No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Class-action bans—contract provisions that deny the right to pursue classwide relief, whether through litigation or arbitration—are invalid in some circumstances under generally applicable state contract law. Is such state law preempted by the FAA when the class-action ban to which it is applied is embedded in an arbitration agreement?

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INTRODUCTION

In recent years, this Court has repeatedly denied petitions for certiorari raising the question presented here—including a previous petition arising out of this very litigation. *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008), No. 07-976. Just three months ago, in *Athens Disposal Company v. Franco*, 130 S. Ct. 1050 (2010), No. 09-272, the Court denied another petition on the question, and it should do the same here.[1]

Every federal circuit and every state supreme court to confront the question presented has held that the Federal Arbitration Act (FAA) does not preclude courts from striking down particular class-action bans as unconscionable under generally applicable state contract law. These courts include the First, Third, Ninth, and Eleventh Circuits, and the highest state courts of Alabama, California, Illinois, Massachusetts, New Jersey, New Mexico, North Carolina, Washington, and West Virginia. In light of that unanimity, the federal-preemption question is unimportant and unworthy of this Court's review.

AT&T's petition is even less certworthy than T-Mobile's recent petitions, which likewise relied on a purported conflict created by dicta in *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007). The Third Circuit has now made clear that it agrees with all of the other courts: So

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[1] Other recently denied petitions on the question presented include *T-Mobile USA, Inc. v. Janda*, 129 S. Ct. 45 (2008), No. 07-1331; *T-Mobile USA, Inc. v. Lowden*, 129 S. Ct. 45 (2008), No. 07-1330; *T-Mobile USA, Inc. v. Ford*, 128 S. Ct. 2503 (2008), No. 07-1103; *T-Mobile USA, Inc. v. Gatton*, 128 S. Ct. 2501 (2008), No. 07-1036; *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008), No. 07-988; and *County Bank of Rehoboth Beach, Del. v. Muhammad*, 127 S. Ct. 2032 (2007), No. 06-907.

long as the defense of unconscionability is employed as "a general contract defense, one that applies to all waivers of class-wide actions, not simply those that also compel arbitration," then "there are no grounds for FAA preemption." *Homa v. American Express Co.*, 558 F.3d 225, 229-230 (3d Cir. 2009). AT&T also claims a conflict with *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001), but that case did not even discuss the question presented.

Finally, AT&T's petition relies heavily on the premise that this case involves a revised arbitration agreement that, among other things, permits recovery of attorneys' fees. While such a revision may be relevant to the state-law enforceability analysis, it has no bearing on FAA preemption, and AT&T cites no authority suggesting otherwise. But even if the revision did make a difference, as AT&T contends, this case is a poor vehicle to explore the question because AT&T's revised agreement was formulated and unilaterally imposed on the plaintiffs *after* this lawsuit was filed. As AT&T acknowledged below, the question whether the revised agreement applies under these circumstances is a "threshold question" of state contract law that is logically antecedent to the question presented. *Cf. Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (failing to reach question presented under the FAA in light of an antecedent question of state contract law). For this reason, too, the petition should be denied.

STATEMENT

This petition arises out of consolidated class actions brought by respondents Jennifer Laster, Andrew Thompson, Elizabeth Voorhies, Vincent Concepcion, and Liza Concepcion, against several cellular phone companies, including T-Mobile and AT&T. Respondents allege

that the phone companies, in violation of state consumer-protection laws, charged consumers sales tax on the full retail value of cellular phones that they advertised as "free."

1. Laster, Voorhies, and Thompson sued AT&T (then known as Cingular) and T-Mobile in May 2005. Both companies moved to compel arbitration and invoked class bans in their arbitration agreements. Relying on *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1110 (Cal. 2005), the district court determined in November 2005 that AT&T's and T-Mobile's class bans were unconscionable under generally applicable California contract law and that the FAA did not preempt that determination. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1192 (S.D. Cal. 2005).

