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 Third Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

CTIA—The Wireless Association® ("CTIA") is a non-profit organization representing diverse sectors of the wireless communications industry. CTIA's membership encompasses hundreds of service providers, manufacturers, wireless data and Internet companies, as well as other contributors to wireless services. CTIA has made appearances in regulatory proceedings before the Executive Branch, the Federal Communications Commission, Congress, and various state legislative bodies on behalf of the wireless communications industry. CTIA also engages in outreach to the government and the public to build awareness on matters of significance to the wireless communications industry.

Many CTIA members use nationwide customer service agreements providing that customer disputes be resolved through arbitration rather than litigation and specifying that arbitration

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

proceed on an individual, not class-wide, basis. The latter individual-claim-only provisions are among the most valuable provisions in the agreements to both CTIA members and their customers, ensuring a streamlined and efficient process for resolving disputes.

CTIA has a strong interest in cases raising important issues of arbitration, and has participated as *amicus curiae* in several recent cases. *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Preston v. Ferrer*, 552 U.S. 346 (2008). *Amicus* and its members seek to ensure that individual arbitration remains a viable, efficient, and cost-effective means of dispute resolution that, in turn, contributes to customer satisfaction and loyalty. If courts may void an arbitration agreement whenever class-action procedures are foreclosed by the parties' consent, many wireless carriers will question the wisdom of pursuing arbitration at all in the future.

INTRODUCTION AND SUMMARY OF ARGUMENT

Conditioning arbitration agreements on the availability of class-wide treatment amounts to a direct attack on arbitration. Most of the 240 million mobile telephone subscribers in the United States have service agreements that expressly provide for arbitration and specify that the arbitration must proceed on an individual basis. For hundreds of wireless carriers, like AT&T Mobility, and their millions of customers, that consent to individual arbitration forms one of the

most important provisions of their agreements. By providing that disputes should be resolved through arbitration rather than litigation, and brought on an individualized basis, carriers are able to lower their costs, streamline their dispute resolution process, and maintain amicable and productive relationships with their customers. Customers, in turn, reap the rewards of lower service costs and expeditious results.

The Ninth Circuit's decision renders millions of such critical provisions unenforceable. By conditioning the enforcement of arbitration agreements on the availability of class-wide arbitration, the Ninth Circuit effectively rewrote AT&T Mobility's arbitration agreement in direct contravention of its terms. But allowing a state policy interfering with the parties' mutual consent and favoring one form of arbitration over another is "fundamentally at war with the foundational … principle that arbitration is a matter of consent." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*, 130 S. Ct. 1758, 1775 (2010). It defies the Federal Arbitration Act's ("FAA") chief purpose of ensuring that "private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). And it flouts this Court's consistent warnings that courts' ultimate responsibility is to "give effect to the contractual rights and expectations of the parties." *Id.*

Beyond that, the Ninth Circuit's holding amounts in practical terms to a bar on arbitration. Arbitration in its traditional form is attractive to consumers and businesses alike precisely because

of its promise of "simplicity, informality, and expedition." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Those benefits are eviscerated by the importation of class-action procedures into the arbitral forum. The hybrid form of class arbitration turns the litigation-for-arbitration trade-off on its head, offering instead the worst of both worlds — litigation's complexity, formality, and delay, and arbitration's lack of procedural protections. The problem, accordingly, is not only that the Ninth Circuit engrafted a condition on the arbitration agreement that the agreement explicitly foreclosed; but also that, in so holding, the Ninth Circuit sapped arbitration of its appeal. The Ninth Circuit's decision, if left to stand, will compel carriers to abandon arbitration altogether.

Finally, not only have millions of carefully drafted arbitration agreements been rendered unenforceable in the State of California, but the enforceability of carriers' nationwide agreements for nationwide service will now vary from State to State. And customers nationwide ultimately will bear the increased costs of California's forced substitution of unwieldy litigation for relatively streamlined and efficient arbitration. The enforceability of the plain terms of an arbitration agreement is not meant to turn on the happenstance of where the customer brings suit and what particular State's policy on class actions is at issue. By threatening wireless carriers with precisely that prospect, however, the Ninth Circuit's decision further undermines the FAA's federal policy favoring arbitration.

