No. 09-893

In the
Supreme Court of the United States

AT&T MOBILITY, LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

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

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—when national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership, their clientele, and to the judicial system as a whole. Based on its members' extensive practical experience, DRI is uniquely qualified to explain to the Court why the decision below distorts generally applicable contract law, creates an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements that benefit customers and businesses alike, and generally conflicts with the liberal federal policy favoring arbitration. In addition, DRI desires to explain why, in its members' experience, class actions are fundamentally incompatible with arbitration and its benefits.

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[1] No counsel for a party authored any part of this brief, and no person or entity other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

As AT&T Mobility ("AT&T") explains in its brief, the Ninth Circuit's decision conflicts with the Federal Arbitration Act ("FAA") in every way imaginable: by requiring specific arbitral procedures as a precondition to the enforcement of arbitration agreements; by invoking a novel brand of unconscionability devised specifically to invalidate arbitration agreements; and by creating powerful disincentives to use consumer arbitration agreements. This *amicus* brief aims to do two things: first, to provide additional detail as to precisely how the decision below impermissibly distorts generally applicable contract law; and, second, to outline additional ways in which the decision conflicts with the FAA.

1. The Ninth Circuit's decision contravenes the FAA by invoking a version of "unconscionability" that departs dramatically from the doctrine applied to contracts generally. Traditional unconscionability doctrine requires a limited review of the fairness of the parties' contract, viewed *ex ante* (*i.e.*, at the time the contract was made) and taking into account all of the contract's provisions. The decision below, in contrast, relies on broad notions of public policy, applied from an *ex post* perspective (*i.e.*, at the time of litigation) and focusing exclusively on the effect of a single term of the parties' arbitration agreement, while ignoring the benefits the agreement offers to customers. This novel "unconscionability" analysis violates the FAA by singling out arbitration agreements for special scrutiny.

2. The Ninth Circuit's decision conflicts with the FAA in several additional ways.

a. The practical effect of the decision below is to impose a realistically impossible burden on a party seeking to enforce an arbitration agreement: to *disprove* the supposed need for the "deterrent effect" of a class action. This novel, insurmountable burden is fundamentally inconsistent with the FAA.

b. As this Court recognized last Term in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), class-wide procedures are inherently incompatible with the traditional advantages and essential features of arbitration. California's insistence on class-wide arbitral procedures that destroy the benefits of arbitration is but another effort to "chip away at [the FAA] by indirection." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001).

c. By making the enforceability of arbitration agreements highly unpredictable from jurisdiction to jurisdiction, the Ninth Circuit's decision also conflicts with Congress's goal of "mak[ing] arbitration agreements universally enforceable" (*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 279 (1995))—and *not* "dependent for [their] enforcement on the particular forum in which [the right to arbitrate] is asserted" (*Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984)).

d. Finally, by adopting what amounts to a *per se* rule against consumer agreements that require individual arbitration, the decision below conflicts with the liberal federal policy favoring arbitration agreements, which, as this Court has recognized, applies with full force in the consumer context.

ARGUMENT

I. The Ninth Circuit's Decision Contravenes The FAA By Distorting Traditional, Generally Applicable Contract Law.

"The FAA's displacement of conflicting state law is now well-established, and has been repeatedly reaffirmed." *Preston v. Ferrer*, 552 U.S. 346, 352 (2008) (quotation marks, citation omitted). Among its well-established preemptive principles is that while "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to … arbitration agreements" (*Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)), they may not be applied in ways that differ from the manner in which they are applied to contracts generally. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). That is, "courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny." *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 359 F.3d 159, 167 (5th Cir. 2004).

The decision below violates this principle by invoking a novel version of "unconscionability" that bears little resemblance to the traditional, generally applicable doctrine. Traditional unconscionability doctrine (1) focuses on the relative fairness of the obligations exchanged by the parties, serving as a narrow defense only to contracts that are truly "harsh," "oppressive," or "conscience-shocking"; (2) evaluates the contract at the time it was made (*i.e.*, *ex ante*), taking into account the range of possible outcomes; and (3) judges the contract as a whole, denying enforcement only to contracts that involve an overall "gross disparity" of values exchanged.

The decision below, in contrast, (1) relies on expansive notions of public policy to invalidate an arbitration agreement "that a reasonable consumer may well prefer"; (2) proceeds from an *ex post* perspective, focusing exclusively on a circumstance that will rarely come to pass; and, (3) operating in a vacuum, fixates on a single term of the arbitration agreement, ignoring the significant benefits the agreement confers on AT&T's customers. In short, the Ninth Circuit applied the unconscionability doctrine in name only, in a manner that subverts the FAA and this Court's precedents.

A. The Ninth Circuit's Analysis Departs From Traditional Unconscionability Doctrine, Which Is Narrow And Bargain-Focused.

"Unconscionability is a narrow doctrine[.]" *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 305 (4th Cir. 2001). "Traditionally"—and to this day—"a bargain was said to be unconscionable" only "if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" RESTATEMENT (SECOND) OF CONTRACTS (1981) § 208 cmt. b (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (1750));[2] *see also, e.g.*, Dando B. Cellini & Barry L. Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193, 196 (1967) (explaining that modern unconscionability, as re-

[2] *Accord, e.g., Cicle v. Chase Bank USA*, 583 F.3d 549, 554 (8th Cir. 2009); *Stinger v. Chase Bank, USA, NA*, 265 F. App'x 224, 228 (5th Cir. 2008); *Gay v. CreditInform*, 511 F.3d 369, 391 (3d Cir. 2007).

flected by the Uniform Commercial Code, "draws on a long history of common-law development"). Stated differently, a contract is unconscionable only if it is "so unfair as to shock the conscience of the court." 1 E. ALLEN FARNSWORTH, CONTRACTS § 4.27 (4th ed. 2004).