AT&T and T-Mobile appealed. Before the appeal was decided, the Ninth Circuit held in another case that AT&T's class ban was unenforceable under California law and that the FAA did not preempt that holding. *Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 978 (9th Cir. 2007). In response, AT&T dropped its appeal. Pet. App. 26a. In T-Mobile's appeal, the Ninth Circuit followed *Shroyer* and affirmed the district court. *T-Mobile USA, Inc. v. Laster*, 252 Fed. Appx. 777 (9th Cir. 2007).

T-Mobile then filed a petition for certiorari on the FAA preemption issue, which this Court denied. *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (07-976). AT&T took the unusual step of filing an *amicus* brief recommending that the Court deny its co-defendant's petition. AT&T argued that review would be premature and unnecessary given the absence of a circuit split and would interfere with the ongoing evolution of class bans and the state law concerning their enforce-

ability. AT&T observed that the preemption issue was "certain to be much murkier than it would be in a case in which it is clear that the State has adopted an essentially per se rule against the enforcement of class waivers." AT&T Amicus Br. in *T-Mobile USA, Inc. v. Laster*, No. 07-976, at 6.

2. While the first appeal was pending, the district court granted AT&T's request to consolidate the ongoing litigation with an action filed in March 2006 by Vincent and Liza Concepcion, raising the same allegations against AT&T. The Concepcions first purchased their telephone service from AT&T in 2002. At the time they filed suit, their wireless service agreement included AT&T's then-standard arbitration clause, including the class ban. Pet. App. 19a-20a.

Nine months after the Concepcions filed suit, AT&T sought to unilaterally modify the terms of its contract with the Conceptions. Invoking a "change-in-terms" provision in its agreement, AT&T sent the Concepcions a notice of revision in the envelope containing their monthly bill. Pet. App. 20a. The notice included provisions under which AT&T would pay a California customer attorneys' fees and $7,500 (the amount of the maximum claim that could be brought in small claims court) if the arbitrator issued an award in favor of the consumer exceeding AT&T's last written settlement offer made before the selection of the arbitrator. Pet. App. 21-22a. It is unclear from the record whether the Concepcions actually received the notice.

In March 2008, AT&T moved to compel the Concepcions to arbitration. The plaintiffs argued that the applicable agreement was "the one that existed at the beginning of the lawsuit in March 2006," and had already been held unenforceable. Pet. App. 28a. Although the district

court found the revised agreement applicable, *id.* 28a-30a, the revision did not alter the outcome of its state-contract-law unconscionability analysis. Pet. App. 30a-46a. With respect to FAA preemption, the court adhered to its November 2005 decision, from which T-Mobile had previously appealed and petitioned for certiorari. *Id.* 47a n.11.

The Ninth Circuit again affirmed. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009). On appeal, AT&T acknowledged that, if the difference between the pre-2006 and post-2006 agreements would affect the outcome as it claimed, then the validity of the 2006 revision presented a "threshold question" of California law. AT&T Reply Br. in *Laster v. AT&T Mobility*, No. 08-56394 (9th Cir.) at 1. The Ninth Circuit concluded that AT&T's premium-payment and attorneys' fees clauses would not change the underlying value of the claims at issue or the analysis under *Discover Bank*. "The *Discover Bank* rule," the court explained, "focuses on whether damages are predictably small and, in the end, the premium payment provision does not transform a $30.22 case into a predictable $7,500 case." App. 9a-11a. The court also rejected AT&T's preemption theory, explaining that "*Shroyer* controls this case because AT&T makes the same arguments we rejected there." *Id.* 12a.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Concerning The Question Presented Because No Court Has Adopted AT&T's Theory of FAA Preemption.

AT&T asserts that the "[l]ower [c]ourts [a]re [d]ivided" and in "disarray" over "whether, and if so, when, the FAA preempts state-law limitations on class waivers in arbitration provisions." Pet. 17, 20. In fact, the lower courts are unanimous: No appellate court, state or

federal, has held that "the FAA preempts state-law limitations on class waivers in arbitration provisions." *Id.* AT&T attempts to create the illusion of a split in three ways—by failing to mention the accumulating body of cases addressing the question presented, relying on two cases that did not decide the question at all, and conflating the *federal-law* question of FAA preemption with the *state-law* question of enforceability under general contract law.

