determined that the *Denver Area* issue justified this Court's immediate review. *Id.* at 3.

The second issue that the District Court found justified immediate review is Plaintiffs' "encouragement test" argument: That they had shown that AT&T is a state actor under the encouragement test articulated in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), because the Supreme Court's recent decisions compelling courts to enforce consumer adhesion forced arbitration contracts drastically changed the law to the vast benefit of drafters of such contracts. Hence, the government can be fairly held responsible for encouraging the recent proliferation and use of forced arbitration contracts, including by AT&T, making AT&T a state actor. This Court left open in *Duffield* whether state action

would exist if the government issued a "'rule or regulation that specifies arbitration as the favored means of resolving … disputes.'" 144 F.3d at 1202 (citation omitted). Since then, this Court has held that the Supreme Court has decreed that the FAA embodies such a "'liberal federal policy favoring arbitration'" that courts must "'ensur[e] that private arbitrations are enforced' … [and] … give preference (instead of mere equality) to arbitration provisions" over other contractual terms. *Mortenson v. Bresnan Communs., LLC*, 722 F.3d 1151, 1157, 1159-60 (9th Cir. 2013) (citations omitted). The answer to *Duffield's* open question should be that the judiciary's ardent support for imposing forced arbitration contracts on consumers renders the drafters of those contracts state actors.

Judge Chen found that Plaintiffs' encouragement test argument "presents a plausible theory" that "is not without force," but he was not persuaded that there had been a sufficient degree of government encouragement to establish state action. Arbitration Order at 14-15, 16. Nevertheless, he recognized that other jurists could reasonably disagree and determined that this Court should review the issue because "no authority has clearly defined the limits as to what constitutes encouragement" or "addressed the issue presented here." Certification Order at 3.

As shown below, the District Court properly certified the Arbitration Order for interlocutory appeal after finding correctly that Plaintiffs' proposed appeal of the state action issues meets the three essential requirements of section 1292(b):

(1) the appeal "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) an immediate appeal "may materially advance the ultimate termination of the litigation." Certification Order at 1 (quoting § 1292(b)). This Court should concur.

Resolving the state action issues is important for reasons that extend beyond this particular dispute and beyond the arbitration context. State action is required to find violations of "'most rights secured by the Constitution'" because most "'are protected only against infringement by governments.'" *Ohno v. Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013) (citation omitted). First Amendment, due process and equal protection violations are all tied to state action. *See id.* The Ninth Circuit's views on whether the state action element can work to immunize statutes from constitutional scrutiny and on what constitutes sufficient "encouragement" to implicate state action will inform most future private constitutional rights cases.

The Court should exercise its discretion to hear Plaintiffs' appeal.

## II. JURISDICTIONAL STATEMENT

The District Court has subject matter jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). This Court has jurisdiction to review the Arbitration Order under 28 U.S.C. § 1292(b) and Fed. R. App. P. 5. The Petition is timely because it was filed on July 7, 2016, within 10 days of entry of the Certification Order on June 27, 2016. *See* 28 U.S.C. § 1292(b).

## III. QUESTIONS PRESENTED

1. Whether Plaintiffs' First Amendment challenge to the FAA as applied to consumer adhesion forced arbitration contracts requires Plaintiffs to prove that AT&T is a state actor—which would immunize the FAA from constitutional scrutiny if AT&T is not a state actor—or whether, under *Denver Area*, state action exists here because the government is the relevant state actor for purposes of Plaintiffs' constitutional challenge?

2. Whether AT&T, in any event, is a state actor because the proliferation and use of consumer adhesion forced arbitration contracts has been encouraged by the Supreme Court's liberal federal policy favoring such arbitration clauses?

## IV. RELIEF SOUGHT

Plaintiffs seek an order from this Court (i) holding that state action is present in this case; (ii) vacating the Arbitration Order; and (iii) remanding to the District Court for a ruling on the merits of Plaintiffs' First Amendment challenge.

## V. FACTS NECESSARY TO UNDERSTAND THE QUESTIONS PRESENTED

Plaintiffs filed this prospective consumer class action on July 24, 2015, alleging that AT&T falsely advertised that certain of its mobile phone plans allow customers to utilize "unlimited" data when, in fact, AT&T regularly "throttles" (*i.e.*, intentionally slows) customers' data speeds once they reach data usage levels as low as between 2GB and 5GB per month. *See* Amended Complaint (Dkt. No.

11) at ¶¶ 1-2, 15-25. AT&T began dishonoring its "unlimited" data agreements shortly after its victory in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), slowing data speeds to the point that its customers could not use their phones for intended (and AT&T-advertised) capabilities such as streaming video and music, or even for browsing webpages. *Id.* ¶ 21.

AT&T, as expected, moved to compel arbitration. Dkt. No. 25. Plaintiffs opposed on First Amendment grounds, asserting that judicial decisions applying the FAA to consumer adhesion forced arbitration contracts violate the Petition Clause. Dkt. No. 44. The Supreme Court has never considered the First Amendment implications of *Concepcion* and its other FAA decisions. Plaintiffs asked the District Court to assess, as a matter of nationwide first impression, whether applying the FAA to consumer adhesion forced arbitration contracts runs afoul of the Petition Clause. The District Court acknowledged during the hearing on the motion to compel arbitration that the issue is a "still open" question, and AT&T agreed. *See* Transcript of Feb. 18, 2016 Hearing (Dkt. No.53), at 34-35.

While the merits of Plaintiffs' Petition Clause argument are not relevant to the instant Petition, a summary of Plaintiffs' argument helps frame why the threshold state action issues should be heard by this Court. The Supreme Court's FAA cases, which never contemplated the Petition Clause, must be reconciled with that Court's Petition Clause jurisprudence, which has not addressed the FAA.

Plaintiffs argue that the Petition Clause should, of course, trump the FAA, because "[w]here a specific statute … conflicts with a general constitutional provision, the latter governs." *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 504 (2012).

Outside the FAA context, the Supreme Court has unequivocally held that the Petition Clause embodies a constitutional right to sue in court. *E.g.*, *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("This Court's precedents confirm that the Petition Clause protects the rights of individuals to appeal to *courts and other forums established by the government* for resolution of legal disputes.") (citations omitted) (emphasis added). The Petition Clause bars the government from infringing the right to sue in court either directly or indirectly. *See United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("The First Amendment would … be a hollow promise if it left government free to destroy or erode its guarantees by *indirect restraints* so long as no law is passed that prohibits free speech, press, petition, or assembly as such.") (emphasis added) (quoted in *Sosa v. DirectTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006)).

Like other First Amendment rights, the right to sue in court can be waived only "knowingly and voluntarily," not by force or coercion. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187 (1972) (contractual waiver of free speech). *Cf. Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015) (contractual waiver of right to access Article III court).

Consequently, Congress cannot enact a law overtly stating that "AT&T's customers shall waive their First Amendment right to sue AT&T in court" because such a law would directly violate the Petition Clause. Congress likewise cannot pass a law that is less overt but has the same effect—*i.e.*, that bars AT&T's customers from suing AT&T in court—because doing so would indirectly violate the Petition Clause. The FAA, however, has become precisely such a law since the Supreme Court ruled, first in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) and later in *Concepcion*, that the FAA applies to, and mandates judicial enforcement of, consumer adhesion forced arbitration contracts. Just as a statute directly banning AT&T's consumers from suing AT&T in court would violate the First Amendment, the Supreme Court's interpretation of the FAA as a statute that permits AT&T itself to ban consumer suits in court through adhesion contracts and then *requires courts to enforce* AT&T's ban violates the First Amendment.

At the very least, there is substantial reason to question whether applying the FAA to consumer forced arbitration contracts violates the Petition Clause. In light of that doubt, the constitutional avoidance doctrine comes into play. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Under that doctrine, the FAA cannot apply to consumer adhesion forced arbitration contracts unless the enacting 1925 Congress evidenced "the clearest indication" in the FAA's text or legislative history that it intended that

result. *See id.* at 575, 577. Plaintiffs have shown, however, that Congress expressed the exact opposite intention—it *unequivocally rejected* the notion that the FAA would apply to adhesion contracts of any kind. Dkt. No. 44 at 15-25.

The District Court did not reach the merits of the Petition Clause issue because it found that Plaintiffs lacked capacity to raise the issue since, in the District Court's view, AT&T was not a state actor. By finding that AT&T rather than the government is the relevant state actor, however, the District Court insulated the FAA from any and all constitutional scrutiny, because no aggrieved consumer subject to an adhesion forced arbitration contract—either before or after engaging in arbitration—could ever satisfy the state action requirement.

Plaintiffs submit that is not, and ought not be, the law. Plaintiffs accordingly urge the Court to grant their appeal and resolve whether state action is present here.

