No. 16-80090

IN THE 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,
Petitioners,

v.

AT&T MOBILITY LLC,
Respondent.

On Petition for Leave to Appeal from an Order of the United States District Court for the Northern District of California, No. 3:15-cv-3418-EMC, Judge Edward Chen, Presiding

Respondent's Opposition to Petition for Leave to Take Interlocutory Appeal Under 28 U.S.C. § 1292(b)

Donald M. Falk
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
Telephone: (650) 331-2000
Facsimile: (650) 331-2060
dfalk@mayerbrown.com

Archis A. Parasharami
Kevin Ranlett
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
aparasharami@mayerbrown.com
kranlett@mayerbrown.com

Attorneys for Respondent AT&T Mobility LLC

CORPORATE DISCLOSURE STATEMENT

AT&T Mobility LLC is a nongovernmental corporate entity that has no parent company. AT&T Mobility LLC's members are all privately held companies that are wholly-owned subsidiaries of AT&T Inc., which is the only publicly held company with a 10 percent or greater ownership stake in AT&T Mobility LLC.

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INTRODUCTION

This Court has long recognized that Section 1292(b) appeals are reserved for "extraordinary cases." *Robbins Co. v. Lawrence Mfg. Co.*, 482 F.2d 426, 429 (9th Cir. 1973). That is especially so in the context of orders compelling arbitration, because the Federal Arbitration Act ("FAA") generally bars appeals of those orders until after arbitration concludes. 9 U.S.C. § 16. That rule advances a central purpose of the FAA, which is to move "parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

This is not an extraordinary case warranting an exception. The arbitration clause at issue here is materially identical to one enforced by the Supreme Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and this Court in *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012). And the argument plaintiffs make in an effort to evade arbitration—that the FAA violates the First Amendment's Petition Clause—is one that no court has ever endorsed.

Indeed, the argument fails at the threshold because the First Amendment applies only if there is "state action," and, as the district court held, there is none here. That ruling hewed to this Court's prior holding that "neither private arbitration nor the judicial act of

enforcing it under the FAA constitutes state action." *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202 (9th Cir. 1998), *separate holding overruled on other grounds*, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc).

The district court nevertheless certified its ruling for interlocutory appeal under Section 1292(b). But as we explain below, the jurisdictional criteria for review are not met. There is no "substantial ground for difference of opinion" over whether state action is present here. The argument already has been rejected by this Court (and others), with no authority on the other side. And plaintiffs cannot show that an immediate appeal would "materially advance the ultimate termination of the litigation," because adopting their view of state action would simply result in piecemeal appeals.

PROCEDURAL HISTORY

Plaintiffs Marcus Roberts, Kenneth and Ashley Chewey, and James Krenn are AT&T customers who each entered into a pre-dispute arbitration agreement with AT&T. Dkt. No. 60, at 2. Nonetheless, plaintiffs filed a putative class action, alleging that AT&T did not disclose that it might reduce the download speeds of customers with unlimited-data plans if their usage becomes

excessive. Dkt. No. 11, ¶ 26. AT&T moved to compel arbitration. Dkt. No. 25. Plaintiffs opposed the motion, arguing that enforcing their arbitration agreements would infringe their First Amendment right to petition the government. Dkt. No. 44, at 3-14.

The district court (Chen, J.), granted AT&T's motion, rejecting the Petition Clause challenge on the ground that plaintiffs had failed to show state action. Dkt. No. 50, at 3-12.

Plaintiffs sought reconsideration, contending that Judge Chen had "overlooked" an argument buried in one of the 132 footnotes in their brief—namely, that they met a new, laxer standard for state action that (they claim) the Supreme Court established in *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996). Dkt. No. 54, at 8-10. In response, Judge Chen amended the order compelling arbitration to explain that *Denver Area*'s brief mention of state action "did not overturn" prior Supreme Court precedents addressing state action. Dkt. No. 60, at 11-12.

