No. 07-976

IN THE

Supreme Court of the United States

T-MOBILE USA, INC., OMNIPOINT COMMUNICATIONS, INC. D/B/A T-MOBILE, AND TMO CA/NV, LLC,

Petitioners,

v.

JENNIFER LASTER, ANDREW THOMPSON, ELIZABETH VOORHIES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States 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." 9 U.S.C. § 2. Class-action bans—contract provisions that prohibit classwide proceedings, whether in litigation or arbitration—have been held to be unconscionable in some circumstances under the generally applicable contract law of some states. 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

T-Mobile asks this Court to review a question on which the state and federal courts unanimously agree: Whether the Federal Arbitration Act (FAA) categorically preempts any state-law determination that a class-action ban is unconscionable if that ban is embedded in an arbitration clause. Just last month, in *Circuit City Stores, Inc. v. Gentry*, No. 07-998, this Court denied a petition raising the same question, and it should do the same here.

Every state and federal court to confront the question presented has reached the same conclusion—that the FAA, as its plain text indicates, does not preclude courts from assessing on a case-by-case basis and in a manner that does not discriminate against arbitration whether class-action bans are unconscionable under generally applicable state contract law. These courts include the highest courts of California, Illinois, New Jersey, Washington, North Carolina, Alabama, and West Virginia, as well as the Eleventh Circuit (considering Georgia law) and the Ninth Circuit (considering California and Washington law).

Despite that unanimity, T-Mobile tries to create a conflict by exaggerating the significance of speculative closing remarks in a single opinion, *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), in which FAA preemption was not dispositive. *Gay* held that an unconscionability claim failed as a matter of *Virginia law*, not federal law. To be sure, the opinion went on to discuss how the case *might* be decided *if* Pennsylvania law were applicable, speculating that "we would reach the same result, largely because [of] federal law." *Id.* at 392. But that speculation was specifically limited "to the extent" that Pennsylvania law would, alone among the states, insist

on "the right to bring *judicial* class actions," as opposed to classwide relief in *either* litigation *or* arbitration. *Id.* at 394. Such a state-law rule differs markedly from the law of other states and would likely be preempted because, unlike the California law applied in this case, it would flatly discriminate against arbitration—and class arbitration in particular.

Thus, *Gay* does not create a conflict on a question of federal law but, at best, merely identifies a potential difference in *state law* that might lead to different consequences for FAA preemption—as the Ninth Circuit recently recognized when it distinguished *Gay* on that basis in *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008). And even that state-law difference is more imagined than real, because Pennsylvania's highest court has yet to decide the state-law question and has abrogated the lower-court decisions on which *Gay* relied.

Finally, T-Mobile stretches to create a broader conflict over the enforceability of class-action bans, but the cases it cites do not even reach the FAA preemption issue presented in this case. Most of these cases decide whether class-action bans conflict with specific federal remedial statutes, while others determine whether particular class-action bans violate the unconscionability doctrines of specific states. Differing outcomes concerning the enforceability of class-action bans are not a reflection of any conflict over FAA preemption, but are instead the inevitable consequence of an analysis that is fact- and context-specific and that turns (as AT&T's *amicus* brief point out) on the evolving design of the contracts themselves.

Given the absence of any conflict on the question presented—and given the serious danger that review at

this time would unnecessarily inhibit the evolution of arbitration agreements in the marketplace, the law governing their enforceability, and the development of efficient classwide arbitration procedures—the petition should be denied.

STATEMENT

A. Class Arbitration and Class-Action Bans

Despite its potential to combine the efficiencies of both arbitration and the class-action device, American courts have until recently demonstrated a hostility to classwide arbitration. That hostility is "a remnant of the historic mistrust of the arbitral process" that the FAA was intended to eradicate. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U.L. Rev. 301, 301 (2004); *see also Discover Bank v. Superior Court*, 113 P.3d 1110, 1113 (Cal. 2005) (view that "arbitration is an inferior forum and therefore cannot be trusted with classwide claims" reflects "the very mistrust of arbitration that has been repudiated by the United States Supreme Court" and the FAA). Despite its invocation of the FAA, T-Mobile's position bristles with that same hostility. Indeed, the court below would have sent this case to arbitration had T-Mobile's form contract not insisted on a judicial forum in the event its class-ban was held unenforceable. Pet. App. 37a-37a.