An agreement has never been thought "unconscionable" merely because unequal "bargaining power" produced an uneven "allocation of risks." UNIFORM COMMERCIAL CODE ("U.C.C.") § 2-302 cmt.1 (1995); *accord* RESTATEMENT, *supra*, § 208 cmt.d (1981). Nor will the doctrine relieve a party of "a simple old-fashioned bad bargain." *Wille v. Sw. Bell Tel. Co.*, 549 P.2d 903, 907 (Kan. 1976); *accord* 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:1 (4th ed. 1998). Unconscionability has thus been described as an "infrequently used" "safety valve" for relief from a contract so one-sided "'that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice.'" *Steinhardt v. Rudolph*, 422 So.2d 884, 890 (Fla. Dist. Ct. App. 1982) (quoting 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1632 (3d ed. 1972)). Precisely because it is intended as a narrow defense to only the most unfair contracts, "it is well-known that unconscionability is generally a loser of an argument." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1442 (2008); *accord* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 29.4 (rev. ed. 2002) ("Most claims of unconscionability fail.").

Traditional unconscionability doctrine "looks to the oppressiveness or one-sided nature of the transaction," evaluating the substantive fairness of the obligations and

burdens that the contract imposes on "one party or … the other," *i.e.*, the actual parties to the contract and before the court. Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 473 (1995). That is, it is a focused assessment of the contract itself,[3] *not* a wide-ranging public policy inquiry. *See, e.g.*, J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1760 (2006) ("unconscionability" is "a doctrine that evaluates an individual contract's fairness"). Indeed, a California appellate court recently stated that it was unaware of "any statute or case authorizing application of the doctrine of unconscionability for the benefit of nonparties to the contract." *Lynwood Redevelopment Agency v. Angeles Field Partners, LLC*, 2009 WL 4690213, at *8 (Cal. Ct. App. Dec. 10, 2009) (unpublished/non-precedential op.).

The Ninth Circuit's analysis bears no resemblance to this narrow doctrine. Rather than testing the fairness of the contract of the parties actually before the court, the court relied on California's supposed public "policy … of deterring and redressing wrongdoing" through class-action litigation. Pet. App. 5a. And rather than applying any of the traditional measures of unconscionability, the court applied a unique "test" that inevitably requires the

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[3] *See, e.g.*, *Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1390 (1996) ("Substantive unconscionability focuses on the actual terms of the agreement…."); *Lovey v. Regence BlueShield of Id.*, 72 P.3d 877, 882 (Idaho 2003) ("substantive unconscionability focuses upon the terms of the agreement itself"); *Knight Adjustment Bur. v. Lewis*, 228 P.3d 754, 757 (Utah App. 2010) ("substantive unconscionability focuses on the terms of the agreement, examining the relative fairness of the obligations assumed" (quotation marks omitted)).

invalidation of any consumer agreement to arbitrate on an individual basis. *Id.* at 7a. Under this "test," a consumer need only file a putative class action *alleging* that the defendant "has carried out a scheme deliberately to cheat" its customers, and her arbitration agreement automatically is rendered unconscionable. This perfunctory "test" requires invalidation of the arbitration agreement no matter what else the plaintiff has received as part of the bargain and no matter what advantages and incentives the arbitration agreement provides. *See id.* at 7a-11a.

The decision below is thus plainly inconsistent with traditional unconscionability doctrine because the court's "test" has nothing to do with the basic fairness of the agreement between AT&T and the Concepcions. Indeed, Judge Bea, the author of the Ninth Circuit's opinion, stated that he understood California law to include "a bizarre component to it that no matter how conscionable to the individual [an arbitration agreement is], the public policy of California is to use class actions." Oral Argument Tr., *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), at 7:55, *at* http://www.ca9.uscourts.gov/datastore/media/2009/09/17/08-56394.wma. The only facts that matter are (1) that the agreement requires arbitration on an individual basis and (2) that the Concepcions alleged widespread fraud. Indeed, the Ninth Circuit effectively acknowledged that the agreement is fair to the Concepcions in that it "essentially guarantee[s] that [AT&T] will make any aggrieved customer whole who files a claim"—which, undeniably, is "a good thing." Pet. App. 11a n.9. This sort of make-whole guarantee, however, is not enough to render the arbitration agreement enforceable under California law, because other parties *not before the court* may choose not to file similar

claims. *Id.* This sort of concern, which has nothing to do with the Concepcions' ability to pursue their own claims or "the actual terms of the agreement" (*Ali*, 46 Cal. App. 4th at 1390), has no basis in traditional unconscionability doctrine (*Lynwood Redevelopment Agency*, 2009 WL 4690213, at *8); it has been created out of whole cloth to invalidate arbitration agreements.

Applying a test lacking any foundation in generally applicable contract law, the Ninth Circuit, unsurprisingly, reached a result fundamentally at odds with existing doctrine. As noted, it has long been the case that a contract is considered "unconscionable" only if it is so unfair and one-sided that it "shocks the conscience"—or that only a "man … under delusion would make" it. A contract that provides aggrieved customers with a make-whole guarantee (Pet. App. 11a n.9) and "that a reasonable consumer may well prefer" (*id.* at 42a) does not even remotely approach this exacting standard.

B. The Ninth Circuit's Analysis Departs From Traditional Unconscionability Doctrine, Which Requires An Assessment Of The Contract's Fairness At The Time It Was Made, Not Second-Guessing At The Time Of Litigation.