At plaintiffs' request, however, Judge Chen certified two issues for interlocutory appeal under Section 1292(b): (1) whether *Denver Area* effected a sea change in state-action law; and (2) whether the Supreme Court's interpretations of the FAA had "crossed the line" to

"encourage[]" the use of arbitration, thereby transforming AT&T into a state actor. Dkt. No. 69, at 3. Though acknowledging that no authority supports plaintiffs' position, Judge Chen deemed the issues presented to be "novel and difficult questions of first impression." *Id.* He also stated that an immediate appeal would "materially advance the ultimate termination of the litigation" because plaintiffs "are likely to appeal" on these issues eventually. *Id.* at 2.

REASONS FOR DENYING THE PETITION

This Court has underscored that appeals under Section 1292(b) are reserved for "extraordinary cases." *Robbins*, 482 F.2d at 429; *accord U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). For decades, "[t]he precedent in this circuit has recognized the congressional directive that section 1292(b) is to be applied sparingly and only in exceptional cases." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1982).

Because the "requirements of § 1292(b) are jurisdictional," this Court must independently determine that "the statutory prerequisites" are met. *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Those requirements are that the order "involves a controlling question of law as to which there is substantial ground for

difference of opinion" and that "an immediate appeal * * * may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Even if those requirements are met, this Court may "deny the appeal for any reason, including docket congestion." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

I. There Is No "Substantial Ground For Difference Of Opinion" On The Issues Certified By The District Court.

The district court erred in certifying that there is "substantial ground for difference of opinion" as to plaintiffs' state-action arguments. It is true that plaintiffs' arguments are "novel." Dkt. No. 69, at 3. But the mere fact that "a court is the first to rule on a particular question" is insufficient. *Couch*, 611 F.3d at 633. Unless "reasonable jurists might disagree" about the proper resolution of an issue, certification should wait until "contradictory precedent" develops. *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). That is the case here, because no reasonable jurist would adopt either of plaintiffs' two arguments in the face of binding adverse precedent from the U.S. Supreme Court and this Court.

A. Plaintiffs' Theory That *Denver Area* Upended State-Action Doctrine Is Specious.

In a long line of cases, the Supreme Court has adopted a "two-

part approach" to assessing assertions of state action:

> First, the deprivation [of a constitutional right] must be caused by the exercise of some right or privilege created by the State * * *. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); *see also*, *e.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978); *Ohno v. Yasuma*, 723 F.3d 984, 995-96 (9th Cir. 2013) (citing cases).

As this Court has explained, these principles compel the conclusion that "neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action." *Duffield*, 144 F.3d at 1202. Every other court to address the issue agrees. *See*, *e.g.*, *Smith v. Am. Arbitration Ass'n*, 233 F.3d 502, 507 (7th Cir. 2000) ("The fact that the courts enforce these [arbitration] contracts * * * does not convert the contracts into state or federal action[.]"); *Katz v. Cellco P'ship*, 2013 WL 6621022, at *6 (S.D.N.Y. Dec. 12, 2013) ("[T]here is no state action in the application or enforcement of the parties' private agreement to arbitrate."), *aff'd in part and vacated in part*, 794 F.3d 341, 344 (2d Cir.) ("the FAA [does not] violate[] Article

III"), *cert. denied*, 136 S. Ct. 596 (2015). Because a private party such as AT&T that seeks to enforce a private arbitration agreement cannot "fairly be said to be a state actor," there is no state action under *Lugar*, 457 U.S. at 937.

Judge Chen correctly rejected plaintiffs' assertion that *Denver Area* silently overruled *Lugar* and its progeny and dispensed with the "state actor" requirement. Dkt. No. 60, at 8-12. But he was mistaken in believing that the question is sufficiently "novel and difficult" (Dkt. No. 69, at 3) to warrant an interlocutory appeal, for two reasons.