An important turning point in the evolution of class-wide arbitration came in *Green Tree Financial Corporation v. Bazzle,* 539 U.S. 444 (2003), when a majority of this Court rejected the argument that class actions are incompatible with arbitration. Following *Bazzle*, major arbitration organizations in the United States, such as the American Arbitration Association, adopted classwide arbitration rules, and hundreds of

class arbitrations began to appear on their dockets. *See* Buckner, *supra*, at 333-34. Some businesses, like T-Mobile, however, responded by attempting to insulate themselves from *any* type of classwide proceeding by embedding class-action bans in their arbitration agreements.

Class-action bans are contract provisions that strip consumers or employees of the right to seek any classwide relief (whether through class-action litigation or classwide arbitration). Under the general contract law of many states, such provisions may be unconscionable where the inability to seek any form of classwide relief effectively exculpates the drafter from potential liability for individually small claims involving widespread practices. State law in this regard arises from generally applicable rules relating to all sorts of exculpatory contract terms, and applies equally to bans of class-action litigation in contracts without arbitration clauses as it does to bans of class arbitration in contracts with such clauses.

Under the FAA, arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This Court has consistently interpreted that savings clause to mean that "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 Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The sole question presented by T-Mobile's petition is whether the FAA preempts a state-law determination that a particular class-action ban is unconscionable, where that ban happens to be found in an arbitration clause.

B. Factual and Procedural Background

Elizabeth Voorhies and Jennifer Laster are Californians who purchased wireless phones and service plans from Cingular (now AT&T) and T-Mobile, respectively. AT&T is the largest wireless telephone company in the United States; T-Mobile is the fourth largest. Voorhies and Laster brought a putative class action against both companies, alleging that they violated state consumer-protection law by charging sales tax on the full retail value of the phones, which were advertised as "free" or substantially discounted. Both companies separately moved to compel arbitration. Invoking class-action bans embedded in arbitration agreements, the companies insisted on individual rather than classwide arbitration.

At the time Laster received her phone from T-Mobile, she signed a one-page Service Agreement, which identified her plan rates and the equipment she purchased but mentioned neither mandatory arbitration nor a class-action ban. Pet. App. 8a-9a. Inside the sealed box containing her phone was a copy of T-Mobile's fifty-two page "Welcome Guide." *Id.* 9a. Within that Welcome Guide, along with general information about the phone itself, was a mandatory binding arbitration clause that purported to prohibit any consumer from representing "other potential claimants or a class of potential claimants in any dispute" with T-Mobile. *Id.* 37a. The clause also included a provision stating that in the event the class-action ban was unenforceable, the arbitration agreement would not apply, and any dispute would be resolved in a court. *Id.* When she bought her phone from AT&T, Voorhies was likewise given an arbitration agreement containing a class-action ban. *Id.* 6a-8a.

The district court, relying on the California Supreme Court's decision in *Discover Bank*, 113 P.3d 1110, concluded that the class-action bans in both companies' agreements were unconscionable under California law because, among other things, they were contained in contracts of adhesion and would exculpate the companies from a claim that the party with superior bargaining power had carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. Pet App. 20a. Adhering to the position of all other courts to decide the question, the district court also held that this state-law ruling did not discriminate against arbitration, and hence was not preempted by the FAA, because it was based on general contract-law principles that applied equally to contracts with or without arbitration agreements. *Id.* 24a.

Both AT&T and T-Mobile appealed. While the case was pending, the court of appeals issued its decision in S*hroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007), which held that California law holding some class-action bans unconscionable, as articulated in *Discover Bank*, was not preempted by the FAA. In this case, the court of appeals affirmed in an unpublished memorandum, holding that S*hroyer* had already "expressly and conclusively" rejected the argument that the application of California's unconscionability law to class-action bans in arbitration clauses is preempted by the FAA. *Id.* 1a-2a.