ARGUMENT

I. THE DECISION BELOW CONSTRUES ARBITRATION AGREEMENTS IN DIRECT CONTRAVENTION OF THEIR TERMS AND THE FEDERAL POLICY FAVORING ARBITRATION.

The FAA evinces a federal policy favoring both arbitration in general and enforcement of the terms produced by the parties' mutual consent in particular. The FAA thus commands federal courts to enforce arbitration agreements according to their terms. Section 2 of the FAA provides that arbitration agreements "*shall be valid, irrevocable, 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). Where the agreements clearly specify that arbitration shall take place on an individual basis, then, courts do not have license to trump those terms by invoking a state-law policy disfavoring agreements to proceed individually, rather than via class actions.

This Court has repeatedly directed courts to give "due regard" to the FAA's "federal policy favoring arbitration." *Volt*, 489 U.S. at 476. The Court has espoused and reinforced that federal policy time and time again: Any "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983). Any "judicial policy concern[s]" alone may not be grounds for declining to enforce an arbitration agreement altogether. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1472 (2009). And

"state legislative attempts to undercut the enforceability of arbitration agreements" should be resisted. *Preston v. Ferrer*, 552 U.S. 346, 357 (2008).

The federal policy favoring arbitration is perhaps most directly undercut when a court not only fails to "rigorously enforce … agreements according to their terms," but construes the agreements in *direct contradiction* of their terms. *Volt*, 489 U.S. at 479 (internal quotation marks omitted). Mutual consent, after all, is the "foundational … principle" of both arbitration and the FAA. *Stolt-Nielsen*, 130 S. Ct. at 1775. Rewriting the terms of private arbitration agreements to permit what they unequivocally preclude is a straightforward violation of FAA preemption principles.

Because arbitration is at bottom about mutual consent, it is elementary that parties should be free to structure their arbitration agreements "as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). Parties, accordingly, can limit the issues to be arbitrated. *See Mitsubishi Motors*, 473 U.S. at 628. Parties can specify the rules to govern the arbitration, stipulating to procedures as formal or informal as they desire. *See Volt*, 489 U.S. at 479. Parties can choose who will resolve their disputes. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). And parties can specify "*with whom* they

choose to arbitrate their disputes." *Stolt-Nielsen*, 130 S. Ct. at 1774.[2]

Just last Term, in *Stolt-Nielsen*, the Court held that where an arbitration agreement was silent as to whether the parties intended to submit to class arbitration, compelling them to submit to class arbitration would be "fundamentally at war" with the consensual nature of arbitration. *Id.* at 1775. Rather than a "single dispute" between the parties to a single agreement, class arbitration sweeps in "many disputes between hundreds or perhaps even thousands" of parties. *Id.* at 1776. The Court emphasized that the shift from bilateral arbitration to class-action arbitration constitutes a "fundamental change[]" that is "too great" for consent simply to be presumed. *Id.*

Here, AT&T Mobility's agreement, like many similar agreements of wireless carriers and other businesses, was not merely *silent* on the question of whether class-action procedures were available. Rather, the agreement *expressly foreclosed* class-

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[2] The same is not true with respect to litigants who opt to avail themselves of the court system. Such litigants must to a certain extent take the procedural rules of the court system as they find them, subject to background principles such as waiver. For this reason, California's *Discover Bank* rule cannot be defended as a neutral rule favoring class actions in all dispute resolution. *See Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (setting forth three-pronged unconscionability test for arbitration agreements). Whatever the State's interest in having litigants in its state court system follows its rules, it cannot force arbitrations to follow its preferred rules without running afoul of the FAA.

action procedures and mandated individual-claim-only arbitration. Conditioning enforceability on the availability of class-action procedures specifically precluded by the agreements runs roughshod over the parties' intent and the terms of the agreement. The Ninth Circuit did not merely insist on class-action procedures in the face of a contractual ambiguity; it imposed them despite the express agreement of the parties to the contrary. The Ninth Circuit's holding was therefore even more "fundamentally at war" with the FAA principle that arbitration is a matter of consent. *Id.* at 1775.