## VI. REASONS WHY THE APPEAL IS AUTHORIZED BY 28 U.S.C. § 1292(b) AND SHOULD BE GRANTED

The District Court properly exercised its discretion to grant Plaintiffs' motion for interlocutory appeal of the Arbitration Order because the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and … an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Section 1292(b)'s purpose is to enable "immediate appeal [of] interlocutory orders deemed pivotal and debatable." *Swint v. Chambers Cnty. Comm'n*, 514

U.S. 35, 46 (1995). This case presents a proper and exceptional circumstance where permitting immediate appeal could avoid unnecessary protracted litigation. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). The FAA expressly permits interlocutory appeals under § 1292(b) from orders compelling arbitration. *See* 9 U.S.C. § 16(b). The Ninth Circuit has exercised its discretion to accept such interlocutory appeals in comparable cases, and it should do so here. *See Van Dusen v. Swift Transp. Co.*, 544 F. App'x 724 (9th Cir. 2013); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (interlocutory appeal of order compelling arbitration may avoid "the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter. A contrary holding would render meaningless the acknowledgment in [FAA] § 16(b) that an interlocutory order … may in some circumstances satisfy" 28 U.S.C. § 1292(b).). *See also Duffield v. Robertson*, No. C-95-109 EFL, 1997 U.S. Dist. LEXIS 14996, at *21 n.5 (N.D. Cal. Mar. 13, 1997), *on appeal at* 144 F.3d 1182 (9th Cir. 1998).

### A. The Arbitration Order Presents A Controlling Question Of Law

An issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court" and is not "collateral to the basic issues" in the dispute. *In re Cement Antitrust Litig.*, 673 F.2d at 1026-27. An issue need not be dispositive of the lawsuit to be controlling. *See United States v. Woodbury*, 263 F.2d 784, 787-88 (9th Cir. 1959).

AT&T did not dispute below that the state action issues are "controlling question[s] of law" within the meaning of section 1292(b). Certification Order at 2. Indeed, it is difficult to imagine a question more likely to materially affect the outcome of the litigation than whether Plaintiffs' claims should be heard as a class action in court or in four separate, purely individual arbitrations.

### B. There Is Substantial Ground For Difference Of Opinion

"Courts traditionally will find that a substantial ground for difference of opinion exists where … novel and difficult questions of first impression are presented." *Couch v. Telescope, Inc.* 611 F.3d 629, 633 (9th Cir. 2010). "'[W]hen novel legal issues are presented'" a "'substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution,'" and in such a case, an interlocutory appeal of a novel issue may be certified "'without first awaiting development of contradictory precedent.'" Certification Order at 3 (quoting *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011)). The District Court properly found that "a substantial ground for difference of opinion" exists as to both state action issues presented for appeal.

#### 1. Reasonable Jurists Could Differ on the *Denver Area* Issue

*Denver Area* involved a First Amendment challenge to three sections of the Cable Television Consumer Protection and Competition Act of 1992, including two sections that *permitted* (but did not require) private cable system operators to

censor "patently offensive" sexual-related content from their cable programming. 518 U.S. at 732-36. To best understand *Denver Area*, the case should be read in conjunction with the D.C. Circuit *en banc* decision that was on appeal, *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995).

The *en banc* majority concluded that if Congress had banned "offensive" programs instead of permitted private entities to ban them, the government "would be hard put to defend the constitutionality of" the statute. *Id.* at 113. But because two sections of the statute merely permitted and did not require private censorship, the court found no state action as to those two provisions and refused to allow the plaintiffs to challenge them. Employing an encouragement test analysis, the court held that only statutes that "commanded" private actors to infringe others' free speech involved state action while statutes that simply "authorize[d]" private infringements did not. *Id.* at 113, 116, 118-23. The court rejected the argument that state action always exists when an act of Congress is at issue. *Id.* at 113.

Judge Wald dissented. She argued that the state action inquiry depends in part on whose actions are at issue. In a case involving "a direct facial challenge to a federal statute," inquiring whether a private party is a state actor is "the wrong question" to ask. *Id.* at 132. Proving "whether the cable operators' private decisions implicate state action" was not necessary because "we have state action in the government's own ban-or-block scheme, which is what is at issue here." *Id.*

Making the same argument that Plaintiffs make here, Judge Wald reasoned:

> [I]t simply does not follow that, if the cable operators' decisions are *not* state action, then the statute itself is not state action, and is exempt from constitutional scrutiny. Indeed, it … [is] wholly untenable … that a statute duly enacted by … Congress … could be anything other than state action.

*Id.* at 132 n.4 (emphasis in original).

Judge Wald criticized the majority's approach to state action because it "would immunize the *statute itself* from constitutional scrutiny on grounds that cable operators' decisions … are not state action." *Id.* (emphasis in original).

On appeal to the Supreme Court, all nine Justices explicitly or implicitly agreed with Judge Wald, because they all reached and addressed the merits of the plaintiffs' First Amendment challenge without requiring them to first prove that the cable system operators were state actors. *Denver Area*, 518 U.S. 727. Whether the private entities were state actors was irrelevant to all nine Justices.

Justice Breyer's four-member plurality opinion, while somewhat obtuse, plainly agreed that state action existed because a statute was being challenged. It assumed, in fact, that the *en banc* majority, which "said that it found no 'state action,' … could not have meant that phrase literally, for, of course, petitioners attack … a congressional statute—which, by definition," is state action. 518 U.S. at 737. Justices Kennedy and Ginsburg found state action because the statute made a First Amendment right "vulnerab[le] to private" infringement in a context where

the government could not itself infringe that right, stating that "[s]tate action lies in the enactment of a statute altering legal relations between persons, *including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State*." *Id.* at 782 (Kennedy, J., concurring in part and dissenting in part) (citation omitted) (emphasis added). Both Justices Breyer and Kennedy found that state action existed without employing the encouragement test or any other test for determining whether the private cable system operators were state actors.

In short, the Supreme Court unanimously rejected the D.C. Circuit *en banc* majority's view that a private entity must be shown to be a state actor before a court can hear a constitutional challenge to a law that permits that private entity to violate other citizens' First Amendment rights. Under *Denver Area*, no such law enacted by the State, including the FAA, is, or should be, immune from constitutional scrutiny. The same is true whether the challenged law is a statute or a judicial decision interpreting the statute. *See Ohno*, 723 F.3d at 993, 994 (domestic court rulings that cause alleged constitutional harm are state actions).

Plaintiffs allege here that their constitutional harm resulted from the Supreme Court's rulings applying the FAA in a manner that permits private parties such as AT&T to force Plaintiffs to give up their First Amendment right to sue in court. That grant of permission to AT&T directly parallels the statute permitting

private censorship in *Denver Area*, which teaches that the government, not AT&T, is the relevant state actor for purposes of Plaintiffs' Petition Clause challenge.

Although the Supreme Court rejected the D.C. Circuit *en banc* majority's approach in *Denver Area*, the District Court nevertheless applied the *en banc* majority's approach here and required Plaintiffs to prove that AT&T is a state actor. The District Court limited *Denver Area* to its facts, in part because the plurality there "assumed there was state action because the plaintiffs were challenging an act of Congress" without providing a "clear analysis as to why," Arbitration Order at 10, and in part because *Denver Area* appears inconsistent with other Supreme Court state action precedents, *id.* at 11-12, including one decided three years later, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50-54 (1999) (plaintiffs challenging a statute had to show private insurers were state actors).

While the District Court's analysis was reasonable, other jurists reasonably could reach a contrary conclusion based on Judge Wald's opinion in *Denver Area* and the Supreme Court's reaction to it. *Sullivan*, moreover, did not cite *Denver Area*, and it is distinguishable. It was not a First Amendment case. Also, it was a suit seeking *damages* under 42 U.S.C. § 1983 against private entities (for alleged due process violations), a factor that troubled members of the *Sullivan* Court in an earlier § 1983 state action case. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 945-46, 952-53 (1982) (Powell, J. dissenting). No damages will flow from finding

a constitutional violation here. Notably, the statute at issue in *Sullivan* would not escape constitutional scrutiny if the private entities were not state actors. The Court there, in fact, was able to reach the due process issue because state officials had been sued along with the private insurers. *See* 526 U.S. at 47-48, 58-59.

The only time the Supreme Court confronted a defendant's effort to use the state action requirement to immunize a statute from constitutional scrutiny was in *Denver Area*, which, like this case raising the same issue, was a First Amendment case. For that reason, and because statutes and judicial decisions that are alleged to violate the Constitution should never be allowed to escape review, a reasonable jurist could conclude that *Denver Area* rather than *Sullivan* controls this case.

### 2. Reasonable Jurists Could Differ on the Encouragement Test Issue

In *Duffield*, the Ninth Circuit found that an SEC rule that permitted a securities exchange to compel arbitration of broker-dealer employment disputes did not constitute state action because it did not "move[] beyond mere approval of private action into the realm of 'encouragement, endorsement, and participation' of that action." 144 F.3d at 1202 (citations omitted). This Court left open, however, whether state action would have been present if the SEC had issued a "'rule … that specifies arbitration as the favored means of resolving … disputes.'" *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 135-36 (1973)). Plaintiffs argue that the FAA has become precisely such a rule.