AT&T dropped its appeal after the decision in *Shroyer* was issued and did not petition for certiorari. Indeed, before this Court, AT&T has filed an *amicus* brief recommending that the Court deny the petition, arguing that review based on the outdated, "second generation" agreement at issue in this case would not

only be premature and unnecessary in light of the absence of any conflict, but would affirmatively interfere with the ongoing evolution of class-action bans in arbitration agreements, and the state law concerning their enforceability. That evolution, AT&T argues, has already produced "third generation" agreements more protective of consumer rights than the arbitration clause at issue here, and may ultimately result in agreements that pass muster under state law, thus obviating any perceived need for review of the federal question presented.

REASONS FOR DENYING THE WRIT

T-Mobile repeatedly describes this case as presenting the question whether courts may refuse to enforce arbitration agreements on the grounds that "individual arbitration" is unconscionable. By framing the issue in this way, T-Mobile attempts to obscure the fact that it is *its* position, not respondents', that is hostile to arbitration, and to class arbitration in particular. T-Mobile already has the right to compel arbitration. What it seeks is the ability to use a class-action ban that it placed within an arbitration clause to exculpate itself from any liability for small consumer claims, by precluding classwide proceedings of any kind, in any forum, including an *arbitral* forum.

The court below did not hold that the class-action ban in this case was unconscionable because it happened to be contained within an agreement to arbitrate. To the contrary, it held, as a matter of *state law*, and based on the circumstances of this case—a case involving very small individual claims spread across a large class of people—that an adhesion contract provision denying the opportunity for classwide relief (whether in litigation or in arbitration) is an unenforceable exculpatory provision.

Because that conclusion is based on generally applicable contract law that applies equally to contracts with or without arbitration clauses, it is not preempted by the FAA merely because the provision in question happens to be found in an arbitration agreement. Indeed, no federal appellate court or state court of last resort has held that such an even-handed application of state unconscionability doctrine is preempted by federal law. In the absence of such a conflict, T-Mobile offers no persuasive reason for this Court to review an unpublished opinion presenting precisely the same question on which it has recently declined review

I. THERE IS NO CONFLICT OVER THE QUESTION PRESENTED.

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

There is no conflict among the courts over the question presented. Every state court of last resort and every federal circuit to have decided the question has reached the same conclusion: The FAA does not preclude courts from assessing whether particular class-action bans are unconscionable under generally applicable state contract law.

To date, seven state courts of last resort have issued decisions on the question presented. Five state high courts—California, Illinois, New Jersey, Washington, and North Carolina—have recently held that the FAA does not preempt state-law determinations, under generally applicable contract law, that particular class-action bans may be unconscionable. *See Discover Bank*, 113 P.3d at 1110-17; *Muhammad v. County Bank of Rehoboth, Del.*, 912 A.2d 88, 94-96 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006); *Scott v.*

Cingular Wireless, 161 P.3d 1000, 1008-09 (Wash. 2007); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008). These recent decisions are consistent with two pre-*Bazzle* rulings by the supreme courts of Alabama and West Virginia.[1] In addition, lower state courts in Missouri, Florida, Wisconsin, and Oregon have reached the same conclusion.[2]

The federal circuits that have decided the FAA preemption question have come to the same conclusion. The Eleventh Circuit and the Ninth Circuit have both recently issued decisions finding particular class-action bans unconscionable under state law and rejecting claims of FAA preemption. *See Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (Georgia law); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007) (California law); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1219-22 (9th Cir. 2008) (Washington law). These holdings are consistent with earlier Ninth Circuit precedent predicting California law prior to

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[1] *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002) (FAA does not preempt challenge to class-action ban on state-law unconscionability grounds; such a challenge does not discriminate against arbitration because the analysis "would be the same if the contract merely prohibited assertion of claims on a class-wide basis" in litigation); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va.), *cert. denied*, 537 U.S. 1087 (2002) (FAA does not bar application of generally applicable contract defense of unconscionability to strike class-action ban).

[2] *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Coady v. Cross Country Bank*, 729 N.W.2d 732, 748 (Wis. App.), *review denied*, 737 N.W.2d 432 (Wis. 2007); *Reuter v. Davis*, 2006 WL 3743016, at *2 (Fla. Cir. Ct. Dec. 12, 2006); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308, 310 (Mo. App. 2005).