It is well-settled that the relevant question under traditional unconscionability doctrine is whether the contract was "unconscionable *at the time the contract [was] made*." RESTATEMENT, *supra*, § 208 (emphasis added); *accord, e.g.*, U.C.C. § 2-302(1); *Williams v. Walker-Thomas Furniture*, 350 F.2d 445, 449 (D.C. Cir. 1965) (Wright, J.) ("[T]he primary concern must be with the terms of the contract considered in light of the circums-

tances existing when the contract was made."). Because "the critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties," "[u]nconscionability cannot be demonstrated by hindsight." *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985). Thus, "[i]t is clear that a proper application of the unconscionability doctrine involves an assessment of the contract *ex ante*, rather than *ex post*. In other words, a court should assess the 'values exchanged' as of the time the contract was formed, rather than as of a later time, such as, the time of a dispute." Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. L. 251, 267-68 (2006); *accord, e.g.*, LORD, *supra*, § 18:12.

The *ex ante* focus is eminently sensible. Contracts typically govern a range of potential events, many of which are unlikely to occur. "To judge the substantive fairness of contracts at a date subsequent to their making could nullify many contracts entailing a speculative element." *Resource Mgmt. Co.*, 706 P.2d 1043. To illustrate this principle, Professor Farnsworth cites a Missouri Supreme Court case holding that an ailing woman's promise to devise a farm valued at $34,400 in return for care during the remainder of her life was not unconscionable even though she died just one month later, so that the value of the services rendered amounted to just one percent of the value of the farm. *Tuckwiller v. Tuckwiller*, 413 S.W.2d 274, 278-79 (Mo. 1967), *cited in* 1 FARNSWORTH, *supra*, § 4.27, at 573 n.3. As that court explained, "in determining whether or not a contract … is unconscionable …, the transaction must be viewed prospectively, not retrospectively." 413 S.W.2d at 278.

Therefore, the relevant question was whether, at the time the contract was made, a promise to provide care for an indefinite period of time—possibly for years—in exchange for the farm was conscience-shocking, and the court properly held that it was not. *See id.* at 278-79.

Thus, a contract cannot be condemned as unconscionable simply because, post-formation, a situation arises in which its provisions disadvantage one side or the other. To do so would ignore that when the contract was made, a variety of outcomes was possible, some more or less likely to occur, some more or less advantageous to the respective parties, etc. This principle matters here because, at the time of contracting, the likely outcome is that no disputes will arise between the customer and AT&T that require arbitration or litigation. In that situation, the arbitration provision is unambiguously mutually beneficial: AT&T benefits from lower dispute-resolution costs, and the customer benefits from the lower prices of goods and services that necessarily result.[4] The customer further benefits because, to the extent that any minor disputes arise, the arbitration provision's

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[4] "[W]hatever lowers costs to businesses tends over time to lower prices to consumers…. [T]he size of the price reduction caused by enforcement of consumer arbitration agreements will vary…. But it is inconsistent with basic economics to question the existence of the price reduction." Ware, *supra*, at 255-56. In an analogous context, this Court has recognized that customers' whose contracts include a forum-selection clause "benefit in the form of reduced [prices] reflecting the savings that [a company] enjoys by limiting the fora in which it may be sued." *Carnival Cruise Line, Inc. v. Shute*, 499 U.S. 485, 594 (1991); *see also, e.g.*, *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) ("arbitration offers cost-saving benefits to telecommunication providers and these benefits are reflected in a lower cost of doing business that in competition are passed along to customers" (quotation marks omitted)).

"Premium" creates a strong incentive for AT&T to resolve the dispute informally. *See* Pet. App. 42a; Pet.'s Br. 5-8.

It is also apparent that the customer benefits from the arbitration provision if a dispute arises that is not resolved informally and is not appropriate for class treatment. In addition to paying reduced prices for goods and services, the customer will then be entitled to pursue arbitration at no cost with a potential recovery of a contractual "Premium" and double attorneys' fees. Indeed, for a small claim not appropriate for class treatment, the arbitration provision may affirmatively provide the only viable mechanism for the customer to pursue her claim. As this Court has recognized, "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

The only scenario in which there is even a question about the fairness of the arbitration provision is the relatively rare instance in which a dispute actually arises that is litigable on a classwide basis. But the overwhelming majority of disputes are *not* appropriate for class treatment. For example, in a Federal Judicial Center study of nearly 300 cases filed as putative class actions, a class was certified in only about 20% of the cases.[5] And

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[5] Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 634-35 (2006); *see also* Administrative Office of the California Courts, *Class Certification in California*, at A1, tbl.A-1 (Feb. 2010) (finding that a class was certified in only 22.3% of 1,294 putative class actions terminated in California state court from 2000 to 2005), *available at* http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf.

that study, of course, consisted only of cases in which the plaintiff's attorney concluded that there were non-frivolous grounds for pursuing class certification; it does not reflect the much larger universe of cases in which class status is never sought because the dispute obviously is not appropriate for class treatment. Thus, the one scenario on which the decision below fixates is, by far, the least likely actually to occur under the contract. And even in that rare scenario, the substantive fairness of the provision is debatable; as the district court concluded, "a reasonable consumer" with a claim litigable as a class action still "may well prefer" AT&T's arbitration provision. Pet. App. 42a.[6]

Under traditional unconscionability doctrine, when there is reasonable debate as to a contract's fairness, it cannot be condemned as conscience-shocking. *See* Part I.A, *supra*. Even more clearly, adopting the *ex ante* perspective that is an indispensable feature of the doctrine, a contract cannot be deemed unconscionable when (1) it unambiguously benefits the complaining party in

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[6] As the district court explained, even certified class actions often settle for "pennies on the dollar with few consumers actually submitting claims" (Pet. App. 42a), and Congress has found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed" (Class Action Fairness Act ("CAFA"), Pub. L. 109–2, § 2(a)(3), Feb. 18, 2005). On the other side of the ledger, a recent study by the Searle Civil Justice Institute at Northwestern University School of Law found that AAA consumer arbitration is inexpensive and expeditious for consumers; in addition, consumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255. *See Consumer Arbitration Before the American Arbitration Association; Preliminary Report*, at xi-xv (Mar. 2009), *available at* http://www.searlearbitration.org/p/full_report.pdf.

the *most likely* outcomes under the contract, and (2) its fairness is debatable only with respect to the *least likely* outcome under the contract.