First, this Court could adopt plaintiffs' *Denver Area* argument only by overturning *Duffield*—and that would require an initial hearing *en banc*. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1087 (9th Cir. 2015). *Duffield*, which was decided two years after *Denver Area*, confirmed that when (as here) "no federal law ***require*[*s*]" parties to agree to arbitrate, "no state action is present in simply enforcing that agreement." 144 F.3d at 1201 (emphasis added).

Second, plaintiffs' argument rests on a manifest misreading of *Denver Area*. That case involved a First Amendment challenge to FCC regulations implementing a statute that (a) authorized cable system operators to censor "patently offensive" content on leased-

access and public-access channels and (b) required segregation of any such leased-channel content onto a channel that could be blocked. 518 U.S. at 732-36 (plurality op.).

There was no majority opinion in *Denver Area*—a plurality of four Justices agreed with two Justices on some issues and with three other Justices on other issues; there were six opinions. Accordingly, the *Denver Area* Court did not endorse any particular standard regarding state action. Probably for that reason, in the 20 years since it was decided, no Supreme Court opinion has relied on, or even cited, *Denver Area* in addressing state action, and only one published opinion of a federal court of appeals has ever cited it in reference to state action—in passing—in holding that there was ***no*** state action.[1]

Plaintiffs point to the plurality's statement that "[a]lthough the [lower] court said that it found no 'state action,' it could not have meant that phrase literally, for, of course, petitioners attack * * * a congressional statute—which, by definition, is an Act of 'Congress.'" Pet. 14-15 (quoting 518 U.S. at 737).

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[1] *See Yeo v. Town of Lexington*, 131 F.3d 241, 249 (1st Cir. 1997) (citing *Denver Area* for proposition that the First Amendment "'ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech'").

But *Denver Area* was a First Amendment challenge to regulations promulgated by a ***governmental*** defendant—the FCC. *Denver Area* thus satisfies the general state-action test, because "the party charged with the deprivation," the FCC, was "a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937.

Here, by contrast, plaintiffs are challenging the action of AT&T—a private party. No government entity is a party to the case. The government did not require AT&T to offer wireless service to plaintiffs under contract terms containing an arbitration provision. It was AT&T's choice—not the government's—to seek to enforce the arbitration agreements it has with plaintiffs. And as Judge Chen noted, *Denver Area* involved a "close interrelationship" between cable operators and "governmental regulation" (Dkt. No. 60, at 12); there is no such "interrelationship" here involving AT&T's arbitration clause.[2]

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[2] Plaintiffs also rely on a sentence in the separate opinion of Justice Kennedy, joined by Justice Ginsburg: "State 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." Pet. 14-15 (quoting *Denver Area*, 518 U.S. at 782 (Kennedy, J., concurring in part and dissenting in part) (emphasis and alteration omitted)). But a statement by two Justices cannot overturn prior holdings of a majority of the Supreme Court,

More important, *Denver Area* did not purport to abrogate *Lugar*. Nor did it question other decisions, such as *Flagg Brothers*, in which the Court held that a "warehouseman's proposed sale of [stored] goods * * * as permitted by New York Uniform Commercial Code § 7-210," was not state action. 436 U.S. at 151, 164-66. Unsurprisingly, plaintiffs have never identified anyone else who shares their view of *Denver Area*. And this Court has continued to rely on these cases. *See*, *e.g.*, *Ohno*, 723 F.3d at 997 ("[N]either the Uniform [Foreign-Country Money Judgments Recognition] Act nor the district court's challenged enforcement" of a foreign judgment "meets the standards for state action, under the controlling *Lugar* framework[.]").

Moreover, plaintiffs' expansive reading of *Denver Area* does not merely contravene this Court's decisions. It also would mean that every time a litigant invokes a federal law or regulation to bar a cause of action—such as a federal law preempting a tort action—the law would be subject to Petition Clause scrutiny. There is no basis for attributing such a dramatic change in the law to the truism in the *Denver Area* plurality opinion that a federal statute "by definition, is

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particularly when, as here, the statement is contained in the ***dissenting*** portion of their opinion.

an Act of 'Congress.'" 518 U.S. at 737.