Discover Bank.[3] Several federal district courts in various states have similarly held that the FAA does not stand as a barrier to a determination that class-action bans are unenforceable under generally applicable state-law unconscionability doctrine.[4]

B. The Third Circuit's Opinion in *Gay* Does Not Create a Conflict.

Against the unanimous position of the courts that have actually decided the question presented, T-Mobile pits the closing remarks in a single recent opinion in which FAA preemption was not even a dispositive issue. According to T-Mobile, the Third Circuit, in *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), dramatically broke ranks with all other courts and "ruled" that the FAA categorically "precludes a court from refusing to enforce an agreement to arbitrate individually based upon a state-law determination that individual arbitration of small consumer claims is unconscionable." Pet. 2.

That description does not reflect the holding of the Third Circuit—or, for that matter, the holding of any court anywhere. In fact, *Gay* disposed of the plaintiff's unconscionability challenge on the basis of *Virginia law*, not FAA preemption. The agreement at issue contained a Virginia choice-of-law clause, and the court was fully "satisfied that there [was] no reason not to honor the

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[3] *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003).

[4] *See, e.g.*, *Creighton v. Blockbuster, Inc.*, 2007 WL 1560626 (D. Or. 2007); *Wong v. T-Mobile USA, Inc.*, 2006 WL 2042512 (E.D. Mich. 2006); *Hollins v. Debt Relief of America*, 479 F. Supp. 2d 1099 (D. Neb. 2007); *Doerhoff v. General Growth Props., Inc.*, 2006 WL 3210502 (W.D. Mo. 2006).

parties' choice of Virginia law in considering the unconscionability claim." 511 F.3d at 390 ("[W]e will apply Virginia law in considering the enforceability of the arbitration provision."). Applying the standards set by the Virginia Supreme Court, the court held that the agreement was not unconscionable *as a matter of state law*. *Id.* at 391-92 (citing *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992)). In reaching this conclusion, *Gay* reiterated the rule that generally applicable state law controls the unconscionability analysis. *Id.* at 388 ("federal courts may apply state law pursuant to section two of the FAA" and "[i]n particular, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2").

To be sure, although the *Gay* opinion "recognized that courts including our court" must look to the applicable state's law, it also noted that "one might wonder why the consideration of state law is so confined" because "it is logical that the law should be uniform throughout the country." *Id.* at 388 n.13. But the court made clear that its decision on Virginia-law grounds made a definitive resolution of such concerns unnecessary: "[I]f a further examination of that point ever is needed it will be at some later day as we have no need to consider it now. The need to examine the question might arise" if the relevant state law were "aberrational." *Id.*

In the same hypothetical vein, the opinion went on to discuss how the panel might have decided the case if there were no choice-of-law clause, so that the law of the Pennsylvania forum applied instead. In that scenario, it speculated that "we would reach the same result, largely because federal law requires that we do so and

Pennsylvania law must conform with federal law." *Id.* at 392. This discussion of Pennsylvania law was doubly hypothetical, as it was premised not on an authoritative construction of state law, but on a pair of lower-court decisions—*Lytle v. CitiFinancial Services, Inc.*, 810 A.2d 643 (Pa. Super. Ct. 2002), and *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006)—that have themselves been abrogated by the Pennsylvania Supreme Court as reflecting an improper presumption in favor of unconscionability.[5]

Based only on those two now-discredited cases, *Gay* assumed for purposes of its discussion that the Pennsylvania Supreme Court—unlike the high courts of, for example, California, Illinois or Washington—would demand hostility to arbitration, requiring that consumers be permitted to bring classwide proceedings *in court* as opposed to in arbitration. The court specifically limited its speculation about FAA preemption to this understanding of state law: The FAA would preempt state law only "[t]o the extent . . . that *Lytle* and *Thibodeau* hold that the inclusion of a waiver of the right to bring *judicial* class actions in an arbitration