The decision below reaches a result irreconcilable with generally applicable contract law by improperly adopting an *ex post*, rather than an *ex ante*, view of the contract. Nowhere does the court's opinion acknowledge the benefits to customers who never have a dispute with the company. And only in a footnote does the court grudgingly concede that customers who pursue individual claims are virtually guaranteed to be made whole. Pet. App. 11a n.9. But the clearest evidence of the court's *ex post* approach is its reliance on the customer's underlying allegations that the company engaged in a broad "scheme deliberately to cheat" customers. Pet. App. 7a. For the reasons discussed above, under traditional unconscionability doctrine, the enforceability of a contract cannot possibly depend on the nature of allegations and claims made by a party months or even years after the contract was made. It is nonsensical to say (1) that a contract was "unconscionable *at the time [it was] made*" (RESTATEMENT, *supra*, § 208 (emphasis added)), because, *after the contract was made*, one of the parties alleged widespread fraud—but (2) the same contract was not unconscionable *at the time it was made* because, *after it was made*, only individualized grievances were raised. A contract is either unconscionable at its making or it is not. The nature of a party's allegations in a dispute arising after the contract's formation have nothing to do with "the circumstances existing when the contract was made"—and, thus, nothing to do with unconscionability properly understood. *Williams*, 350 F.2d at 449.

C. The Ninth Circuit's Analysis Departs From Traditional Unconscionability Doctrine, Which Requires Consideration Of The Entire Contract, Not A Blinkered Focus On A Single Term.

Under traditional unconscionability doctrine, a court will refuse to enforce a contract only if "*the sum total of its provisions* drives too hard a bargain for a court of conscience to assist." *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 84 (3d Cir. 1948) (emphasis added).[7] Therefore, "[a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into … the fairness of the contract as a whole." *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 750 (W. Va. 1986); *see also, e.g.*, RESTATEMENT, *supra*, § 208 cmt.c ("gross disparity in values exchanged may be an important factor in a determination that a contract is unconscionable").[8] The Ninth Circuit's analysis fails to comport with this well-settled principle of unconscionability. This particular distortion of the traditional doctrine overlaps to a large degree with those already discussed and provides further confirmation that the decision runs afoul of the FAA.

Rather than analyzing the fairness of the contract as a whole, or assessing whether there was any overall im-

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[7] The classic *Campbell Soup* case is cited both by the RESTATEMENT, *supra*, § 208 cmt.b & Reporter's Note, and by the U.C.C. § 2-302 cmt.1. *Accord, e.g.*, *Waters v. Min Ltd.*, 587 N.E.2d 231, 232-34 (Mass. 1992).

[8] This Court has made a similar point under the FAA: "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce*, 513 U.S. at 281.

balance in values exchanged, the Ninth Circuit focused *exclusively* on the class waiver in the parties' arbitration agreement. Pet. App. 7a-9a. Before it mentioned any other feature of the agreement, the court had already checked each box of its special "test" focused solely on the class waiver and declared the arbitration agreement "unconscionable under California law." *Id.* at 9a. Later in its opinion, the court did acknowledge the agreement's pro-consumer features—but only to explain why those features made no difference under the court's novel unconscionability analysis. *See id.* at 9a-11a. Indeed, in a footnote, the court dismissed as *irrelevant* under California law the fact that the arbitration provision virtually guarantees that any aggrieved customer will be made whole. *See id.* at 11a n.9. And, as noted above, the opinion contains no acknowledgment of the lower prices that necessarily result from a company's reduced litigation costs. *See supra* note 4.

As one commentator explained, even when a relatively "low-quality" (*i.e.*, one-sided) arbitration provision is challenged, the "fail[ure] to consider offsetting benefits to buyers in the form of lower prices" is a "glaring flaw in [a court's] substantive unconscionability" analysis. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1273-74 (2003). This distorted application of the unconscionability doctrine is exemplified by the decision below: It "focus[es] on the utility of the [allegedly] low-quality term to the litigating buyer ex post." *Id.* at 1274. A proper application of traditional unconscionability doctrine, in contrast, must compare "the utility of the *entire contract* to buyers ex ante" to a hypothetical contract that lacks the allegedly unconscionable term but charges a higher price. *Id.* (emphasis added). The dis-

torting effect of a blinkered focus on a single term is compounded when, as in this case, the arbitration provision cannot fairly be characterized as "low-quality," and its "offsetting benefits to buyers" include not only "lower prices" but also features of the arbitration provision that are designed to, and do, make individual arbitration a viable dispute-resolution mechanism. *See* Pet.'s Br. 5-8. Put simply, the Ninth Circuit's refusal to consider these offsetting benefits cannot be squared with the unconscionability doctrine applicable to contracts generally.