A. Every Court That Has Decided the Question Presented Has Reached the Same Conclusion.

Every federal circuit and state court of last resort to have decided the question has reached the same conclusion: The FAA does not preclude courts from striking down particular class-action bans under generally applicable state contract law.

The courts of last resort in at least nine states—Alabama, California, Illinois, Massachusetts, New Jersey, New Mexico, North Carolina, Washington, and West Virginia—have squarely reached that conclusion. *See Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762-68 (Mass. 2009); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008-09 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006); *Muhammad v. County Bank of Rehoboth, Del.*, 912 A.2d 88, 94-96 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007); *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1110-17 (Cal. 2005); *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002).

Intermediate courts in states including Missouri, Oregon, and Wisconsin have agreed.[2]

The federal circuits that have decided the question presented have come to the same conclusion. The First, Third, Ninth, and Eleventh Circuits have all held that the FAA does not preempt determinations that class-action bans are invalid under state law. *See, e.g., Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (New Jersey law); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1219-22 (9th Cir. 2008) (Washington law), *cert. denied*, 129 S. Ct. 45 (2008); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 57-59 (1st Cir. 2007) (Massachusetts law); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007) (California law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (Georgia law); *see also Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010) (certifying question whether a class ban is enforceable under Florida law to the Florida Supreme Court).

B. Neither The Third Circuit Nor the Tennessee Court of Appeals Have Created a Conflict.

Against the unanimous position of the many courts that have actually decided the question presented, AT&T pits two cases, one from the Third Circuit and the other from Tennessee's intermediate state court. Neither case creates a conflict, however, because neither case decided a question of FAA preemption of state contract law.

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[2] *See Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 746 (Wis. App. 2007), *review denied*, 737 N.W.2d 432 (Wis. 2007); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308, 310 (Mo. App. 2005).

1. AT&T's reliance on *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), echoes the principal argument made in T-Mobile's earlier petition in this litigation. *See* Pet. for Cert. in *T-Mobile USA, Inc. v. Laster*, No. 07-976. *Gay*, however, disposed of an unconscionability claim solely on the basis of *Virginia law*, not FAA preemption. 511 F.3d at 391-92. The opinion's discussion about the potential preemption of Pennsylvania law, which it had already determined to be inapplicable, was purely speculative and was based on an expansive reading of state trial-court rulings that have been discredited by the Pennsylvania Supreme Court. *Id.* at 392 (citing *Lytle v. CitiFinancial Services, Inc.*, 810 A.2d 643 (Pa. Super. Ct. 2002)); *see Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 129 (Pa. 2007) (concluding that *Lytle* "swept too broadly" and reflected an improper presumption in favor of unconscionability).

AT&T's petition is even less certworthy than T-Mobile's because the Third Circuit has now made clear that a determination that a class-action ban is unconscionable under generally applicable contract law is not preempted, and that *Gay* does not hold otherwise. *See Homa*, 558 F.3d at 229-230 ("The defense *Muhammad* provides [under New Jersey law] is a general contract defense, one that applies to all waivers of class-wide actions, not simply those that also compel arbitration. Therefore, there are no grounds for FAA preemption.") (relying on *Lowden v. T-Mobile*, 512 F.3d 1213).

Undeterred, AT&T speculates that the Third Circuit might follow *Gay*'s dicta "the next time a case governed by Pennsylvania law is before it." Pet. 19. That speculation entirely overlooks recent Third Circuit decisions upholding arbitration agreements containing class-action bans under Pennsylvania law. *See, e.g., Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009)

("We have little difficulty concluding that Kaneff's agreement to arbitrate would not be considered unconscionable under Pennsylvania law."); *see also Cronin v. CitiFinancial Services, Inc.*, 352 Fed. Appx. 630, 635 (3d Cir. 2009) (describing *Gay*'s discussion of Pennsylvania law as dicta and "conclud[ing] that the class action waiver provision in the parties' arbitration agreement is not unconscionable under Pennsylvania law.").