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[5] *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); *see also* Kaplinsky, *Scorecard on Class-Action Waivers*, 1657 PLI/Corp 127, 154 n.5 (2008) (citing *Lytle* and *Thibodeau* and stating that *Salley* "casts serious doubt on the continued vitality of these two opinions"). Just last week, the Third Circuit, assessing an arbitration agreement under Pennsylvania law, recognized that the Pennsylvania Supreme Court had "expressly abrogat[ed]" *Lytle. Zimmer v. Cooperneff Advisors, Inc.*, --- F.3d ---, 2008 WL 1700526, at *6 (3d Cir. Apr. 14, 2008) (describing *Lytle*'s analysis as "discredited" and reliance on the decision by federal courts as "questionable").

agreement" is unconscionable. *Id.* at 394 (emphasis added); *see also id.* at 395 (describing plaintiff's argument "that the provision is unconscionable because of what it provides—*i.e.* arbitration of disputes on an individual basis *in place of litigation* possibly brought on a class action basis") (emphasis added).[6]

To the extent that *Gay*'s assumptions about Pennsylvania law were correct, its hypothetical preemption analysis, too, was likely correct because the FAA "withdrew the power of the states to *require a judicial forum* for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (emphasis added). *Gay*'s speculation about the potential FAA preemption of Pennsylvania law was based, however, on an understanding of Pennsylvania law that differs markedly from the law of states like California, Illinois, or New Jersey. *Compare Gay*, 511 F.3d at 394, *with Muhammad*, 189 N.J. at 101 (under New Jersey law, it is unconscionable in some circumstances to deprive consumers of "the mechanism of a class action, *whether in arbitration or in court litigation*") (emphasis added); *Discover Bank*, 113 P.3d at 1112 ("In the present case, the principle that class-action waivers are, under certain circumstances,

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[6] The unusual way in which the issue was framed in *Gay* may also be a function of the fact that the unconscionability challenge was not the chief issue on appeal. Rather, the plaintiff, who had sued under the federal Credit Repair Organizations Act (CROA) and a parallel state statute, contended that both statutes gave her "a right to assert her claims in a *judicial forum*" and expressly prohibited a waiver of that right. 511 F.3d at 375 (emphasis added); s*ee* 15 U.S.C. § 1679f(a) (prohibiting "[a]ny waiver by any consumer of . . . any right of the consumer" under the CROA); *id.* § 1679f(c) (providing that consumers "have a right to sue" under the CROA).

unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements."). Thus, the "conflict" claimed by T-Mobile arises not from conflicting approaches to the *federal-law* question presented, but rather on underlying differences in *state law* and, in particular, *Gay*'s understanding of a hypothetical and unique rule of state law that would impermissibly discriminate against arbitration.

In four different instances, T-Mobile quotes the Ninth Circuit's recent statement declining to "follow" *Gay* in *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008). *See* Pet. 2, 12, 17 n.1, 24. But T-Mobile misleadingly omits the explanation for that statement, which is given in the very next sentence. *Lowden* did not *disagree* with *Gay*'s FAA preemption discussion. Rather, it *distinguished* that discussion on the grounds that the applicable Washington *state law* in *Lowden* was entirely unlike the hypothetical *state law* discussed in *Gay*. As *Lowden* explained, "[u]nlike" the Pennsylvania law described in *Gay*, "the Washington Supreme Court in *Scott* does not hold 'that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate.'" *Id.; see also id.* at 1221 ("[T]he *Scott* holding targets not the arbitration context, but rather the class action waiver, which the Washington State Supreme Court has determined would deprive Washington consumers of a right generally applicable to arbitration and litigation contracts alike and which only happens to be within an arbitration agreement in this case."). This Court does not sit to resolve such differences in state law.