II. The Ninth Circuit's Analysis Conflicts With The FAA's Pro-Arbitration Policy.

A. California Law Creates Insurmountable Obstacles To The Enforcement Of Arbitration Agreements.

As the district court explained, the innovative features of AT&T's arbitration provision serve a "noble purpose" because they "virtually guarantee[]" that, "even for claims of questionable merit," AT&T will make whole any aggrieved customer who takes the few minutes necessary to complete a one-page form available on AT&T's website. Pet. App. 39a-40a. The Ninth Circuit was also constrained to concede, albeit in a footnote, that "this is … a good thing." *Id.* at 11a n.9. Moreover, even for claims not resolved prior to arbitration, the provision creates "a substantial inducement for the consumer to pursue the claim in arbitration." *Id.* at 40a. Not surprisingly, then, the district court concluded that "a reasonable consumer may well prefer" AT&T's arbitration provision to the distant possibility of a class action that may yield, if anything, "pennies on the dollar." *Id.* at 42a. As discussed above, hornbook contract law dis-

poses of any contention that such a provision is "unconscionable" for the straightforward reason that a contract cannot be *both* preferable to a reasonable consumer *and* so conscience-shocking that only a delusional consumer would accept it.

In California, however, generally applicable contract law has lost much, if not all, of its relevance in the consumer arbitration context. This is because California has imposed a special obstacle to the enforcement of arbitration agreements: An agreement to arbitrate individually will not be enforced unless the party seeking to enforce it first proves that a class action is unnecessary to deter the underlying "wrongdoing" it is alleged to have committed. Pet. App. 9a-11a, 42a-47a.[9] Applying this novel rule, the district court concluded that AT&T had not produced sufficient "evidence" of arbitral deterrence to overcome "California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct." *Id.* at 44a-46a. Or, as the Ninth Circuit put it, even though "[t]he provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim," it is invalid under California law because "not *every* aggrieved customer will file a claim." *Id.* at 11a n.9 (emphasis added).

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[9] California courts' reversal of the settled rule that "the party asserting unconscionability as a defense has the burden of establishing that condition" (*Woodside Homes of Cal., Inc. v. Super. Ct.*, 107 Cal. App. 4th 723, 727-28 (2003)), is yet another distortion of the generally applicable doctrine. *See also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.").

As discussed above, this novel approach distorts traditional unconscionability doctrine. In addition, it creates serious—if not insurmountable—practical obstacles to the enforcement of arbitration agreements. To begin with, the requirement that the defendant *disprove* the supposed necessity of the "deterrent effect" of a class action implicitly assumes that, if the plaintiff is allowed to avoid his or her obligation to arbitrate, a class will be certified and prevail on the merits, and class members will ultimately recover. This series of assumptions, however, conflicts with the realities of class-action litigation—*e.g.*, that most putative class actions are never certified; that those that are certified often settle for just "pennies on the dollar with few consumers actually submitting claims"; and that, as a result, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." *Supra* pages 12-13 and note 6.

These implicit assumptions also saddle defendants with the untenable burden of disproving the propriety of class certification. This turns on its head the ordinary rule that there is *no* "presumption" in favor of certification and that the *plaintiff's* burden of proof that Rule 23's requirements are met is *not* "a lenient one." *In Re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2009); *see also, e.g.*, *Gen. Tel. Co. v. Falcone*, 457 U.S. 147, 161 (1982) ("[A] … class action … may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."). It is, however, realistically impossible for a defendant to make such a showing in a motion to compel arbitration. Because the right to compel arbitration may be waived by pursuing litigation in court, parties are admonished "to move to compel arbitration at an early stage, before engaging in … discovery." *Berman v.*

Health Net, 80 Cal. App. 4th 1359, 1373 (2000). This makes sense because "discovery would … subject the parties to the very complexities, inconveniences and expenses of litigation that they determined to avoid" in arbitration. *Suarez-Valdez S.A. v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648, 649-50 (11th Cir. 1988) (Tjoflat, J., concurring). Yet the very discovery that arbitration is intended to avoid "is often *necessary*" to resolve the issue of class certification. FED. R. CIV. P. 23, Advisory Committee Notes, 2003 Amendments (emphasis added). Thus, on a motion to compel arbitration, the Ninth Circuit's presumption that class treatment is appropriate is effectively irrebuttable.

The Ninth Circuit's approach is also contrary to the "very purpose" of the FAA in that it requires the defendant to negate an assumption that it has engaged in "wrongdoing" that requires "deterrence" *before* its right to arbitrate the merits of the *only* basis for that assumption—the plaintiff's allegations—will be enforced. *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1274 (2009) ("[The FAA's] very purpose is to have an arbitrator, rather than a court, resolve the merits."); *cf. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (courts may not rely on "public policy" as a basis for addressing the merits of an arbitral dispute). This sort of one-sided, preliminary consideration of the substantive allegations also conflicts with "Congress' clear intent … to move the 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).

Moreover, the defendant's burden to prove that "arbitration … is an adequate substitute for the deterrent

effect of the class action mechanism"—*i.e.*, a sufficient "incentive to stop [the defendant's presumed] wrongdoing" (Pet. App. 45a)—is also a practical impossibility. As an initial matter, it indulges the fiction that class-action plaintiffs' attorneys who believe they have identified actionable wrongdoing will postpone filing suit to see whether arbitration proves an "adequate … deterrent." The reality, of course, is that the first hint of a colorable claim triggers a "race to the courthouse" among lawyers hoping to land a leading role in the litigation and a share in any attorneys' fees. Thus, if a defendant promptly moves to compel arbitration in response to the typical putative class action, it will be impossible for it to show that the plaintiff's allegations are already being addressed in arbitration.