2. AT&T's reliance on the nine-year-old decision of the Tennessee Court of Appeals in *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001), is even further afield. *Pyburn* did not touch on the question presented. The plaintiff in *Pyburn* claimed that a class-action ban was inconsistent with a *state statute* (the state's consumer-protection law), not a generally applicable contract-law defense. The Tennessee court resolved that challenge entirely on state-law grounds, finding no inconsistency with the state statute. *Id.* at 354.

In the passage upon which the petition seizes, the court went on to speculate that "[e]ven if we were to conclude that the Tennessee Legislature specifically intended" to preclude class bans in arbitration, federal law "would" bar invalidation of the agreement on that basis. *Id.* at 365. The court properly noted that enforceability of an arbitration agreement under FAA section 2 depends on whether the agreement is in a written contract involving commerce and whether it is subject to revocation under general state contract law. *Id.* at 364-65. Because the plaintiff invoked none of these grounds, his claim failed. *Id.* at 364 ("In our opinion, whether the unavailability of class action relief would violate the intent of a State legislature is not a relevant consideration . . . under the FAA.").

Pyburn, in short, created no conflict on the question presented because it did not discuss the question at all. Whether the FAA would have barred a hypothetical Tennessee statute that had the effect the plaintiff claimed is an entirely separate question from whether the FAA trumps the application of general contract law. Accordingly, neither of the two cases cited by AT&T support its claim of a split, much less the "disarray" of which AT&T complains. Pet. 20.

C. AT&T's Petition Conflates the Federal Question of Preemption with the State-Law Question of Enforceability Under Generally Applicable Contract Law.

In addition to distorting *Gay* and *Pyburn*, AT&T's petition repeatedly attempts to create the illusion of a conflict by conflating the federal-law question of FAA preemption with the state-law question of enforceability under generally applicable contract law. The petition thus leaps from statements describing the issue of the enforceability of class bans under *state law* as "hotly contested" and "important" to the conclusion that the preemption question under *federal law* is hotly contested and important. Pet. 24. But when nine state supreme courts and four federal appellate courts over nearly a decade have consistently rejected a particular legal theory, and no courts have reached the opposite conclusion, one cannot sensibly describe that legal theory as hotly contested or sufficiently important to warrant this Court's review.

Along similar lines, AT&T's petition includes an appendix that supposedly demonstrates that most states would uphold its class-action ban, thus suggesting that the decision below is an outlier. Pet. App. 63a-69a. But the decisions are grouped based only on *state-law* en-

forceability determinations, not federal preemption. Moreover, the appendix is highly selective, relying chiefly on unpublished federal district-court decisions and citing many cases that did not involve unconscionability challenges at all. Most of the states listed in AT&T's appendix are those in which the state's highest court has decided neither the enforceability nor the preemption question. Finally, the appendix lists Alabama, Georgia, Illinois, and West Virginia, omitting binding state supreme court and federal appellate precedent squarely holding that the FAA does not preempt those state's determinations that particular class-action bans are unconscionable. *See Leonard*, 854 So. 2d at 535-36; *Dale*, 498 F.3d at 1219; *Kinkel*, 857 N.E.2d at 260-63l; *Dunlap*, 567 S.E.2d at 272 n.3.

Faced with the complete absence of a conflict on the question presented, AT&T falls back on a prediction that the development of "disagreement among the lower courts is highly unlikely." Pet. 21. But absent a split, that concession is a sound reason to deny the petition—not to grant it.