T-Mobile's claim of a conflict thus ignores the critical differences for federal preemption analysis that may flow from differences in state law. Indeed, T-Mobile's reliance on *Gay* as the basis for a claim of conflict is particularly mistaken because "the state's highest court has not spoken" on the state-law issue. Gressman, *et al.*, *Supreme Court Practice* § 4.10, at 261 (9th ed. 2007). Whether, and under what circumstances, class-action bans are unconscionable under Pennsylvania contract law is "a matter that ultimately rests with the highest state court and that can be authoritatively clarified by the highest state court in future litigation." *Id.* Pennsylvania's highest court has yet to decide that question, and it is quite possible, even likely, that a decision by that court would differ from *Gay*'s reading of state law and wipe out the tenuous "conflict" claimed by T-Mobile. The Third Circuit, moreover, has yet to discuss the FAA preemption question presented here in any case in which it actually affects the outcome. When the question arises in a Third Circuit case in which Pennsylvania provides the applicable law (unlike in *Gay*), the Third Circuit would likely certify the state-law question to the state court, as it has done recently on other state-law unconscionability questions. Or the issue might arise first in an appeal that comes up through the state courts. Until then, in the absence of a decision on the predicate state-law issue by the state's highest court, or even a Third Circuit case in which the outcome actually turns on the federal preemption question, the Third Circuit's speculation about Pennsylvania law and FAA preemption will remain purely academic.[7]

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[7] Currently pending before the Third Circuit is an appeal squarely raising the question whether New Jersey law concerning

(*Footnote continued*)

That *Gay* does not reflect the categorical rejection of the application of all state unconscionability doctrines to class-action bans in arbitration agreements is confirmed by the fact that the Third Circuit's approach—before *Gay*, in *Gay* itself, and after *Gay*—has been to regard the unconscionability of a contract provision, including a class-action ban, as a matter of general state contract law. In *Delta Funding v. Harris*, 426 F.3d 671, 671 (3d Cir. 2005), for example, the Third Circuit certified to the New Jersey Supreme Court the "undecided issue of New Jersey law" whether a class-action ban contained in an arbitration clause was unconscionable under the circumstances.[8] And after *Gay*, the Third Circuit has continued to analyze unconscionability as a matter of state law just as it did before. *See Zimmer v. Cooperneff Advisors, Inc.*, --- F.3d ---, 2008 WL 1700526 (3d Cir. Apr. 14, 2008) (analyzing unconscionability of arbitration clause under Pennsylvania law, without citing *Gay*); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Clemente*, 2008 WL 857756 (3d Cir. Mar. 31, 2008) (same as to New Jersey law).

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the unconscionability of class-action waivers is preempted by the FAA. *Homa v. American Express Co.*, 3d Cir. Case No. 07-2921. Unlike *Gay*, *Homa* presents the question in a case in which it may affect the outcome, and where the court has the benefit of a decision by the state's highest court. New Jersey's high court has squarely confronted the question of whether, and under what circumstances, a class-action waiver may be unconscionable. *See Muhammad*, 912 A.2d at 97.

[8] As the Third Circuit later explained when it received the New Jersey court's ruling in *Delta Funding*, the point of such certifications is that they allow "federal courts to give the state supreme courts an opportunity to elucidate an important issue of state law, thereby avoiding erroneous predictions that will confuse rather than clarify the issue." *Delta Funding v. Harris*, 466 F.3d 273, 273 n.1 (3d Cir. 2006) (emphasis added).

If the Third Circuit actually followed the rule that T-Mobile attributes to the Third Circuit—a rule that categorically precludes *any* decision that a class-action ban in an arbitration clause is unenforceable based on a state-law determination of unconscionability—it would have been pointless to have certified the class-action ban issue to the New Jersey court in *Delta Funding* or to analyze Virginia law in *Gay,* because the FAA would have preempted a finding of unconscionability in any event. *See 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.").

* * *

Given all of the above—the Third Circuit's consistent treatment of the unconscionability issue as one of state law in cases such as *Delta Funding*; the hypothetical nature of *Gay*'s discussion of Pennsylvania law; *Gay*'s assumption that Pennsylvania law would, alone among the states, insist on a "judicial class action"; the abrogation of the lower-court decisions on which that assumption was based; and *Lowden*'s distinction between Washington law and Pennsylvania law as depicted in *Gay*—the petition's claim that *Gay* creates a conflict on the question presented is wrong.