The District Court agreed that Plaintiffs' factually have "a stronger case" than was present in *Duffield* given that the Supreme Court's FAA rulings have "led to increasing use of arbitration to displace judicial remedies, particularly in the field of consumer rights." Arbitration Order at 14-15. Judge Chen accepted that the Supreme Court's FAA decisions have arguably encouraged "businesses to impose pre-dispute arbitration clauses" by "safeguarding [their] enforceability" even against "well-established defenses" such as unconscionability and the "policy concerns embodied in other laws and statutes." *Id.* at 16 (citations omitted). He ultimately concluded, however, that the encouragement test was not met because the FAA's purpose is to "put arbitration agreements on equal, not more favorable, ground with other contracts." *Id.* at 15. He also found that whatever encouragement the FAA has provided "falls short of government conduct in cases where state action has been found." *Id.* at 16 (citing cases).

Judge Chen's analysis was reasonable. But he correctly found that other jurists could reasonably disagree. Disagreement could easily arise on the central point of whether the Supreme Court has put pre-dispute arbitration contracts only on equal footing with other contracts—rather than more favorable footing—given this Court's holding in another context that the FAA's "'liberal federal policy favoring arbitration'" gives "preference (instead of mere equality) to arbitration provisions" over other contracts. *Mortenson*, 722 F.3d at 1157, 1159-60 (citations

omitted). This Court should decide now whether its holding in *Mortenson* applies in the state action context and governs the encouragement test analysis in this case.

### 3. AT&T's Arguments Below were Off Point

AT&T's opposition below did not focus on whether the two, discrete state action issues that Plaintiffs seek to appeal are novel issues as to which jurists could reasonably disagree. AT&T instead largely launched hyperbole against Plaintiffs' Petition Clause argument, for example, asserting it would "overturn decades of U.S. Supreme Court precedent" and "wreak havoc on the legal system." Dkt. No. 63 at 2, 7. AT&T's assertions are as untrue as they are irrelevant to this Petition. Plaintiffs argue only that the Supreme Court's FAA decisions should not be applied in a context that Court did not contemplate—when consumers have not waived their rights to sue in court in accordance with the Court's own strict standards for contractual waivers of constitutional rights. *Cf. Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 U.S. App. LEXIS 9638 (7th Cir. May 26, 2016) (finding exception to FAA in employment context Supreme Court never contemplated).

While AT&T argued that no court "has ever sided with the plaintiffs' view of state action here," Dkt. No. 63 at 2, AT&T did not cite any cases on point. Rather, it placed undue reliance on *Sullivan* and on cases rejecting state action arguments that Plaintiffs have not made, none of which "engaged substantively with the relevant arguments." *Epic Sys.*, 2016 U.S. App. LEXIS 9638, at *23.

### C. An Interlocutory Appeal May Materially Advance The Ultimate Termination Of The Litigation

In certifying the Arbitration Order for interlocutory appeal, the District Court correctly determined that an immediate appeal "will materially advance the ultimate termination of the litigation because, regardless of the result of the arbitration proceedings, Plaintiffs are likely to appeal their case to the Ninth Circuit on the basis of their opposition to the motion to compel which raises the issues certified herein." Certification Order at 2 (citing *Duffield*, 1997 U.S. Dist. LEXIS 14996, at *21 n.5). *See Kuehner*, 84 F.3d at 319.

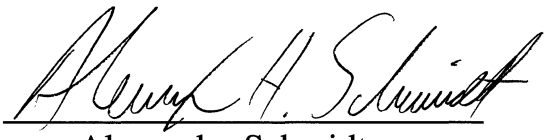
It would waste time and resources to proceed to four individual arbitrations when Plaintiffs, whether they win or lose their individual claims, will still pursue their class claims, which cannot be arbitrated under AT&T's arbitration clause, and will still appeal the state action issues. If Plaintiffs prevail on appeal and on the Petition Clause issue, all parties will have participated in arbitrations needlessly. If Plaintiffs lose in court, on either the state action issue or the merits of their First Amendment argument, they will likely forgo arbitrating four separate complex claims that they cannot in any event cost-effectively pursue on an individual basis.

## VII. CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to grant them permission to appeal the Arbitration Order pursuant to 28 U.S.C. § 1292(b).

Dated: July 7, 2016

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP

By: 
Alexander Schmidt
Michael Liskow
270 Madison Avenue
New York, NY 10016
Telephone: (212) 545-4600

Rachele R. Rickert
Symphony Towers
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: (619) 239-4599

LIEFF CABRASER HEIMANN
& BERNSTEIN LLP
Michael W. Sobol
Roger N. Heller
Nicole D. Sugnet
275 Battery Street, 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000

MORGAN & MORGAN
COMPLEX LITIGATION GROUP
John A. Yanchunis
Rachel Soffin
201 North Franklin Street 7th Floor
Tampa, FL 33602
Telephone: (813) 223-5505

LAW OFFICE OF JEAN SUTTON
MARTIN PLLC
Jean Sutton Martin
2018 Eastwood Road, Suite 225
Wilmington, NC 28403
Telephone: (910) 292-6676

HATTIS LAW
Daniel M. Hattis
9221 NE 25th Street
Clyde Hill, WA 98004
Telephone: (650) 980-1990

MASTANDO & ARTRIP, LLC
D. Anthony Mastando
Eric J. Artrip
301 Washington St., Suite 302
Huntsville, AL 35801
Telephone: (256) 532-2222

MARTINSON & BEASON, PC
Douglas C. Martinson, II
115 Northside Square
Huntsville, AL 35801
Telephone: (256) 776-7006

*Counsel for Plaintiffs-Petitioners*

DECLARATION OF SERVICE

I, Kathryn Cabrera, the undersigned, declare that:

1. Declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California 92101.

2. On July 7, 2016, declarant served Plaintiffs' Petition For Permission To Appeal Pursuant To 28 U.S.C. § 1292(b) via Federal Express Overnight Delivery, in a prepaid sealed envelope, and via electronic mail, addressed to:

Donald M. Falk
MAYER BROWN LLP
Two Palo Alto Square, Ste. 300
3000 El Camino Real
Palo Alto, CA 94306-2112
dfalk@mayerbrown.com

Archis A. Parasharami
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006-1101
aparasharami@mayerbrown.com

3. There is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 7, 2016

*/s/ Kathryn Cabrera*
Kathryn Cabrera

# Addendum A

# Arbitration Order

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCUS A. ROBERTS, et al.,

Plaintiffs,

v.

AT&T MOBILITY LLC,

Defendant.

Case No. 15-cv-03418-EMC

**AMENDED ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION; AND STAYING PROCEEDINGS**

Docket No. 25

Plaintiffs Marcus A. Roberts, Kenneth A. Chewey, Ashley M. Chewey, and James Krenn (collectively, "Plaintiffs") have filed a class action against Defendant AT&T Mobility LLC ("AT&T"), asserting statutory, tort, and warranty claims based on AT&T's "deceptive and unfair trade practice of marketing its wireless service plans as being 'unlimited,' when in fact those plans are subject to a number of limiting conditions [in particular, throttling[1]] that either are not disclosed or inadequately disclosed to consumers." FAC ¶ 1. Currently pending before the Court is AT&T's motion to compel arbitration. AT&T's motion relies largely on the fact that the Supreme Court upheld AT&T's arbitration provision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that arbitration agreement should be enforced under the Federal Arbitration Act ("FAA"); California's *Discover Bank* rule – which deemed class waivers in consumer arbitration agreements substantively unconscionable – was preempted by the FAA). In response, Plaintiffs argue that the *Concepcion* Court never addressed the specific issues now raised – *i.e.*, that enforcement of the arbitration agreements would violate their rights as protected

[1] Throttling is the intentional slowing of customers' data speed once they reach certain data usage thresholds. *See* Mot. at 2.

by the Petition Clause of the First Amendment.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** AT&T's motion to compel arbitration.[2] The Court further stays this lawsuit pending arbitration. *See* 9 U.S.C. § 3.

## I. DISCUSSION

The parties do not dispute that Plaintiffs entered into contracts with AT&T in order to obtain wireless service. The parties also do not dispute that each of the agreements contained an arbitration provision.

In its motion, AT&T contends that the Court should enforce the arbitration agreements and compel arbitration. In response, Plaintiffs essentially raise three arguments as to why arbitration should not be compelled: (1) because, if this Court were to compel arbitration, that would be state action that would violate their First Amendment rights – more specifically, the right to petition a court for a redress of grievances[3]; (2) because, even though the arbitration provision allows a claim to be brought in small claims court, that court is not an adequate forum and therefore their First Amendment rights have still been abridged; and (3) because the FAA must be construed as not applying to consumer actions in order to avoid a constitutional problem (*i.e.*, the constitutional avoidance doctrine).

Each of the above arguments turns on the applicability of the First Amendment. But, as both parties recognize, in order for Plaintiffs to have a First Amendment claim, they must first show state action. *See Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259,

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[2] After the Court issued an order granting AT&T's motion to compel arbitration (Docket No. 50), Plaintiffs sought leave to file a motion to reconsider. The Court granted leave (Docket No. 55), and upon reconsideration, amends the order herein to address matters raised by the additional briefs.

[3] *See* U.S. Const., amend. 1 (providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); *see also Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) (stating that "the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes[;] '[t]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government'").

263 (2d Cir. 2014) ("Because the United States Constitution regulates only the Government, not private parties, a litigant like Grogan who alleges that her constitutional rights have been violated must first establish that the challenged conduct constitutes state action.") (internal quotation marks omitted)); *cf. Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."). Plaintiffs acknowledge that the arbitration agreements are contracts between private actors. Nevertheless, they assert, there would still be state action in the instant case upon this Court's enforcement of that private agreement.