AT&T speculates that courts "generally would have no need to reach the FAA preemption issue unless they first were to conclude that the applicable state law would bar enforcement of the arbitration provision." *Id.* In fact, a large number of appellate courts have addressed the preemption issue precisely because they have found particular class bans unconscionable. And, in any event, courts frequently address the FAA preemption issue *before* resolving the state-law unconscionability issue. *See Pendergast*, 592 F.3d at 1113 & n.13 (explaining that Florida law controls and that the FAA permits the plaintiff to challenge a class-action ban under the generally applicable contract-law defense of unconscionability, without deciding enforceability); *Kinkel*, 857 N.E.2d at

260 ("If plaintiff's claim is preempted by federal law, we need go no further in our analysis of the class action waiver."); *Muhammad*, 912 A.2d at 96 ("Because federal arbitration law does not prevent us from examining the validity of the class-arbitration waiver, we turn then to our state law requirements in respect of contract unconscionability.").

Contrary to what AT&T says, then, there *is* good reason to expect that the steady stream of appellate decisions on the FAA preemption question will continue. Unless and until one of those decisions actually agrees with AT&T's preemption theory, however, the question presented will remain unworthy of this Court's review.

II. This Case Is a Poor Vehicle to Address the Question Presented.

AT&T claims that this case is "a better vehicle for resolving the preemption issue" than the petitions in *Laster* and *Lowden* (in which the Court recently denied certiorari) because the arbitration agreements in those cases "did not allow for recovery of statutory attorneys' fees." Pet. 16 n.7. Indeed, AT&T's preemption theory rests on its view that the distinction between the two types of arbitration agreements makes a difference to the FAA preemption question. That view is wrong. Although the claimed fairness of AT&T's arbitration agreement (which the Ninth Circuit explained is illusory) may be pertinent to whether it is in fact unconscionable under state contract law, it has no bearing on whether the FAA preempts a finding that a class ban is unconscionable under state contract law, and AT&T cites no authority even suggesting that such factors bear on the preemption analysis.

But even if AT&T's supposedly new and improved agreement could somehow make a difference to the pre-

emption analysis, this would not be the proper case in which to explore the question because of the lingering and unresolved state-law question whether the new agreement even applies to this case. At the time the Conceptions filed suit in March 2006, the arbitration agreement in place did not allow for the recovery of statutory attorneys' fees. Nine months later, AT&T sent the Conceptions a bill stuffer purporting to revise the agreement to include the attorney-fee provision. The notice stated that "[c]ustomers whose contracts include arbitration provisions that differ from this current arbitration provision, may, of course, arbitrate pursuant to the terms of those contracts if they prefer to do so." Pet. App. 56a. The notice did not inform customers that any action was necessary if they "prefer[red]" not to accept the new terms. *Id.*

Both in the district court and the Ninth Circuit, the plaintiffs argued that, as a matter of California law, the agreement in place at the time the suit was filed was the applicable agreement. Pet. App. 28a-30a. On appeal, AT&T acknowledged that, because AT&T believed the difference between the pre-2006 and post-2006 agreements should affect the outcome, the validity of the 2006 revision presented a "threshold question" of California law. AT&T Reply Br. in *Laster v. AT&T Mobility,* No. 08-56394 (9th Cir.) at 1. The Ninth Circuit concluded that the revision did not alter its state-law enforceability or FAA-preemption analysis. Pet. 9a-11a, 12a-16a.

The California Supreme Court has not resolved the question whether and to what extent a post-litigation bill stuffer can be used to alter the rights of parties to pending litigation. Below, AT&T relied on dicta in two California cases. *See* AT&T Reply Br. at 1 (citing *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273 (Cal. App. 1998); *Gregory v. Spring Spectrum L.P.*, 2006 WL 2497781 (Cal. Ct.