The end result was that the Ninth Circuit invalidated the linchpin of AT&T Mobility's agreement. That agreement, like most wireless carriers' nationwide service agreements, provides for arbitration but specifically limits the agreement to arbitrate to individual claims.[3] That limitation

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[3] The arbitration agreements of CTIA members Verizon Wireless, Sprint Nextel, and T-Mobile all similarly limit arbitration to individual claims. *See, e.g.*, Verizon Wireless Service Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp ("Except for small claims court cases that qualify, any dispute that results from this agreement or from the Services you receive from us … will be resolved by one or more neutral arbitrators …. This agreement doesn't allow class arbitrations even if [arbitration] procedures or rules would."); Sprint Nextel Service Agreement, http://shop.sprint.com/en/legal/legal_terms_privacy_popup.shtml ("We each agree to finally settle all disputes [except those brought in small claims court or before a government agency] only by arbitration.... We each agree not to pursue arbitration on a classwide basis. We each agree that any arbitration will be solely between you and us

helps ensure a cost-effective, streamlined, non-adversarial process for handling the typically small-dollar customer disputes on a case-by-case basis — free from the attendant burdens of either litigation or multi-party proceedings.

Here, the Ninth Circuit imposed the complex, costly, mass proceedings of class arbitration on carriers and customers who contracted to avoid those very proceedings. The whole point of arbitration, however, is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition" of arbitration. *Mitsubishi Motors*, 473 U.S. at 628.

(not brought on behalf of or together with another individual's claim).... TO THE EXTENT ALLOWED BY LAW, WE EACH WAIVE ANY RIGHT TO PURSUE DISPUTES ON A CLASSWIDE BASIS; THAT IS, TO EITHER JOIN A CLAIM WITH THE CLAIM OF ANY OTHER PERSON OR ENTITY, OR ASSERT A CLAIM IN A REPRESENTATIVE CAPACITY ON BEHALF OF ANYONE ELSE IN ANY LAWSUIT, ARBITRATION OR OTHER PROCEEDING."); T-Mobile Service Agreement, http://www.t-mobile.com/Templates/Popup.aspx?WT.z_unav=ftr__TC&PAsset=Ftr_Ftr_TermsAndConditions&print=true ("WE EACH AGREE THAT ... ANY AND ALL CLAIMS OR DISPUTES IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT.... WE EACH AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS, WHETHER IN ARBITRATION OR COURT, WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION OR AS A MEMBER IN A CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION.").

Parties that believe that the trade-off only makes sense if the very different stakes and procedures of class arbitration are foreclosed are entitled to make that judgment and make it stick. The Ninth Circuit's decision upends that trade-off. By holding that state-law policies — here, California's minority view that class-action procedures are non-waivable, even in arbitration — may trump the express intent and wishes of the parties, the decision below runs directly contrary to the whole thrust of the FAA.

Allowing States to rewrite arbitration provisions in this manner effectively allows States to undermine arbitration itself. The Ninth Circuit's decision not only undermines the FAA's federal policy favoring arbitration and respecting the mutual consent of the parties by rendering unenforceable millions of arbitration agreements. It also undercuts the very concept of arbitration — private parties bargaining around the procedural constraints of litigation — by conditioning enforceability on the availability of certain preferred procedures. Whatever the State's ability to insist on its favored procedures in its own forums, it cannot superimpose those favored procedures on arbitrations without running afoul of the FAA.

II. THE DECISION BELOW HAS SERIOUS RAMIFICATIONS FOR THE WIRELESS COMMUNICATIONS INDUSTRY AND ITS CUSTOMERS.

A. Arbitration Provides Valuable Benefits To Wireless Carriers And Their Customers.

Arbitration provisions, as noted above, are an important and prevalent feature in many businesses' consumer agreements, including wireless carriers' nationwide service agreements. The provisions are attractive to carriers and customers alike, producing important benefits for both. Holding unenforceable the specifications of millions of mutually beneficial agreements makes no sense as either a matter of policy or precedent.