A. Judicial Enforcement

As a starting point, the Court finds no merit to Plaintiffs' assertion that the mere fact of judicial enforcement automatically establishes state action. The Ninth Circuit rejected that position in *Ohno v. Yasuma*, 723 F.3d 984 (9th Cir. 2013). More specifically, in *Ohno*, the Ninth Circuit rejected the defendant's contention that judicial enforcement of a foreign-country money judgment against it – through application of California's Uniform Foreign Country Money Judgments Recognition Act – "constitute[d] domestic state action triggering constitutional scrutiny."[4] *Id.* at 986. The court stated:

> [T]here is no doubt that the district court's decision in this case applying California's Uniform Act – legislation that is itself the result of governmental action – constitutes state action for purposes of constitutional scrutiny. But that truism does not resolve our question, which is: Should the *substance* of the underlying Japanese monetary damages judgment, resulting from a lawsuit in Japan between two private parties, be ascribed to the district court's enforcement of the judgment under the Uniform Act and so subjected to constitutional scrutiny?

*Id.* at 994 (emphasis in original).

The *Ohno* court further explained:

> *Recognizing and enforcing* a foreign-country judgment is distinct from *rendering* that judgment in the first place. The district court, in

[4] The defendant argued that "the Religion Clauses [of the First Amendment] would bar a court in the United States from rendering the same judgment in the first instance." *Ohno*, 723 F.3d at 992.

> giving effect to the judgment issued in Japan, *has not participated in the action the [defendant] claims is unconstitutional* – namely, judging the truth or falsity of the [defendant's] religious teachings or imposing liability for the consequences of religious expression.

*Id.* at 993 (emphasis in original and added). "[T]he source of the alleged constitutional harm is . . . Japanese tort law, created and enforced through Japanese governmental entities," and so "the claimed constitutional deprivation cannot be traced to a right, privilege, or rule of conduct imposed by a domestic governmental entity or individual." *Id.* at 994. The act of enforcement of the Japanese judgment by the U.S. court did not constitute state action causing a constitutional deprivation.

To the extent Plaintiffs have relied on *Shelley v. Kraemer*, 334 U.S. 1 (1948),[5] *see* Mot. at 3-4, to support the position that judicial enforcement itself provides the requisite state action necessary to establish a constitutional claim, the Court is not persuaded. In *Ohno*, the Ninth Circuit made clear that "*Shelley*'s attribution of state action to judicial enforcement has generally been confined to the context of discrimination claims under the Equal Protection Clause." *Id.* at 998.

Indeed, in discussing the reach of *Shelley*, the *Ohno* court pointed out that, "[i]n the context of First Amendment challenges to speech-restrictive provisions in private agreements or contracts, domestic judicial enforcement of terms that could not be enacted by the government has *not* ordinarily been considered state action." *Id.* (emphasis added.) In addition, and more on point to the case at bar, the Ninth Circuit stated that, "in the context of judicial confirmation of arbitral awards, . . . [courts have] held that 'mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause.'" *Id.* at 999. While the Ninth Circuit did state that it did "not mean to adopt or sanction any of [these] cases," *id.* at 999 n.17, its reference to the cases – particularly the latter group – is still telling.

Furthermore, a Ninth Circuit decision that pre-dates *Ohno* is in strong accord with the

[5] In *Shelley*, the Supreme Court noted that racially restrictive covenants applicable to real properties were, in and of themselves, private agreements but that, once the agreements were judicially enforced by state courts, there was the requisite state action to give rise to a constitutional claim. *See Shelley*, 334 U.S. at 19 (stating that, "but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint").

above cases. More specifically, in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), *overruled on other grounds*, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003), the plaintiff – a broker-dealer in the securities industry – sued her employer for employment discrimination. The plaintiff had signed a securities industry form that included an arbitration provision. The form also required the plaintiff to abide by the rules of the New York Stock Exchange ("NYSE") and National Association of Securities Dealers ("NASD"), and each of these organizations had a rule that required arbitration. The plaintiff argued, nevertheless, that she could not be compelled to arbitration because "the arbitration agreement imposes an unconstitutional condition of employment," requiring her "to forfeit her Fifth Amendment right to due process, her Seventh Amendment right to a jury trial, and her right to an Article III judicial forum." *Id.* at 1200. According to the district court, "the essential prerequisite of state action was lacking" for the due process claim, and the Ninth Circuit agreed, stating "no state action is present in simply enforcing that agreement." *Id.* at 1201.

Plaintiffs have pointed to no authority holding that judicial enforcement, particularly of an arbitration award, constitutes state action.[6] In fact, as the *Ohno* court noted, the authority is to the contrary. For example, in *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995), the defendant appealed to the Eleventh Circuit after the district court confirmed the arbitration panel's award of punitive damages. The defendant argued, *inter alia*, that the punitive damages award violated its due process rights, more specifically, "because arbitration lacks the procedural protections and meaningful judicial review required for the imposition of punitive damages." *Id.* at 1190. The Eleventh Circuit rejected the argument. It noted first that "the state action element of a due process claim is absent in private arbitration cases" because private arbitration is by itself "a voluntary contractual agreement of the parties." *Id.* at 1191. As to the defendant's assertion that the district court's *confirmation* of the punitive damages award provided the requisite state

[6] To the extent Plaintiffs have suggested that enforcement here is the equivalent of or comparable to a court-ordered injunction, the Court does not agree. The enforcement of the arbitration agreements would not "require[] the [C]ourt to take such an active role in, or to exercise sustained supervision of, the [arbitration agreements or even the arbitrations themselves] that it becomes appropriate to review the [C]ourt's activities as governmental actions." *Ohno*, 723 F.3d at 1000.

action, the court disagreed. The Eleventh Circuit echoed the Ninth Circuit's analysis in *Ohno* that the defendant was offering a "*Shelley v. Kraemer* theory that a court's enforcement of a private contract constitutes state action" but "[t]he holding of *Shelley* . . . has not been extended beyond the context of race discrimination." *Id.* *See also Katz v. Cellco P'ship*, No. 12 CV 9193 (VB), 2013 U.S. Dist. LEXIS 176784, at *10, 17 (S.D.N.Y. Dec. 12, 2013) (in a case where plaintiff argued that "application of the FAA to his state law claims violates Article III of the Constitution – both the structural protections of our tripartite system of government (i.e., separation of powers) and his personal right to have his claims adjudicated before an independent Article III judge," agreeing with defendant that "there is insufficient state action for plaintiff to maintain an action under Article III"; stating that "the fact that Verizon sought a court order compelling arbitration does not transform enforcement of the parties' arbitration agreement into state action"), *vacated in part on other grounds*, No. 14-138, 2015 U.S. App. LEXIS 13055 (2d Cir. July 28, 2015); *Smith v. Argenbright, Inc.*, No. 99 C 7368, 1999 U.S. Dist. LEXIS 19827, at *8 (N.D. Ill. Dec. 27, 1999) (stating that "[w]e do not believe that our limited power to conduct an after-the-fact review of an arbitration panel for bias constitutes the requisite governmental action to implicate *Batson*"); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1468 (N.D. Ill. 1997) (rejecting contention that defendant was "using a government official, i.e., this Court, to enforce the arbitration rules that will inevitably deprive her of due process"; "refus[ing] to hold that every time a Court enforces a private arrangement it potentially violates one party's constitutional rights"); *United States v. Am. Soc'y of Composers, Authors & Publ'rs*, 708 F. Supp. 95, 97 (S.D.N.Y. 1989) (stating that "[t]he mere approval by this Court of the use of arbitration did not create any state action[;] [i]ndeed, under [party's] strained interpretation . . . , all arbitrations could be subject to due process limitations through the simple act of appealing the arbitrator's decisions to the court system"). At bottom, "[government] permission of a private choice cannot support a finding of state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999).

Finally, the Court takes note that, in many private contracts, there are provisions that arguably affect access to the courts or otherwise implicate significant rights, such as choice-of-venue, choice-of-law, statute-of-limitations, and limitations-on-damages provisions. Although

these provisions may be subject to restrictions imposed by statutory and/or common law (*e.g.*, the doctrine of unconscionability, violation of public policy), courts have not held that judicial enforcement of these provisions, particularly as found in contracts between private parties, raises constitutional claims. *See, e.g.*, *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1045 (9th Cir. 2001) (holding that a six-month statute-of-limitations provision was enforceable); *Severn Peanut Co. v. Indus. Fumigant Co.*, 807 F.3d 88, 92 (4th Cir. 2015) (rejecting assertion that consequential damages exclusion in contract was not enforceable).