Finally, it is unclear how a defendant could ever prove to the Ninth Circuit's satisfaction that arbitration is an "adequate … deterrent" to its own "wrongdoing" (Pet. App. 45a) short of ceasing whatever practice is alleged to be unlawful. In addition to further illustrating the impossibility of California's test, this line of reasoning conflicts with the FAA by requiring the defendant, in effect, to admit that it has acted unlawfully simply to obtain enforcement of its agreement to arbitrate. *Preston*, 552 U.S. at 355-56.

In sum, California's novel and elusive approach to unconscionability not only imposes seemingly insurmountable obstacles to the enforcement of tens of millions of arbitration agreements but also, by imposing such onerous burdens on defendants seeking to enforce arbitration agreements, "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275.

B. Class Actions Are Inherently Incompatible With Arbitration.

Just last Term, this Court recognized that (1) the advantages of arbitration, which have been repeatedly touted by Congress and this Court, are "much less assured" in class arbitration; (2) imposing class-wide procedures "fundamental[ly] changes" the nature of arbitration; and (3) given the increased stakes and limited judicial review, parties cannot be presumed to have consented to class arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775-76 (2010). The Court was correct. In fact, as explained below, the advantages of arbitration are nonexistent in the class setting; class-wide procedures are inherently incompatible with core features of arbitration; and no rational defendant would willingly agree to the procedure. Thus, California's insistence that consumer arbitration agreements allow class arbitration is not merely a requirement that certain procedures be available in arbitration (though it is preempted by the FAA for that reason alone);[10] rather, it is an attack on arbitration itself, an effort to "chip away at [the FAA] by indirection." *Adams*, 532 U.S. at 122.

1. The Advantages Of Arbitration Do Not Exist In Class Arbitration.

The Court recently reiterated that the fact "that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow

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[10] *See, e.g.*, *Stolt-Nielsen*, 130 S.Ct. at 1774 (reiterating that "parties are generally free to structure their arbitration agreements as they see fit," including "agree[ing] on rules under which any arbitration will proceed" (quotation marks omitted)).

inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1471 (2009) (emphasis added). "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 130 S.Ct. at 1775. These advantages of traditional, individual arbitration do not exist in class arbitration, which by its nature is protracted, complex, and expensive.

First, in contrast to the informality, streamlining, and expedition that are hallmarks of individual arbitration, class arbitration requires complex procedures that blur the distinction between litigation and arbitration. For example, the AAA's class arbitration rules largely copy the Federal Rules of Civil Procedure. *See* AAA, Supplementary Rules for Class Arbitrations, *at* http://www.adr.org/sp.asp?id=21936. Therefore, just as in court, class arbitration requires discovery, full briefing, an evidentiary hearing, and a written ruling on class certification. If a class is certified, absent class members must be notified and given an opportunity to opt out. *Id.*, Rule 6. The parties must then engage in protracted and expensive merits discovery typical of high-stakes class litigation. And, finally, there must be a full hearing—with an opportunity for the defendant to present individualized defenses—and a written award on the merits. *Id.*, Rule 7. Alternatively, if there is a settlement, there must be another round of notice to class members, an opportunity to file objections, more briefing, a fairness hearing, and a written ruling. *Id.*, Rule 8.

As these procedures suggest, the cost savings of individual arbitration do not translate to class arbitration. Indeed, given that it entails substantial arbitrators' fees that have "no equivalent in a traditional, judicial class action," class arbitration may prove more expensive than its judicial counterpart. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 64 (2007). At minimum, it is clear that, unlike individual arbitration, it is *not* a "less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

The emerging data on class arbitration confirm that the procedure is just as cumbersome as a judicial class action, if not more so. Indeed, the AAA's own statistics show that "the median time frame from filing [a AAA class arbitration] to settlement, withdrawal, or dismissal is 583 days with a mean of 630 days."[11] While 19–21 months might be a reasonable period in which to resolve the merits of a class dispute, that is not what these statistics reflect. Rather, 85% of the cases included in the average were terminated *before any ruling on class certification*—and *none* "resulted in a final award on the merits." AAA *Stolt-Nielsen* Brief at 24. Thus, like its court-administered counterpart, a class arbitration is likely to take years to complete.

The delay inherent in class arbitration is in stark contrast to the speed and efficiency of individual consumer arbitration, which, on average, results in an award

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[11] Brief of the AAA as *Amicus Curiae* in Support of Neither Party, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), at 24 [hereinafter, "AAA *Stolt-Nielsen* Brief"], *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1198_NeutralAmCuAAA.pdf.

on the merits in only six months—only four months if a customer elects to have the case decided on documentary submissions alone.[12]

In short, class arbitration offers none of the advantages of traditional arbitration—*e.g.*, its speed, low cost, and streamlined proceedings—that both Congress and this Court have recognized are helpful to business and consumers alike.