C. There Is No Broader Conflict of Federal Law Concerning the Enforceability of Class-Action Bans.

Absent any cases adopting its theory that the FAA categorically precludes courts from holding class-action bans in arbitration agreements unconscionable, T-Mobile

looks even further afield in an attempt to create a conflict. The petition (at 3, 21-22) cobbles together two distinct categories of cases from the Third, Fourth, Seventh, and Eleventh Circuits in which those courts enforced class-action bans, suggesting a broader conflict over the enforceability of such provisions. What T-Mobile fails to mention is that not one of those cases actually decided the FAA preemption question presented by the petition.

Four of the cases that T-Mobile cites, all of them pre-*Bazzle*, did not involve state-law unconscionability challenges at all, let alone the issue of federal preemption under the FAA. Instead, they decided the very different question of whether a class-action ban may in some circumstances conflict with the policies of a particular federal remedial statute. *See Livingston v. Assocs. Fin. Inc.*, 339 F.3d 553 (7th Cir. 2003) (Truth in Lending Act); *Snowden v. Checkpoint Cashing*, 290 F.3d 631 (4th Cir. 2002) (Truth in Lending Act and RICO); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001) (Truth in Lending Act); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (Truth in Lending Act). More recently, the First Circuit held that a class-action ban was unenforceable because it interfered with the plaintiffs' ability to vindicate their rights under the Clayton Antitrust Act, but the court was careful to emphasize the differences between the Antitrust Act and the Truth-in-Lending context in which the earlier cases arose. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 55-61 (1st Cir. 2006). No direct conflict has yet emerged among these vindication-of-federal-rights cases. In any event, even if a conflict were to emerge within this line of cases, it would not implicate the question presented in *this* case, which is whether federal

law precludes a *state-law* unconscionability challenge in a case involving only state-law claims.

That leaves one last case cited by the petition as evidence of a conflict: *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005). *Jenkins*, like this case, *did* involve a state-law unconscionability challenge to a class-action ban in an arbitration clause. But far from adopting T-Mobile's preemption theory, *Jenkins* recognized that "[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." *Id.* at. 875. Applying Georgia law, *Jenkins* concluded that there was no substantive unconscionability in that case, particularly given the ability of the plaintiffs to recover attorneys' fees. *Id.* at 877-78.

T-Mobile's use of *Jenkins* to suggest that the law of the Eleventh Circuit somehow conflicts with the decision below is particularly misleading because the petition omits a more recent Eleventh Circuit decision, authored by the same judge, that squarely decided the question presented. In *Dale*, 498 F.3d 1219, the Eleventh Circuit held that the FAA did *not* preclude the court from finding a class-action ban unconscionable under Georgia law where the class-action ban happened to be found in an arbitration agreement. *Dale*'s unconscionability holding was based in part on the extremely limited opportunity of the cable television subscribers in that case to recover attorneys' fees, making it "difficult for a single subscriber to obtain representation" and "allow[ing] Comcast to engage in unchecked market behavior that may be unlawful." *Id.* at 1224.

At bottom, what the petition seeks to do is to transform differing outcomes—based on differing facts,

differing contracts, and differing federal statutes or state contract law—into a conflict of law. But no jurisdiction has adopted a categorical rule negating *all* class-action bans. The analysis is sensitive to the context, the facts, and the differences in unconscionability doctrine among the state courts. Outcomes necessarily differ. *See Muhammad*, 912 A.2d at 24 (striking down class-action ban based on a "fact-sensitive" assessment of unconscionability); *Delta Funding v. Harris*, 912 A.2d 104, 115 (N.J. 2006) (in a decision issued the same day as *Muhammad*, upholding a class-action ban in a case involving large damages and explaining that "a class-arbitration waiver in [an] arbitration agreement is not unconscionable per se").