B. The FAA and Its Interpretation

In their papers, Plaintiffs argued that, nevertheless, there is state action based on Congress's enactment of the FAA. *See* Opp'n at 4. This argument is similar to that rejected by the Ninth Circuit in *Duffield*. There, the plaintiff argued that "state action is present because 'federal law requires all broker-dealers to register with a national securities exchange (i.e., the NYSE or NASD), and to abide by the rules of that exchange – including its mandatory arbitration rules – as a condition of their continued employment.'" *Id.* at 1200. The Ninth Circuit rejected the argument, stating that

> [t]he rules of NASD and the NYSE are not fairly attributable to the government unless they carry the force of federal law. *And prior to 1993*, no federal statute or regulation required [the plaintiff] to register with the securities exchanges, much less to sign Form U-4 or to arbitrate employment disputes. Thus, when [the plaintiff] signed her Form U-4 *in 1988* and thereby waived her rights to litigate employment-related disputes in a judicial forum, she did not do so because of any state action.

*Id.* at 1201 (emphasis added).

The court acknowledged that, in 1993 – two years before the plaintiff's employer actually invoked the arbitration agreement – the Securities and Exchange Commission ("SEC") had "adopted a regulation that required all broker-dealers to be registered with at least one of the securities organizations of which [the plaintiff's employer] was a member – i.e., the NASD and the NYSE – before effecting any securities transaction." *Id.* That "current requirement that new employees register with a national securities exchange 'constitutes government action of the purest sort.'" *Id.* Nevertheless, the Ninth Circuit was not persuaded by the plaintiff's argument that this

new regulation provided the requisite state action. The court noted:

> State action can be present . . . only to the extent that there is "a sufficiently *close nexus* between the State and the *challenged action*"; the action that [the plaintiff] challenges in her constitutional claims is the requirement that she waive her right to litigate employment-related disputes. Since agreements to arbitrate are "valid, *irrevocable*, and enforceable" to the same extent as any other contract, it is immaterial that years after [the plaintiff] signed her Form U-4 containing the arbitration provision, federal law required other employees like her to register with securities exchanges or even that it compelled her to remain registered. No federal law required [the plaintiff] to waive her right to litigate employment-related disputes by signing the Form U-4 in 1988, *and no state action is present in simply enforcing that agreement*. Insofar as [the plaintiff] argues that the "challenged action" is the requirement that she actually arbitrate her lawsuit, that requirement is found in her private contract, not in federal law.

*Id.* at 1201 (emphasis in original and added).

The instant case is similar to *Duffield* in that, here, while Congress did enact the FAA, the mere enactment of the statute did not *cause* the deprivation of their constitutional rights. *See id.* (noting that "[s]tate action can be present . . . only to the extent that there is 'a sufficiently close nexus between the State and the *challenged action*'") (emphasis in original).

Plaintiffs rely still on *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. 727 (1996), in arguing that a congressional statute or a court's interpretation thereof "that enables private action to restrict citizens' First Amendment rights constitutes a state action." Opp'n at 4.[7] In *Denver Area*, the plaintiffs sued,

[7] This argument briefly alluded to in their initial brief is developed more thoroughly in Plaintiffs' motion for reconsideration. *See* Docket No. 54 (motion to reconsider). AT&T argues, in its opposition to the motion to reconsider, that reconsideration should be denied because Plaintiffs' "*Denver Area* argument was not adequately 'presented to the Court.'" Docket No. 59 (Opp'n at 6). AT&T points out that Plaintiffs' purported best case (so identified at the hearing on the motion to compel arbitration) was embedded in one out of 132 footnotes in their opposition brief. AT&T also argues that Plaintiffs' fleshing out of *Denver Area* during the hearing on the motion to compel arbitration was improper. *See King v. Hausfeld*, No. C-13-0237, 2013 U.S. Dist. LEXIS 51116, at *17 (N.D. Cal. Apr. 9, 2013) (finding that plaintiff waived an argument because he raised the argument "for the first time in a supplemental filing submitted the day before the hearing and without leave of court" and he "offer[ed] no explanation for failing to raise the argument"). The Court agrees with AT&T that it would well be within its rights in deeming the *Denver Area* argument waived. Although, in their opposition brief, Plaintiffs cited *Denver Area* in support of the above proposition, they certainly did not address the issue as it was argued at the hearing nor did they brief the issue as it has now been briefed in the motion for reconsideration. The twenty-five page limitation for the opposition brief, *see* Docket No. 54 (Mot. at 5 n.5), is no excuse.

*inter alia*, the FCC, claiming that three provisions of the Cable Television Consumer Protection and Competition Act of 1992 – which sought to regulate the broadcasting of "patently offensive" sex-related material on cable television – violated their First Amendment rights. The provisions at issue applied to programs broadcast over cable on what are known as "leased access channels" and "public, educational, or governmental channels." "A 'leased channel' is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties.'" *Id.* at 734. Public access channels "are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way." *Id.* "Between 1984 and 1992, federal law (as had much pre-1984 state law, in respect to public access channels) prohibited cable system operators from exercising *any* editorial control over the content of any program broadcast over either leased or public access channels." *Id.* (emphasis in original).

Congress enacted the three challenged provisions "in an effort to control sexually explicit programming over access channels." *Id.* The first provision, which concerned leased channels, *permitted* a cable operator to enforce a policy of prohibiting programming that the operator reasonably believed described or depicted sex-related material in a patently offensive manner. *See id.* The second provision, which also concerned leased channels, *required* cable operators to segregate and block similar programming if they decided to permit its broadcast rather than prohibit it. *See id.* at 735. Finally, the third provision was similar to the first provision but applied to public access channels. *See id.*

A plurality of the Supreme Court held that the first provision was constitutional. In addressing the existence of state action, the plurality took note of the lower appellate court's analysis that there was no First Amendment violation

> because the First Amendment prohibits only "Congress" . . . , not private individuals, from "abridging the freedom of speech."

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Nevertheless, given the importance of the issues herein, the Court addresses the merits of Plaintiffs' *Denver Area* argument.

> Although the court said that it found no "state action," it could not have meant that phrase literally for, of course, petitioners attack (as "abridging . . . speech") a congressional statute – which, by definition, is an Act of "Congress." More likely, the court viewed this statute's "permissive" provisions as not themselves restricting speech, but, rather, as simply reaffirming the authority to pick and choose programming that a private entity, say, a private broadcaster, would have had in the absence of intervention by any federal, or local, governmental entity.

*Id.* at 737.

The plurality acknowledged "the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech – and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting." *Id.* (emphasis in original). But apparently, the plurality assumed there was state action because the plaintiffs were challenging an act of Congress, *i.e.*, its enactment of the provision, which in turn was being carried out by the FCC. *See also* Docket No. 59 (Opp'n at 3) (AT&T arguing that "the FCC was the party 'charged with the deprivation' of the plaintiffs' First Amendment rights, [and thus] the enactment of the statute alone was sufficient state action to trigger constitutional protections under *Lugar*"). That being said, the plurality provided no clear analysis as to why congressional action permitting private conduct amounted to state action in that particular instance.

All that is clear is that the plurality refused to adopt the state action analysis suggested by other Supreme Court Justices – *e.g.*, Justice Kennedy's take that "leased access channels are like a common carrier." *Denver Area*, 518 U.S. at 739-40. The plurality also rejected Justice Thomas's reasoning that "the case is simply because the cable operator who owns the system over which access channels are broadcast, like a bookstore owner with respect to what it displays on the shelves, has a predominant First Amendment interest." *Id.* at 740. According to the plurality, "[b]oth categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect." *Id.*; *see also id.* at 741-42 (stating

that "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes"). The plurality concluded that, "aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now." *Id.* at 742.

> Rather than decide [such] issues, we can decide these cases more narrowly, by closely scrutinizing [the provision] to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessary great restriction on speech. The importance of the interest at stake here – protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica*, and the flexibility inherent in an approach that *permits* cable operators to make editorial decisions, lead us to conclude that [the provision is a sufficiently tailored response to an extraordinarily important problem.

*Id.* at 743 (emphasis in original).

As indicated by the above, while the majority of the Justices assumed that the challenged Act's grant of authority to cable operators permitting them to prohibit or limit certain programs based on content constituted state action, *Denver Area* does not establish the broad pronouncement Plaintiffs assert. The plurality did not overturn (nor could it), *e.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), where the Supreme Court addressed "whether a warehouseman's proposed sale of goods entrusted to him for storage, *as permitted by New York Uniform Commercial Code § 7-210*, is an action properly attributable to the State of New York," and concluded that there was no state action because "a State's mere acquiescence in a private action [does not] convert[] that action into that of the State" – even taking into account that "the State has embodied its decision not to act in statutory form." *Id.* at 164-65 (emphasis added). Subsequent to *Denver Area*, the Court has continued to adhere to the general proposition that a law permitting private conduct does not constitute state action. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53-54 (1999) (stating that, while "the State's decision to provide insurers the option of deferring payment for unnecessary and unreasonable treatment pending review can

in some sense be seen as encouraging them to do just that[,] . . . this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy"; adding that "our cases will not tolerate the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement") (internal quotation marks omitted).