2. Arbitration Lacks The Safeguards And Judicial Oversight That Are Indispensable To Class Litigation.

The judicial oversight that accompanies class-action litigation also guarantees certain protections that benefit both plaintiffs and defendants. Defendants benefit from procedural mechanisms that end meritless litigation before discovery or trial and a judge with no financial incentive to certify a class. Both sides benefit from full appellate review at all critical stages of the litigation. Finally, class members benefit from judicial protection of their due-process rights, which also provides defendants with assurance that absent class members will be bound by the result. None of these protections is assured in arbitration, and some are nonexistent.

i. This Court has imposed pleading standards in class actions designed to ensure that meritless cases are dismissed at an early stage before a defendant is subjected to expensive and protracted discovery. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Rei-*

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[12] AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, *at* http://www.adr.org/si.asp?id=5027.

ter v. Sonotone Corp., 442 U.S. 330, 345 (1979) ("District courts must be especially alert to identify frivolous [class actions] brought to extort nuisance settlements…."). Motions to dismiss and motions for summary judgment are thus common methods for disposing of legally and factually deficient lawsuits short of trial. In arbitration, however, dispositive motions are disfavored; indeed, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 113 (2003). This characteristic of arbitration likely is an extension of the common wisdom that an award may be vacated because the arbitrator refused to hear enough evidence but never because he or she heard too much. *Cf.* 9 U.S.C. § 10(a)(3). In any event, in individual arbitration, this procedural limitation is widely accepted as part and parcel of arbitration's informality and streamlined proceedings. In class arbitration, however, the likely unavailability of early dispositive motions exposes defendants to the expense of discovery and even a merits hearing on meritless claims. *Cf. Twombly*, 550 U.S. at 559 ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases")

ii. In addition, class arbitration creates the special problem that arbitrators have powerful financial incentives to certify a class. Put simply, arbitrators, who are compensated based on the amount of time they devote to a case, stand to earn far more if they allow a class arbitration to proceed than if they do not. Clancy & Stein, *supra*, at 73-74. As this Court has recognized, a party "might … with reason" fear a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against him." *Tumey v. Ohio*, 273 U.S. 510, 523, 533 (1927).

Reinforcing this concern, the AAA's statistics indicate that arbitrators are in fact more likely to certify a class than either federal or state judges. Arbitrators granted 24 of the first 42 contested class-certification motions filed under the AAA Rules—a grant rate of 57.14%. *See* AAA *Stolt-Nielsen* Brief at 22. In contrast, in a Federal Judicial Center study on the impact of CAFA, federal judges granted only 18 of 62 contested class-certification motions—a rate of only 29.03%. Willging & Wheatman, *supra*, at 634-35. In the same study, state judges granted 12 of 27 contested motions—a rate of 44.44%. *Id.* Thus, AAA arbitrators appear nearly *twice* as likely to grant class certification as federal judges, and significantly more likely to certify a class than even state court judges—the very judges whose "[a]buses" provoked CAFA's enactment (CAFA § 2(a)(4)).

In light of such incentives and evidence, most if not all defendants will choose federal courts, where they "have no reason to suppose that [the district judge] *wants* to preside over an unwieldy class action." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

iii. The extremely narrow scope of judicial review of arbitrators' class-certification decisions and final awards on the merits also poses intolerable risks for defendants. As this Court recently held, section 10 of the FAA lists the "exclusive" grounds for vacating an award, all of which "address egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Courts may *not* engage in "legal review generally." *Id.* In the context of individual arbitration, this

limitation is necessary "to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. "If … parties who lose in arbitration [could] freely relitigate their cases in court, … dispute resolution [would] be slower instead of faster[,] and reaching a final decision [would] cost more instead of less." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907 (11th Cir. 2006).

In a class arbitration, however, the vastly increased stakes coupled with narrow judicial review amplify the cost of arbitrator error to an unacceptable level. As Justice Scalia put the problem: "You might not want to put your company's entire future in the hands of one arbitrator." Oral Argument Tr., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_02_634/argument; *see also Stolt-Nielsen*, 130 S.Ct. at 1776 ("[T]he commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited."). No rational business will do so willingly.

Moreover, even in court, a class-action defendant faced with such significant potential liability is "under intense pressure to settle" (*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298-1299), "even if the [plaintiffs'] position is weak" on the merits (*Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001)). In arbitration, the lack of meaningful review—both at the class-certification stage and on the merits—intensifies this pressure and exacerbates the problem of "blackmail settlements." Indeed, a prominent plaintiffs' attorney speaking at an American Trial Lawyers Association convention touted that "decision[s] by the arbitrator with

respect to class certification and an ultimate award are virtually non-appealable" as "a feature which terrifies corporate defendants." Clancy & Stein, *supra*, at 71; *cf. Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172 (3d Cir. 2010) (en banc) (rejecting plaintiffs' argument that the enforceability of a class waiver should be determined by the arbitrator, not the court).

In an apparent attempt to address one aspect of this problem, the AAA authorizes the parties to pursue interlocutory judicial review of arbitrators' class-certification decisions, describing the opportunity as "akin to … interlocutory appellate review of district court class certification decisions." AAA *Stolt-Nielsen* Brief at 19. This comparison is inapt because the arbitrator's decision is reviewable only on the narrow grounds specified in 9 U.S.C. § 10; more searching review "akin to" federal appellate review under Fed. R. Civ. P. 23(f) appears to be foreclosed by *Hall Street*. Thus, the review contemplated by the AAA rules remains an inadequate safeguard.

iv. Finally, it remains uncertain whether class arbitration is capable of protecting class members' due-process rights and producing legally binding results. Most courts have held that due-process protections do not apply to private arbitration because the parties "voluntarily" consent to the arbitral process. *E.g.*, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991). How this reasoning applies to class arbitration remains unclear. For example, do absent class members "voluntarily" consent to a class arbitration, even if they never receive actual notice of its pendency? If not, will an arbitration that fails to "provide minimal procedural due process protection" bind

absent class members? *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Are arbitrators even capable of providing such protections? *See generally, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (2006) (concluding that, without significant ongoing judicial supervision, they are not).

As this Court has recognized, whether a class-action defendant "wins or loses on the merits, [it] has a distinct and personal interest in seeing the entire plaintiff class bound by [the judgment] just as [it] is bound." *Shutts*, 472 U.S. at 805. No rational defendant will agree voluntarily to a procedure that involves all the same risks and potential liability of a class action without the concomitant assurance that the result will bind absent class members.