As AT&T points out in its *amicus* brief, the differing outcomes also turn on the way the arbitration clauses are designed. In *Jenkins* and *Dale*, for example, the outcome of the state-law analysis turned in part on the extent to which plaintiffs could recover attorneys' fees so that they would have a meaningful ability to pursue individual relief. Although T-Mobile suggested otherwise in the court below, it is doubtful that the T-Mobile arbitration agreement provides for the recovery of attorneys' fees where available under the applicable substantive law—a fact that may make this case a particularly poor vehicle to explore the question presented. *See* Br. of *Amicus* AT&T 19-21. The fact that the T-Mobile agreement represents an older generation of agreements, and that a new generation of agreements, touted by their drafters as more "consumer friendly," has emerged, provides an additional reason for refraining from deciding the question presented in the context of this case. Review at this time would not resolve any conflict among the courts—because there is none—but would risk hindering the natural evolution of both arbitration clauses and

class arbitration procedures. *See Muhammad*, 912 A.2d at 24 ("Class arbitration is in its infancy and may provide a fertile ground for establishing flexible class-action procedures.").

II. T-MOBILE'S CLAIM OF A CONFLICT WITH THIS COURT'S PRECEDENT RESTATES ITS MISGUIDED PREEMPTION THEORY, WHICH HAS NOT BEEN ADOPTED BY ANY COURT.

In closing, T-Mobile asserts that the decision below "conflicts with this Court's cases on the fundamental relationship between the FAA and state-law substantive and procedural policies." Pet. 25. That assertion, however, merely restates T-Mobile's theory on the merits of the preemption issue—a theory that has thus far attracted no takers.

Indeed, T-Mobile's categorical preemption theory has been carefully considered and uniformly rejected by the state and federal appellate courts in cases such as *Shroyer*, 498 F.3d at 987-93; *Discover Bank*, 113 P.3d at 1110-17; *Scott*, 161 P.3d at 1008-09; *Kinkel*, 857 N.E.2d at 260-63; and *Muhammad*, 912 A.2d at 94-96. These decisions address this Court's cases on FAA preemption (the same cases cited at pages 26-29 of the petition), the FAA's policy of ensuring that arbitration agreements stand on an equal footing with all other contracts, general principles of express and implied federal preemption, and the generally applicable nature of the state-law doctrine alleged to be preempted. Neither T-Mobile's dissatisfaction with the consensus view of the state and federal courts, nor its ability to invoke snippets of this Court's cases to support its argument, amount to a conflict warranting

certiorari. *See* Gressman, *Supreme Court Practice* § 4.5 at 250 (noting that lawyers "are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine" and that a "conflict must truly be direct" and "readily apparent" to justify certiorari).

As T-Mobile acknowledges, the plain text of the FAA makes arbitration agreements enforceable "save upon such grounds as exist in law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This Court's cases have consistently explained that the FAA requires that arbitration clauses be placed on an *equal* footing with all other contracts: "States may regulate contracts, including arbitration clauses, under general contract law principles" but they may not discriminate against arbitration clauses. *Casarotto*, 517 U.S. at 686. "[S]tate 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, 492 n.9 (1987) (emphasis in original). However, a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport" with the FAA. *Id.*

The courts that have decided the question presented have adhered scrupulously to these principles. *See Shroyer*, 498 F.3d at 990 ("The 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.") (emphasis in original). As the Washington Supreme Court explained in *Scott*, the FAA "requires us to put arbitration clauses on the *same* footing as other contracts, not make them the special

favorites of the law." 161 P.3d at 1008 (emphasis in original). Because the law of states such as Washington, California, Illinois, and New Jersey with respect to exculpatory clauses applies regardless of whether a class-action 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.* Indeed, on the same day that it issued its opinion in *Scott*, the Washington Supreme Court, in another case, held unenforceable a forum selection clause in a non-arbitration agreement that had the effect of barring class actions. *Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007).

Moreover, decisions such as *Discover Bank*, *Scott*, and *Shroyer* do not hold that arbitration itself is foreclosed unless the class-action ban is inseverable from the arbitration agreement. Thus, they 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 *T-Mobile's own choic*e. T-Mobile, not California law, determined that if it could not enforce its class-action ban, it would prefer to proceed in court.

In short, T-Mobile's categorical preemption theory—under which the FAA would preclude *any* state-law determination that a class-action ban is unconscionable if the class-action ban is contained in an arbitration clause—is unprecedented. No court has adopted that position, and nothing in this Court's jurisprudence requires such a sweeping displacement of generally applicable state contract law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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