The plurality's assumption of state action in *Denver Area* must be seen in its proper context. The issue before the Court concerned regulatory legislation particular to cable operators who are often given unique monopolistic power over a single cable system linking broadcasters with the community, and who are "unusually involved" with the government via, *e.g.*, given rights of way and access to governmental facilities. *Denver Area*, 518 U.S. at 739. Such operators are arguably more like common carriers such as telephone companies rather than editors such as newspapers. While the plurality portion of the Court's opinion (in contrast to the opinion of Justice Kennedy concurring in part and dissenting in part) did not commit to any clear rationale as to why there is sufficient state action allowing application of the First Amendment, the plurality opinion was driven by the particular context of the case, informed in part by technology and "the industrial structural related to telecommunications," *id.* at 741, a structure which conferred monopolistic-like power and involved a close interrelationship with governmental regulation. Again, as noted above, the plurality opinion recognize that "the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech – and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting." *Id.* at 737 (emphasis in original).

In any event, no clear state action analysis commanded the votes of a majority of the Justices. Thus, *Denver Area* did not establish a categorical rule that a statute which permits private parties to restrict the speech or other rights of private citizens constitutes as a general matter state action.[8]

[8] AT&T argues *Denver Area* is distinguishable because the defendant was the FCC – the government itself – charged with enforcement of the challenged law, not a private business as in

At the hearing, Plaintiffs conceded that they did actually not have a problem with passage of the FAA per se. Rather, Plaintiffs took the position that it was judicial interpretation of the FAA that provided the requisite state action.[9] In particular, Plaintiffs argued that, if this Court were to compel arbitration, it would be interpreting the FAA as applying to consumer adhesion contracts (and not just contracts between businessmen or merchants), and this interpretation would be the source of Plaintiffs' constitutional injury. But this asserted constitutional injury is predicated on the contract being one of adhesion – *i.e.*, where the consumer did not knowingly and/or voluntarily agree to arbitration and forfeits access to the courts. Thus, the source of the alleged constitutional deprivation when a consumer is involved is not the judicial interpretation of the FAA; rather, the source is AT&T's private conduct in purportedly forcing arbitration on an unwitting consumer. *See Am. Mfrs.*, 526 U.S. at 50 (asking whether "the allegedly unconstitutional conduct [is] fairly attributable to the State") (emphasis omitted). As the court held in *Ohno*, a court giving effect to a private contract does not constitutionalize the contract. *See Ohno*, 723 F.3d at 993 (stating that "[t]he district court, in giving effect to the judgment issued in Japan, has not participated in the action the [defendant] claims is unconstitutional – namely, judging the truth or falsity of the [defendant's] religious teachings or imposing liability for the consequences of religious expression").

At the hearing, Plaintiffs also argued that, if the Court were to compel arbitration, then it would be interpreting the FAA as heavily favoring arbitration and encouraging private parties to employ pre-dispute arbitration clauses, and this interpretation would also be the source of

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the instant case. This distinction, however, does not fully explain why governmental permission of private conduct constituted state action.

[9] The Court acknowledges that, at the hearing, Plaintiffs emphasized that the enactment of the FAA by Congress was significant in that, prior to that time, arbitration agreements were typically not enforced, not only with respect to consumer contracts but also with respect to commercial contracts. *Cf. Concepcion*, 563 U.S. at 339 (noting that "[t]he FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements"). However, the Court does not understand Plaintiffs to be taking the position that the enactment of the FAA, in and of itself, is a constitutional problem. Furthermore, it would be inconsistent for Plaintiffs to take that position given that, as discussed below, Plaintiffs' main contention is that the FAA should be considered unconstitutional only with respect to its application vis-à-vis consumer contracts, and not, *e.g.*, commercial contracts.

Plaintiffs' constitutional injury. Because this specific argument was not raised in Plaintiffs' papers, the Court could disregard it as waived.

However, this argument for state action presents a plausible theory and should be examined. Plaintiffs' argument rests on authority holding that

> "[a] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed that of the State.' Mere approval or acquiescence in the initiatives or a private party is not sufficient to justify holding the State responsible for these initiatives."

*Duffield*, 144 F.3d at 1200 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)[10]).

In *Duffield* itself, the court held that the SEC did not sufficiently influence private conduct because it had not:

> moved beyond mere approval of private action into the realm of "encouragement, endorsement, and participation" of that action . . . with regard to the NASD's and NYSE's compulsory arbitration requirements. "To begin with the obvious, there is nothing in the [Securities Exchange Act of 1934] and there is no Commission rule or regulation that specifies arbitration as the favored means of resolving employer-employee disputes." . . . This puts the role of the SEC in a critically different light than that of the Federal Railroad Administration in *Skinner*, which drafted regulations making plain its "strong preference for [drug] testing," explicitly conferred on railroads the authority to conduct such tests, *required* railroads and employees to perform such tests, and codified its right to receive certain biological samples.

*Id.* at 1202 (emphasis added).[11]

Plaintiffs' position in the instant case is not without force – factually, there is a stronger

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[10] *Lugar* identifies two additional state action tests, *i.e.*, as to whether the actions of private entities are fairly attributable to the state. *See Duffield*, 144 F.3d at 1200. Plaintiffs have not invoked either of these tests, relying instead only on the encouragement test.

[11] In *Duffield*, the plaintiff also invoked state action based on a completely different test – *i.e.*, "'the private party has exercised powers that are traditionally the exclusive prerogative of the State.'" *Duffield*, 144 F.3d at 1200. The Ninth Circuit explained that argument lacked merit because "[w]e have long held that, since dispute resolution is not an 'exclusive' governmental function, neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action." *Id.* Plaintiffs have not invoked the government function state action test in the instant case.

case for encouragement here compared to, *e.g.*, *Duffield*, 114 F.3d at 1202 (there was no SEC rule or regulation that "'specifies arbitration *as the favored means* of resolving employer-employee disputes'") (emphasis added). Here, as discussed below, the Supreme Court has held that the FAA embodies a policy favoring arbitration. And Plaintiffs have cited evidence suggesting that evolution of recent jurisprudence in this area has in fact led to increasing use of arbitration to displace judicial remedies, particularly in the field of consumer rights. *See* Opp'n at 9 (noting, *e.g.*, that the AAA's "statistics on consumer arbitrations filed after January 1, 2003 . . . lists only 1,335 total consumer-initiated arbitrations against AT&T," and 86% of "those arbitrations were initiated by clients of the law firm Bursor & Fisher, who were attempting to prevent a proposed merger between AT&T and T-Mobile").

Nonetheless, Plaintiffs have not established the requisite degree of government coercion or encouragement sufficient under existing case law to establish state action. First, the FAA on its face indicates that an arbitration agreement – like any other agreement – may be challenged on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It purports to put arbitration agreements on equal, not more favorable, ground with other contracts.

Second, the Supreme Court's interpretation of the FAA, while acknowledging a general policy favoring of arbitration, is expressly predicated on the stated purpose of putting arbitration agreements on equal footing with all other contracts and preventing the disfavorable treatment of such agreements. As explained by the Supreme Court in *Concepcion*:

> The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. Section 2, the "primary substantive provision of the Act," provides, in relevant part, as follows:
>
> > "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
>
> We have described this provision as reflecting both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." In line with these principles,

> courts must place arbitration agreements on an *equal footing* with other contracts, and enforce them according to their terms.

*Concepcion*, 563 U.S. at 339 (emphasis added); *see also Hall St. Assocs., L.L.C. v. Mattel, Ic.*, 552 U.S. 576, 581 (2008) (stating that "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements *on equal footing* with all other contracts'") (emphasis added); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (stating that, "[b]ecause the FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements,' we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement").

The problem as identified in *Concepcion* was that arbitration agreements were being singled out simply because arbitration was the subject matter of the agreement. *See Concepcion*, 563 U.S. at 339 (stating that the "savings clause" in § 2 of the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue"). While it may be argued (as Plaintiffs have here) that, in safeguarding the enforceability of arbitration clauses against even well-established defenses based, *e.g.*, on unconscionability and countervailing policy concerns embodied in other laws and statutes (*see, e.g.*, *id.* at 357 (Breyer, J., dissenting); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting)), the Supreme Court's interpretation of the FAA has swung the pendulum to the point of actually encouraging businesses to impose pre-dispute arbitration clauses (and Plaintiffs have cited some empirical evidence so indicating), no court has yet to hold or suggest there is sufficient encouragement or coercion by virtue of the FAA to implicate state action under *Lugar*.[12] Whatever encouragement the FAA gives to the implementation of pre-dispute arbitration clauses, it falls short of government conduct in cases where state action has been found. *See Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001) (stating that "a challenged activity may be state action when it

[12] Moreover, it is worth noting that Plaintiffs' argument here would apply not just to consumer contracts but commercial contracts as well. Accordingly, Plaintiffs' sweeping argument would constitutionalize enforcement of all arbitration agreements made possible by the FAA.