App. 2006)). But those cases, both of which held that the purported modifications at issue did *not* govern the disputes in litigation, actually support the plaintiffs' position. *Badie*, for example, made clear that "a party with the unilateral right to modify a contract" does not have "carte blanche to make any kind of change whatsoever as long as a specified procedure is followed." 79 Cal. Rptr. 2d at 281. The court concluded that the modified contract did not apply because, among other things, "the 'bill stuffer' itself is far from the direct, clear and unambiguous language required" and that the language "[i]f you or we request" made the contract modification sound like an option. *Id.* at 290. The language of the bill stuffer here was even more ambiguous; it asserts that customers can rely on the terms of the old contract if they "prefer."[3]

It is at best unclear under California law whether AT&T's revised agreement is applicable in this case. Accordingly, even on AT&T's own terms, this case is a poor vehicle to explore the question presented because it presents an antecedent question of state contract law—namely, which arbitration clause is applicable to the dispute—that could preclude the Court from reaching the question as AT&T has framed it. *Cf. Green Tree Finan-*

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[3] Other decisions also support the conclusion that the pre-suit agreement applies. *See, e.g., Long v. Fidelity Water Sys., Inc.*, 2000 WL 989914, at *3 (N.D. Cal. 2000) (refusing to apply purported contract modification that postdated the litigation in part because the consumer was "a putative class member at the time defendants' communication with him," which "weakens any argument that he knowingly and voluntarily" agreed to the provision). The attempted unilateral modification of a consumer contract in the context of a pending class action may also run afoul of Rule 23. *See In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 569-70 (S.D.N.Y. 2004) (attempted contract modification constituted prohibited communication to parties without court supervision).

cial Corp. v. Bazzle, 539 U.S. 444 (2003) (failing to reach question presented under FAA in light of an antecedent question of South Carolina contract law).

III. AT&T's Claim of a Conflict with This Court's Precedent Restates Its Mistaken Preemption Theory, Which Has Not Been Adopted By Any Court.

In the absence of a conflict among the lower courts, AT&T argues that certiorari is warranted because the decision conflicts with "this Court's FAA jurisprudence." Pet. 25. AT&T's assertion of a conflict, however, merely restates its theory on the merits of the preemption issue—a theory that has thus far attracted no takers.

As AT&T acknowledges (at 27), the plain text of the FAA makes arbitration agreements enforceable "save upon such grounds as exist in law or equity for the revocation of any contract." 9 U.S.C. § 2. Under that savings clause, "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The Court has consistently held that the FAA requires that arbitration clauses be placed on an *equal* footing with other contracts: "States may regulate contracts, including arbitration clauses, under general contract law principles," but they may not discriminate against arbitration clauses. *Id.* at 686. Under that approach, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 491 n.9 (1987) (emphasis in original). "[A] state-law principle that takes its meaning precisely from the fact that a

contract to arbitrate is at issue," however, "does not comport" with the FAA. *Id.*

The state-law principles applied by the decision below do not depend on or take their meaning from the fact that the contract concerns arbitration. Rather, "[t]he California Supreme Court in *Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration." *Shroyer*, 498 F.3d at 990 (emphasis in original). As the Washington Supreme Court has explained, the FAA requires courts "to put arbitration clauses on the *same* footing as other contracts, not to make them special favorites of the law." *Scott*, 161 P.3d at 1008 (emphasis added). Because the law of states such as California, Illinois, New Jersey, and Washington with respect to exculpatory clauses applies regardless of whether a class ban is found in an arbitration agreement or some other contract, it does not run afoul of the FAA: "The arbitration clause is irrelevant to the unconscionability." *Id.* Exculpatory clauses "do not change their character merely because they are found within a clause labeled 'Arbitration.'" *Id.*

Contrary to AT&T's suggestion, neither California nor any other state has erected a per se rule that class-action bans are unenforceable; rather, state law calls for a fact-specific inquiry that applies equally to class bans located in arbitration clauses and those located in other types of contracts. The even-handed approach of the state law applied in the decision below is demonstrated by the fact that, under California law, a class ban found in a contract that does *not* contain an arbitration clause may likewise be held unenforceable if it would operate to exculpate wrongful behavior. *See Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 712-13 (Cal. Ct. App. 2001) (forum selection clause). Under *Discover*