Indeed, three years after *Denver Area*, the Supreme Court confirmed that state-action law had not changed in the way that plaintiffs suggest. In *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), the Court addressed a due process challenge to a private insurer's decision to withhold payments pending an independent review of a disputed medical treatment. *Id.* at 44-47. Like plaintiffs here, the *Sullivan* plaintiffs sought to circumvent the "state actor" requirement by characterizing their claim as a "facial" challenge to the law authorizing the insurer's action. *Id.* at 50. The Supreme Court disagreed, explaining that the argument "ignores our repeated insistence that state action requires *both* an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State' * * * *and* that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *Id.* (quoting *Lugar*, 457 U.S. at 937).

The private status of AT&T is thus fatal to plaintiffs' state action claim. No "reasonable jurist" (*Reese*, 643 F.3d at 688) would hold that *Denver Area* created plaintiffs' new, more lenient state-action test, since accepting that reading would require overruling

numerous post-*Denver Area* Supreme Court and Ninth Circuit precedents. The issue thus cannot be certified for appeal.

B. Plaintiffs' Argument That The FAA So "Encourages" Arbitration As To Transform Private Parties Into State Actors Is Likewise Specious.

The Supreme Court has held that a private actor's conduct could be fairly attributable to the state if the state "has provided ***such significant encouragement*** * * * that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis added). Invoking this doctrine, plaintiffs argue that AT&T is a state actor because the FAA "encouraged" the use of arbitration. Pet. 3. This argument borders on the frivolous. Indeed, plaintiffs did not even bother to include it in their opposition to AT&T's motion to compel arbitration. As the district court noted, "this specific argument was not raised in Plaintiffs' papers" and could be "disregard[ed] * * * as waived." Dkt. No. 60, at 14.

It is hardly surprising that plaintiffs waited until the waning moments to throw this Hail Mary pass: This Court already has rejected the precise argument—more than once.

For example, almost three decades ago, the Court held that "[a]lthough Congress * * * has provided for some governmental

regulation of private arbitration agreements" in the FAA, "we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim." *FDIC v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987).

More recently, the Court held that the SEC's approval of NASD and NYSE rules *requiring* broker-dealers to enter into arbitration agreements did not so "encourag[e] the mandatory arbitration requirement" as to make the requirement state action. *Duffield*, 144 F.3d at 1201. As the Court explained, "[m]ere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Id.* at 1200 (quoting *Blum*, 457 U.S. at 1004-05). If, as *Duffield* held, the government's approval of rules of "[p]rivate entities" ***mandating*** the use of arbitration agreements did not constitute sufficient "encouragement" to make the drafters of those agreements state actors (144 F.3d at 1200), then the FAA—which simply requires that courts enforce arbitration agreements to which parties voluntarily agree—surely does not either.

In an effort to evade *Duffield*, plaintiffs contend that it is not the FAA itself, but rather the Supreme Court's decisions holding that

the FAA applies to consumer contracts and favors arbitration, that so encourage arbitration as to make AT&T a state actor. Pet. 9, 18. But a statute and its judicial interpretations cannot be disentwined in this manner. Rather, "the Supreme Court's 'construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1225 (9th Cir. 2013).[3]

In any event, plaintiffs can point to ***no case anywhere*** holding that either the FAA itself or the Supreme Court's decisions so encourage the use of arbitration as to transform private actors into state actors. That is for good reason—such an argument is foreclosed