results from the State's exercise of 'coercive power,' when the State provides 'significant encouragement, either overt or covert,' or when a private actor operates as a 'willful participant in joint activity with the State or its agents'"); *Flagg Bros.*, 436 U.S. at 164 (stating that "'a State is responsible for the . . . act of a private party when the State, by its law, has compelled the fact'" but "a State's mere acquiescence in a private action [does not] convert[] that action into that of the State"; adding that "[i]t is quite immaterial [when] a State has embodied its decision not to act in statutory form"); *see also Grapentine v. Pawtucket Credit Union*, 755 F.3d 29, 33 (1st Cir. 2014) (taking note of "the principle set out in *Flagg Brothers* . . . that mere legislative sanction of a private remedy does not constitute state action"); *Apao v. Bank of N.Y.*, 324 F.3d 1091, 1094 (9th Cir. 2003) (stating that, in *Flagg Brothers*, "the state's statutory authorization of self-help provisions [was held insufficient] to convert private conduct into state action[;] [t]he statute neither encourages nor compels the procedure, but merely recognizes its legal effect"). *Cf. Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989) (concluding that state action for purposes of the Fourth Amendment was present because the "specific features of the regulations [imposed by the Federal Railroad Administration] did more than adopt a passive position toward the underlying private conduct"; "[t]he Government has removed all legal barriers to the [drug] testing authorized by Subpart D, . . . has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions[,] . . . and has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D"); *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) (noting that "'[t]here may be a deprivation within the meaning of § 1983 not only when there has been an actual "taking" of property by a police officer, but also when the officer assists in effectuating a repossession over the objection of a debtor or so intimidates a debtor as to cause him to refrain from exercising his legal right to resist a repossession'"). As noted above, no court has found that judicial enforcement of a private arbitration clause constitutes state action for purposes of stating a federal constitutional claim. [13]

[13] The Eleventh Circuit relied on, *inter alia*, *Flagg Bros.* in holding that, "[i]n light of this narrow interpretation of state action, courts considering the issue have rejected the argument that the limited state action inherent in the confirmation of private arbitration awards mandates compliance with the Due Process Clause." *Davis*, 59 F.3d at 1192.

## II. CONCLUSION

Because under the current state of the law, there is no state action in the instant case, Plaintiffs lack a viable First Amendment challenge to the arbitration agreements. As Plaintiffs have not challenged the arbitration agreements on any other bases, the Court grants AT&T's motion to compel arbitration. Furthermore, as requested by AT&T, the Court stays this action pending the resolution of the arbitration. *See* 9 U.S.C. § 3.

This order disposes of Docket No. 25.

**IT IS SO ORDERED.**

Dated: April 27, 2016

EDWARD M. CHEN
United States District Judge

# Addendum B

# Certification Order

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCUS A. ROBERTS, et al.,

Plaintiffs,

v.

AT&T MOBILITY LLC,

Defendant.

Case No. 15-cv-03418-EMC

**ORDER GRANTING PLAINTIFFS' MOTION TO CERTIFY FOR IMMEDIATE INTERLOCUTORY APPEAL**

Docket No. 61

Currently pending before the Court is Plaintiffs' motion to certify for immediate interlocutory appeal the Court's order granting AT&T's motion to compel arbitration. *See* Docket No. 60 (order). At the hearing on the motion, the Court granted Plaintiffs' motion. This order memorializes the Court's oral ruling and as supplemented herein.

## I. DISCUSSION

### A. Legal Standard

Title 28 U.S.C. § 1292(b) governs interlocutory appeals. It provides as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

As indicated by the above, the critical requirements of § 1292(b) are (1) the order must involve a controlling question of law; (2) there must be a substantial ground for difference of opinion regarding that legal question; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. These requirements are addressed briefly below.

B. Controlling Question of Law

According to Plaintiffs, there are two legal issues that warrant certification: (1) whether there is state action under *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. 727 (1996), and (2) whether there is state action under the "encouragement" test. In its papers, AT&T does not dispute that these issues are in fact controlling questions of law. The Court agrees. This Court's order granting AT&T's motion to compel arbitration was predicated on these issues. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204 (1996) (concluding that an appellate court can "'exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the district court'"; "the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court'") (emphasis in original).

C. Materially Advance Ultimate Termination of Litigation

Although AT&T makes an argument that an immediate appeal would not materially advance the ultimate termination of the litigation, *see, e.g.*, Opp'n at 6-7 (pointing out that an arbitration before the AAA typically takes 7 months while an appeal before the Ninth Circuit typically takes 14.3 months), the Court is not persuaded. As Plaintiffs argue, interlocutory appeal will materially advance the ultimate termination of this litigation because, regardless of the result of the arbitration proceedings, Plaintiffs are likely to appeal their case to the Ninth Circuit on the basis of their opposition to the motion to compel which raises the issues certified herein. *See* Mot. at 7; *see also Duffield v. Robertson*, No. C-95-109 EFL, 1997 U.S. Dist. LEXIS 14996, at *21 n.5 (N.D. cal. Mar. 13, 1997)) (noting that, "regardless of the result of the arbitration proceedings, plaintiff will appeal her case," and so it was preferable "to have a ruling from the Ninth Circuit sooner rather than later").

D. Substantial Ground for Difference of Opinion

Under Ninth Circuit law, a substantial ground for difference of opinion exists where the

> appeal involves an issue over which reasonable judges might differ and such uncertainty provides a credible basis for a difference of opinion on the issue. . . . [C]ourts traditionally will find that a substantial ground for difference of opinion exists where . . . novel and difficult questions of first impression are presented . . . . [I]nterlocutory appellate jurisdiction does not turn on a prior court's having reached a conclusion adverse to that from which appellants seek relief. A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed. Stated another way, when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent.

*Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. Wash. 2011) (internal quotation marks omitted).

As indicated above, Plaintiffs argue that there is a substantial ground for difference of opinion on two issues: (1) whether there is state action under *Denver Area* and (2) whether there is state action under the "encouragement" test. The Court agrees that these issues prevent novel and difficult questions of first impression. For example, as indicated in the Court's order compelling arbitration, the basis for the *Denver Area* Court's conclusion of state action is unclear. *See* Docket No. 60 (Order at 10) (stating that "the plurality provided no clear analysis as to why congressional action permitting private conduct amounted to state action in that particular instance"; "[a]ll that is clear is that the plurality refused to adopt the state action analysis suggested by the other Supreme Court Justices," *e.g.*, Justices Kennedy and Thomas); *cf. Alliance for Community Media v. FCC*, 56 F.3d 105, 132 (D.C. Cir. 1995) (Wald, J., dissenting in part) (stating that "[t]he core question here is not whether the cable operators' private decisions implicate state action; whatever the answer to that question, we have state action in the government's own ban-or-block scheme, which is what is at issue here"). Finally, Plaintiffs' position that judicial interpretation of the FAA has crossed the line to constitute "encouragement" and therefore qualifies as state action is not without any basis; no authority has clearly defined the limits as to what constitutes encouragement, and no court has addressed the issue presented here.

## II. CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiffs' motion for certification. The Court is mindful of its role as "gatekeeper" under Section 1292(b) and but, as indicated above, there are novel and difficult questions that justify presenting them to the Court of Appeal for consideration on an interlocutory basis, especially as their resolution may materially advance ultimate termination of this litigation.

This order disposes of Docket No. 61.

**IT IS SO ORDERED**.

Dated: June 27, 2016

EDWARD M. CHEN
United States District Judge

# UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

## Office of the Clerk

## After Opening a Case – Counseled Cases

*(revised April 2016)*

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| Office of the Clerk<br>James R. Browning Courthouse<br>U.S. Court of Appeals<br>P.O. Box 193939<br>San Francisco, CA 94119-3939 | Office of the Clerk<br>James R. Browning Courthouse<br>U.S. Court of Appeals<br>95 Seventh Street<br>San Francisco, CA 94103-1526 | 95 Seventh Street<br>San Francisco, CA 94103 |

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**Court Phone List**

| | |
|---|---|
| **Main Phone Number** | **(415) 355-8000** |
| Attorney Admissions | (415) 355-7800 |
| Calendar Unit | (415) 355-8190 |
| CJA Matters (Operations Unit) | (415) 355-7920 |
| Docketing | (415) 355-7840 |
| Death Penalty | (415) 355-8197 |
| Electronic Filing – CM/ECF | Submit form at http://www.ca9.uscourts.gov/cmecf/feedback |
| Library | (415) 355-8650 |
| Mediation Unit | (415) 355-7900 |
| Motions Attorney Unit | (415) 355-8020 |
| Procedural Motions Unit | (415) 355-7860 |
| Records Unit | (415) 355-7820 |
| Divisional Court Offices: | |
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**Rules of Practice**

The Federal Rules of Appellate Procedure (Fed. R. App. P.), the Ninth Circuit Rules (9th Cir. R.) and the General Orders govern practice before this Court. The rules are available on the Court's website at www.ca9.uscourts.gov under *Rules*.

**Practice Resources**

The Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeals for the Ninth Circuit is available on the Court's website www.ca9.uscourts.gov at *Guides and Legal Outlines* > *Appellate Practice Guide*. The Court provides other resources in *Guides and Legal Outlines*.

**Admission to the Bar of the Ninth Circuit**

All attorneys practicing before the Court must be admitted to the Bar of the Ninth Circuit. Fed. R. App. P. 46(a); 9th Cir. R. 46-1.1 & 46-1.2.

For instructions on how to apply for bar admission, go to www.ca9.uscourts.gov and click on the *Attorneys* tab > *Attorney Admissions* > *Instructions*.

**Notice of Change of Address**

Counsel who are registered for CM/ECF must update their personal information, including street addresses and email addresses, online at: https://pacer.psc.uscourts.gov/pscof/login.jsf 9th Cir. R. 46-3.