Bank, California courts continue to assess enforceability on a case-by-case basis and may either enforce or invalidate class bans in arbitration clauses, based on the facts of the case. *Compare Discover Bank*, 113 P.3d at 162-63 (class ban unenforceable) *with Citibank (South Dakota), N.A. v. Walker*, 2008 WL 4175125, at *6 (Cal. Ct. App. 2008) (class ban enforceable). Federal district courts have also applied the fact-specific inquiry under California law to enforce class bans in arbitration clauses where they do not operate as unconscionable exculpatory clauses.[4]

The same even-handed approach is followed by the other states that have found some class bans unenforceable. For example, the New Jersey Supreme Court issued two decisions the same day reaching different conclusions concerning the enforceability of class bans found two different arbitration clauses, based on the different circumstances presented by those cases. *Compare Muhammad*, 912 A.2d 88 (class ban unenforceable), *with Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006) (class ban enforceable). Similarly, on the same day that it issued a decision striking down a class ban in an arbitration clause in *Scott*, 161 P.3d 1000, the Washington Supreme Court held unenforceable a forum selection clause

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[4] *See, e.g., Smith v. Americredit Fin. Servs., Inc.*, 2009 WL 4895280, at *6-*8 (S.D. Cal. 2009); *Dalie v. Pulte Home Corp.*, 636 F. Supp. 2d 1025, 1027 (E.D. Cal. 2009); *McCabe v. Dell, Inc.*, 2007 WL 1434972, at *3–*4 (C.D. Cal. 2007); *Torres v. Chrysler Fin. Co.*, 2007 WL 3165665, at *2-*3 (N.D. Cal. 2007). Courts have likewise enforced class-action bans in agreements governed by the law of other states after concluding that the class-action bans were not unconscionable under California law. *See, e.g., Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1270 (C.D. Cal. 2008); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1203 (C.D. Cal. 2006); *Lux v. Good Guys, Inc.*, 2006 WL 357820, at *1 (C.D. Cal. 2006).

in a non-arbitration agreement that had the effect of barring class actions. *Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007).

At bottom, the hostility to arbitration in this case is AT&T's, not California's. Decisions such as *Discover Bank* and *Shroyer* do not foreclose arbitration unless an unenforceable class-action ban is inseverable from the arbitration agreement. Indeed, courts have severed unconscionable class bans and compelled arbitration under the remaining contract. *See Indep. Ass'n of Mailbox Center Owners, Inc. v. Superior Court*, 34 Cal. Rptr. 3d 659, 676 (Cal. Ct. App. 2005); *see also IJL Dominicana S.A. v. It's Just Lunch Int'l, LLC*, 2009 WL 305187, at *5-*6 (C.D. Cal. 2009). Thus, unconscionability rulings are neutral as to whether classwide proceedings take place in arbitration or in court—the answer depends on the parties' agreement. In this case, proceeding via litigation rather than arbitration was AT&T's choice. AT&T, not California law, determined that if it could not enforce its class-action ban, it would prefer to proceed in court.

Even counsel for one of AT&T's *amici* (DRI) has taken the position that "the FAA does not preempt any state-court decisions holding a [class-action ban] unconscionable as long as the decision is an objectively reasonable application of state unconscionability law." Jack Wilson, *"No-Class-Action Arbitration Clauses," State Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 Quinnipiac L. Rev. 737, 741 (2004). To the extent that AT&T is asking this Court to decide whether the California Supreme Court and the highest courts of at least eight other states are saying one thing and doing another, its petition runs up against a core principle of federalism—that federal courts should not second-guess

a state high court's articulation of the state's own law. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Because "state courts are the ultimate expositors of state law," this Court is "bound by their constructions except in extreme circumstances," such as "obvious subterfuge." *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975). Surely nine state supreme courts (and four federal circuits) are not all guilty of outright subterfuge.

The last time this Court granted a petition that involved an effort to second-guess a state court's application of state law, the difficulties of the enterprise forced the Court to dismiss the writ as improvidently granted. *See Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436 (2009). The Court should avoid a similar waste of its resources in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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