[3] Moreover, most of the Supreme Court interpretations to which plaintiffs point predate *Duffield*. For example, the Court held that the FAA applies to form consumer contracts three years before *Duffield*. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277-81 (1995). It held that the FAA applies to all contracts within "the full reach of the Commerce Clause" eight years before that. *Perry v. Thomas*, 482 U.S. 483, 490 (1987). And the Court's statements about the federal policy "favoring arbitration" appear as early as the 1980s. *E.g.*, *Moses H. Cone*, 460 U.S. at 24. Plaintiffs' argument thus was available to—but not adopted by—this Court in *Duffield*. To be sure, *Concepcion* post-dates *Duffield*. But AT&T could hardly have been "encouraged" by *Concepcion* to enter into arbitration agreements with plaintiffs years before *Concepcion* was decided. Dkt. No. 11 ¶¶ 60, 71, 81.

by *Sullivan*. There, the plaintiffs argued that the challenged law so "encouraged" private insurers to withhold payments for disputed medical treatments as to make the insurers state actors. 526 U.S. at 53. The Court held that this argument "cannot be squared with our cases," because "this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy." *Id.* Thus, "a finding of state action on this basis would be contrary to the 'essential dichotomy'" between "public and private acts that our cases have consistently recognized." *Id.* at 52-53 (internal citation omitted). The very same thing could be said here.

Accordingly, there is no basis for concluding that there is "substantial ground for difference of opinion" on this issue.

II. An Immediate Appeal Would Not Materially Advance The Ultimate Termination Of The Litigation.

Plaintiffs also cannot show that an interlocutory appeal would "materially advance the ultimate termination of [this] litigation." 28 U.S.C. § 1292(b). The district court assumed that this factor was met because plaintiffs "are likely to appeal" after arbitration. Dkt. No. 69, at 2. That is manifestly insufficient; Section 1292(b) requires that the

interlocutory appeal "appreciably shorten the time, effort, or expense" of litigation. *Cement Antitrust Litig.*, 673 F.2d at 1027.

The primary objective of certification under Section 1292(b) is to "expedit[e] litigation by permitting appellate consideration during the early stages of litigation of legal questions *which, if decided in favor of the appellant, would end the lawsuit*." *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959) (emphasis added). Here, however, plaintiffs seek certification in order to prolong the lawsuit, not end it.

In fact, plaintiffs' proposed interlocutory appeal to decide the threshold state-action issue would not even determine whether they must arbitrate, much less resolve the ultimate merits of their claims. In fact, this could be only the first of three interlocutory appeals. If the Court were to hold that there is state action, the result would be a remand for Judge Chen to decide the merits of plaintiffs' Petition Clause argument. Whichever side loses in the district court will then seek a second interlocutory appeal—AT&T by right (*see* 9 U.S.C. § 16) and plaintiffs under Section 1292(b). If plaintiffs were to prevail and achieve invalidation of a 90-plus-year-old statute that has been applied countless times, the result will be that Judge Chen has to entertain a putative class action that, as we discuss below, can never

be certified. The inevitable denial of class certification could yield a third interlocutory appeal under Federal Rule of Civil Procedure 23(f) before the merits of plaintiffs' claims ever see the light of a courtroom.

The delay and added expense of serial interlocutory appeals is all the more unwarranted because plaintiffs' ultimate prospects of success are vanishingly small. We already have explained why they are wrong on the state-action issue. But if they somehow manage to surmount that hurdle, they have even less hope of prevailing on the merits of their Petition Clause challenge.

There is good reason that in the over 90 years since the FAA was enacted, no one has seriously suggested that it violates the First Amendment. Indeed, plaintiffs' counsel pressed their Petition Clause argument before the Supreme Court in an *amicus brief* in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)—and not even the dissenting Justices thought that it merited comment.