Counsel who have been granted an exemption from using CM/ECF must file a written change of address with the Court. 9th Cir. R. 46-3.

**Motions Practice**

Following are some of the basic points of motion practice, governed by Fed. R. App. P. 27 and 9th Cir. R. 27-1 through 27-14.

- Neither a notice of motion nor a proposed order is required. Fed. R. App. P. 27(a)(2)(C)(ii), (iii).
- Motions may be supported by an affidavit or declaration. 28 U.S.C. § 1746.

- Each motion should provide the position of the opposing party. Circuit Advisory Committee Note to Rule 27-1(5); 9th Cir. R. 31-2.2(b)(6).
- A response to a motion is due 10 days from the service of the motion. Fed. R. App. P. 27(a)(3)(A); Fed. R. App. P. 26(c). The reply is due 7 days from service of the response. Fed. R. App. P. 27(a)(4); Fed. R. App. P. 26(c).
- A response requesting affirmative relief must include that request in the caption. Fed. R. App. P. 27(a)(3)(B).
- A motion filed in a criminal appeal must include the defendant's bail status. 9th Cir. R. 27-2.8.1.
- A motion filed after a case has been scheduled for oral argument, has been argued, is under submission or has been decided by a panel, must include on the initial page and/or cover the date of argument, submission or decision and, if known, the names of the judges on the panel. 9th Cir. R. 25-4.

**Emergency or Urgent Motions**

All emergency and urgent motions must conform with the provisions of 9th Cir. R. 27-3. Note that a motion requesting procedural relief (e.g., an extension of time to file a brief) is *not* the type of matter contemplated by 9th Cir. R. 27-3. Circuit Advisory Committee Note to 27-3(3).

Prior to filing an emergency motion, the moving party *must* contact an attorney in the Motions Unit in San Francisco at (415) 355-8020.

When it is absolutely necessary to notify the Court of an emergency outside of standard office hours, the moving party shall call (415) 355-8000. Keep in mind that this line is for true emergencies that cannot wait until the next business day (e.g., an imminent execution or removal from the United States).

**Briefing Schedule**

The Court generally issues the briefing schedule at the time the appeal is docketed.

Certain motions (e.g., a motion for dismissal) automatically stay the briefing schedule. 9th Cir. R. 27-11.

The opening and answering brief due dates are not subject to the additional time described in Fed. R. App. P. 26(c). 9th Cir. R. 31-2.1. The early filing of

appellant's opening brief does not advance the due date for appellee's answering brief. *Id*.

**Extensions of Time to File a Brief**

*Streamlined Request*
Subject to the conditions described at 9th Cir. R. 31-2.2(a), you may request one streamlined extension of up to 30 days from the brief's existing due date. Submit your request via CM/ECF using the "File Streamlined Request to Extend Time to File Brief" event on or before your brief's existing due date. No form or written motion is required.

*Written Extension*
Requests for subsequent extensions or extensions of more than 30 days will be granted only upon a written motion supported by a showing of diligence and substantial need. This motion shall be filed at least 7 days before the due date for the brief. The motion shall be accompanied by an affidavit or declaration that includes all of the information listed at 9th Cir. R. 31-2.2(b).

The Court will ordinarily adjust the schedule in response to an initial motion. Circuit Advisory Committee Note to Rule 31-2.2. The Court expects that the brief will be filed within the requested period of time. *Id.*

**Contents of Briefs**

The required components of a brief are set out at Fed. R. App. P. 28 and 32, and 9th Cir. R. 28-2, 32-1 and 32-2. After the electronically submitted brief has been reviewed, the Clerk will request 7 paper copies of the brief that are identical to the electronic version. 9th Cir. R. 31-1. Do not submit paper copies until directed to do so.

**Excerpts of Record**

The Court requires Excerpts of Record rather than an Appendix. 9th Cir. R. 30-1.1(a). Please review 9th Cir. R. 30-1.3 through 30-1.6 to see a list of the specific contents and format. For Excerpts that exceed 75 pages, the first volume must comply with 9th Cir. R. 30-1.6(a). Excerpts exceeding 300 pages must be filed in multiple volumes. 9th Cir. R. 30-1.6(a).

Appellees may file supplemental Excerpts and appellants may file further Excerpts. 9th Cir. R. 30-1.7 and 30-1.8. If you are an appellee responding to a pro se brief that did not come with Excerpts, then your Excerpts need only include the contents set out at 9th Cir. R. 30-1.7.

Excerpts must be submitted in PDF format in CM/ECF on the same day the filer submits the brief. The filer shall serve a paper copy of the Excerpts on any party not registered for CM/ECF.

If the Excerpts contain sealed materials, you must submit the sealed documents electronically in a separate volume in a separate transaction from the unsealed volumes, along with a motion to file under seal. 9th Cir. R. 27-13(e). Sealed filings must be served on all parties by mail, or if mutually agreed by email, rather than through CM/ECF noticing.

After electronic submission, the Court will direct the filer to file 4 separately-bound paper copies of the excerpts of record with white covers.

**Mediation Program**

Mediation Questionnaires are required in all civil appeals except cases in which the appellant is proceeding pro se, habeas cases (28 U.S.C. §§ 2241, 2254 and 2255) and petitions for writs (28 U.S.C. § 1651). 9th Cir. R. 3-4.

The Mediation Questionnaire is available on the Court's website at www.ca9.uscourts.gov under *Forms*. The Mediation Questionnaire should be filed within 7 days of the docketing of a civil appeal. The Mediation Questionnaire is used only to assess settlement potential.

If you are interested in requesting a conference with a mediator in any type of appeal, you may call the Mediation Unit at (415) 355-7900, email ca09_mediation@ca9.uscourts.gov or make a written request to the Chief Circuit Mediator. You may request conferences confidentially. More information about the Court's mediation program is available at http://www.ca9.uscourts.gov/mediation.

## Oral Hearings

Approximately 14 weeks before a case is set for oral hearing, the parties are notified of the hearing dates and locations and are afforded 3 days from the date of those notices to inform the Court of any conflicts. Notices of the actual calendars are then distributed approximately 10 weeks before the hearing date.

The Court will change the date or location of an oral hearing only for good cause, and requests to continue a hearing filed within 14 days of the hearing will be granted only upon a showing of exceptional circumstances. 9th Cir. R. 34-2.

Oral hearing will be conducted in all cases unless all members of the panel agree that the decisional process would not be significantly aided by oral argument. Fed. R. App. P. 34(a)(2).

Oral arguments are live streamed to You Tube and can be accessed through the Court's website.

**Ninth Circuit Appellate Lawyer Representatives**
**APPELLATE MENTORING PROGRAM**

1. Purpose

The Appellate Mentoring Program is intended to provide mentoring on a voluntary basis to attorneys who are new to federal appellate practice or would benefit from guidance at the appellate level. In addition to general assistance regarding federal appellate practice, the project will provide special focus on two substantive areas of practice - immigration law and habeas corpus petitions. Mentors will be volunteers who have experience in immigration, habeas corpus, and/or appellate practice in general. The project is limited to counseled cases.

2. Coordination, recruitment of volunteer attorneys, disseminating information about the program, and requests for mentoring

Current or former Appellate Lawyer Representatives (ALRs) will serve as coordinators for the Appellate Mentoring Program. The coordinators will recruit volunteer attorneys with appellate expertise, particularly in the project's areas of focus, and will maintain a list of those volunteers. The coordinators will ask the volunteer attorneys to describe their particular strengths in terms of mentoring experience, substantive expertise, and appellate experience, and will maintain a record of this information as well.

The Court will include information about the Appellate Mentoring Program in the case opening materials sent to counsel and will post information about it on the Court's website. Where appropriate in specific cases, the Court may also suggest that counsel seek mentoring on a voluntary basis.

Counsel who desire mentoring should contact the court at mentoring@ca9.uscourts.gov, and staff will notify the program coordinators. The coordinators will match the counsel seeking mentoring with a mentor, taking into account the mentor's particular strengths.

3. The mentoring process

The extent of the mentor's guidance may vary depending on the nature of the case, the mentee's needs, and the mentor's availability. In general, the mentee should initiate contact with the mentor, and the mentee and mentor should determine

together how best to proceed. For example, the areas of guidance may range from basic questions about the mechanics of perfecting an appeal to more sophisticated matters such as effective research, how to access available resources, identification of issues, strategy, appellate motion practice, and feedback on writing.

4. Responsibility/liability statement

The mentee is solely responsible for handling the appeal and any other aspects of the client's case, including all decisions on whether to present an issue, how to present it in briefing and at oral argument, and how to counsel the client. By participating in the program, the mentee agrees that the mentor shall not be liable for any suggestions made. In all events, the mentee is deemed to waive and is estopped from asserting any claim for legal malpractice against the mentor.

The mentor's role is to provide guidance and feedback to the mentee. The mentor will not enter an appearance in the case and is not responsible for handling the case, including determining which issues to raise and how to present them and ensuring that the client is notified of proceedings in the case and receives appropriate counsel. The mentor accepts no professional liability for any advice given.

5. Confidentiality statement

The mentee alone will have contact with the client, and the mentee must maintain client confidences, as appropriate, with respect to non-public information.