C. California Courts Have Undermined The FAA By Creating Unpredictability In The Law.

While most courts enforce arbitration provisions like AT&T's, which offer a fair and viable mechanism for resolving disputes on an individual basis, courts in California and a handful of other states have not. This unpredictability in the law significantly undermines the certainty and value of the federal right to enforcement of arbitration agreements for businesses with customers dispersed regionally or nationally.[13] It is therefore es-

[13] This unpredictability is exacerbated by the Ninth Circuit's heads-I-win-tails-you-lose rulings that, on one hand, a non-California company cannot specify that the law of its home state governs its contracts with California residents because of California's supposedly "materially greater interest" in those contracts

sential that the Court make clear that such provisions are enforceable *as a matter of federal law*.

To be sure, the FAA does permit courts to apply generally applicable state contract law to arbitration agreements and thus allows for *some* degree of variation in their interpretation and enforcement. In general, however, this causes few difficulties because "contract law is not at its core diverse, nonuniform, and confusing." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995) (quotation marks omitted). The relative uniformity of state contract law promotes the FAA's purpose of making arbitration agreements predictably enforceable.

"Unconscionability," however, "is one of the most amorphous terms in the law of contracts" (7 PERILLO, *supra*, § 29.1, at 377), and courts in California and a handful of other states have seized on this aspect of the doctrine as an opportunity to evade the FAA. These courts have misapplied the doctrine to invalidate arbitration agreements not because of any "gross imposition on the particular [plaintiff] at issue"—the traditional, generally applicable basis for a finding of unconscionability—but based instead on "broadly based considerations of public policy." Bruhl, *supra*, at 1443-44. These decisions conflict with this Court's recent reaffirmation that,

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(*Omstead v. Dell, Inc.*, 594 F.3d 1081, 1086 (9th Cir. 2010) (Texas company); *Oestreicher v. Alienware Corp.*, 322 F. App'x 489 (9th Cir. 2009) (Florida company)), while, on the other hand, a California company cannot specify that the laws of its nonresident customers' home states govern their contracts because of California's supposedly "materially greater interest" in the company's conduct (*Masters v. DirecTV, Inc.*, 2009 WL 4885132 (9th Cir. Nov. 19, 2009)). The ultimate result in all these cases was to invalidate a consumer agreement requiring individual arbitration.

under the FAA, "the enforceability of [an] arbitration agreement [cannot] turn on [state] public policy." *Buckeye*, 546 U.S. at 446 (quotation mark omitted). Moreover, as Justice Ginsburg observed, "public policy has been called an unruly horse." Oral Argument Tr. at 34, *Buckeye*, 546 U.S. 440. If this previously stabled horse is allowed out of the barn under the cover of "unconscionability," decades of FAA jurisprudence will be quickly and easily subverted. *Cf. Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959) (the FAA was enacted to overrule "a great variety" of judicial "devices and formulas" declaring arbitration agreements "against public policy").

For this reason, courts' misuse of the unconscionability doctrine to advance broad "public policy" goals has created substantial unpredictability in arbitration law. This is problematic because businesses often use the same arbitration agreement in customer contracts nationwide. Thus, identical or near-identical provisions have been upheld in many jurisdictions while being invalidated in others. As a result, it has become impossible to advise clients reliably as to how to draft arbitration agreements that will be fair and "universally enforceable." *Allied-Bruce*, 513 U.S. at 279. In *Southland*, this Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." 465 U.S. at 15. That, however, is precisely the result of courts' misuse of the unconscionability doctrine.

D. A Ruling Enforcing The Pro-Consumer Arbitration Provision At Issue Would Promote The Federal Policy Favoring Arbitration.

The "third-generation" arbitration provision at issue in this case represents the culmination of an evolution of consumer arbitration provisions. *See* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 508-09, 512-16 (2009). Apparently taking its cues from decisions invalidating "first-generation" and "second-generation" provisions, AT&T revised its arbitration agreement to, among other things, make available the "Premium" and "Attorney Premium." *See id.* at 512-16; Pet.'s Br. 5-8. No arbitration provision is more pro-consumer than AT&T's. As the district court found, AT&T's provision "provides sufficient incentive for individual consumers with disputes involving small damages to pursue (a) the informal claims process to redress their grievances, and (b) arbitration in the event of an unresolved claim." Pet. App. 42a. Thus, there can be no question that an individual customer "effectively may vindicate his or her" claims under the provision. *Randolph*, 531 U.S. at 90 (alteration omitted). What is at issue, then, is *not* a fact-bound unconscionability determination but rather a *per se* rule that consumer contracts calling for traditional arbitration on an individual basis are invalid. As Judge Reinhardt put it, while "California courts [have] said that [such agreements are] not always invalid, … I don't think they've ever found one that was okay." *Laster* Oral Argument Tr., *supra* page 8, at 17:33.

The Ninth Circuit's *per se* rule could not be more inimical to the FAA's "congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. As this Court has recognized, "Congress, when enacting [the FAA], had the needs of consumers … in mind." *Allied-Bruce*, 513 U.S. at 280. This is because "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Id.* Innovative arbitration provisions like AT&T's promote this congressional goal by ensuring that arbitration is, in fact, "helpful to individuals" and "a less expensive alternative to litigation." A ruling that such a provision is enforceable as a matter of "federal substantive law" (*Moses H. Cone*, 460 U.S. at 24) would further the FAA's pro-arbitration policy by encouraging additional companies to adopt similarly pro-consumer arbitration provisions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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