To begin with, the Petition Clause does not guarantee litigants a right to have a court decide their claims on the merits. After all, "the First Amendment does not impose any affirmative obligation on the government" to respond to a "petition." *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 465 (1979); *see also*, *e.g.*, *Am. Bus.*

Ass'n v. Rogoff, 649 F.3d 734, 739 (D.C. Cir. 2011) (Petition Clause "does not even 'guarantee[]" any "official *consideration* of a petition") (citation omitted). Litigants have no right under the Petition Clause to have any particular legal "process" in court. *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 864 (6th Cir. 2012); *see also*, *e.g.*, *Rogoff*, 649 F.3d at 741 ("No case holds that" congressional "interfer[ence] with *the decisionmaker's ability to grant the remedy* the plaintiffs seek * * * abridges the Petition Clause."). Accordingly, the FAA infringes Petition Clause rights no more than any other procedural or jurisdictional rule that results in the dismissal of a lawsuit.

Beyond that, plaintiffs would need to establish that, by agreeing to arbitrate, they did not waive their First Amendment rights in the same way that they waived the right to trial by jury.[4] That, they

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[4] Six circuits, including this one, have rejected the argument that arbitration agreements do not count as valid waivers of the Seventh Amendment right to trial by jury. *See*, *e.g.*, *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988), *overruled on other grounds by Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001); *accord*, *e.g.*, *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 994 (7th Cir. 2008); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1370-73 (11th Cir. 2005); *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 506 (6th Cir. 2004); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002).

could not do, because the Supreme Court has made clear that the First Amendment does not create a "constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). Finally, they would need to explain away the fact that AT&T's arbitration clause gives them the right to sue in small claims court—a governmental institution. Dkt. No. 25, at 10.

Not only are these hurdles insuperable, but adopting plaintiffs' view of the Petition Clause would wreak havoc on the legal system. As Judge Chen noted, it would invalidate innumerable contracts with "provisions that arguably affect access to the courts," including not only arbitration clauses, but also, for example, "choice-of-venue, choice-of-law, statute-of-limitations, and limitations-on-damages provisions." Dkt. No. 60, at 6. Other laws limiting judicial authority or jurisdiction may also fall. It is unlikely, to say the least, that plaintiffs will persuade Judge Chen, this Court, and ultimately the Supreme Court, to proceed down that path.

But if by some twist of fate plaintiffs do prevail, their victory would be an empty one. They admit that they are willing to pursue this case only as a class action. Pet. 20. Yet there is virtually no

chance that any court would certify a class, because plaintiffs' claims are inherently individualized. For example, as AT&T explained below, a customer-service agent informed Krenn about the potential for speed reductions before he renewed his unlimited data plan and only then became subject to speed reductions for the first time. Dkt. No. 25, at 8. There is similar individualized evidence that Roberts and the Cheweys renewed their unlimited data plans with their eyes open to the potential for download speed reductions. *Id.* at 6-7. This kind of evidence would preclude findings of commonality, typicality, adequacy, and predominance, making it all but certain that the class action that plaintiffs so badly want to pursue is a pipe dream.

Meanwhile, plaintiffs could arbitrate their claims in less time than it would likely take for this Court to hear oral argument in the first of the three potential interlocutory appeals. In short, the requirement that the proposed interlocutory appeal "materially advance the ultimate termination of this litigation" is not satisfied.

CONCLUSION

The petition for leave to appeal should be denied.

Respectfully submitted,

/s/ Archis A. Parasharami

Donald M. Falk
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
Telephone: (650) 331-2000
Facsimile: (650) 331-2060
dfalk@mayerbrown.com

Archis A. Parasharami
Kevin Ranlett
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
aparasharami@mayerbrown.com
kranlett@mayerbrown.com

Attorneys for Respondent AT&T Mobility LLC

July 18, 2016

STATEMENT OF RELATED CASES

Counsel for AT&T is unaware of any related cases pending in this Court.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of July 2016, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that everyone who has filed a notice of appearance in this case is a registered CM/ECF user.

July 18, 2016

MAYER BROWN LLP

/s/ Archis A. Parasharami
Archis A. Parasharami
Attorney for Respondent AT&T Mobility LLC