In enacting the FAA, Congress recognized the broad appeal of arbitration. Congress "had the needs of consumers, as well as others, in mind." S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). Opting for arbitration, Congress believed, would minimize the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37, § 2(a)(3)(B)(iv), 106 Stat. 185. Avoiding those burdens of litigation would therefore appeal "to big business and little business alike, … corporate interests [and] … individuals.'" S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). This Court has likewise long recognized the virtues of arbitration, including its "simplicity, informality, and expedition." *Mitsubishi Motors*, 473 U.S. at 628; *see also Preston*, 552 U.S. at 357 (arbitration

ensures "streamlined proceedings and expeditious results").

Wireless carriers for their part have embraced arbitration as a vital aspect of their business operations. Arbitration provides wireless carriers — many of whom provide service nationwide — and their customers with a streamlined and time- and cost-efficient mechanism for addressing and resolving disputes out of court. Through arbitration, carriers are able to keep dispute resolution costs to a minimum and, in turn, maintain lower service costs for their customers. At the same time, the non-adversarial process reduces the likelihood that a customer relationship will turn sour; in fact, generous arbitral awards and an efficient arbitration process can shore up customer loyalty to the carrier. Intense competition and low prices among mobile phone carriers have spurred carriers to put an increasing premium on high-quality customer service and high subscriber retention rates over the long-term. *See In re Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 08-28, WT Docket No. 07-71 ¶¶ 225, 290 (Feb. 4, 2008).

Customers of wireless services likewise reap substantial benefits from arbitration provisions. The wireless carriers' cost savings are passed along to customers in the form of lower prices. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-55 (2006). Absent the

arbitration remedy, moreover, consumers with small-dollar damages claims would be forced to seek remedies in court — "the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). The availability of an informal arbitration process means that more customers with grievances are likely to pursue and therefore obtain remedies. And, of course, customers who have their grievances resolved are more likely to remain customers.

The value to customers is especially pronounced where, as here, the arbitration provisions are extraordinarily customer-protective — by one district judge's account, "perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009) (Feess, J.). As the district court below observed, the arbitral awards under AT&T Mobility's provision substantially exceed the average payments granted to class representatives as part of court-approved settlement agreements. The terms were so protective, in fact, that they served to prompt AT&T Mobility to accept liability before arbitration "even for claims of questionable merit and for claims it does not owe" to avoid having to shoulder the costs of arbitration. Pet. App. 39a.

Thus, consistent with the pronouncements of Congress and this Court, both carriers and customers stand to gain from arbitration and its numerous efficiencies and relative advantages to litigation.

B. Class Arbitration Defeats The Benefits Of Traditional Arbitration.

By contrast, class arbitration often devolves into a lose-lose proposition. Class arbitration is a relatively recent innovation; it was not until 2003, in the wake of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), that the main arbitration providers even established rules to govern class arbitrations. *See* David S. Clancy, et al., *An Uninvited Guest: Class Arbitrations and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 56 & n.1 (2007).

As this Court recently recognized in *Stolt-Nielsen*, class arbitration is fundamentally different from traditional arbitration. Indeed, each of class arbitration's departures from the rules of traditional, individual arbitration "disrupt the negotiated risk/benefit allocation" of traditional arbitration and represent an altogether "different sort of arbitration" than the parties bargained for. *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995). The class arbitration hybrid blurs the distinction and trade-off between arbitration's streamlined proceedings and expeditious results, on one hand, and litigation's in-court protections and rigorous review, on the other. *See* Kathleen M. Scanlon, *Class Arbitration Waivers: The 'Severability' Doctrine And Its Consequences*, 62 Disp. Resol. J. 40, 42 (2007) (class arbitration imports "collective action into the arbitration context").

Class-action procedures, in effect, render arbitration "a private judicial system that looks

and costs like the litigation it's supposed to prevent." Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, Harv. Bus. Rev. 120, 120 (May 1994). The resulting hybrid nullifies traditional arbitration's expedition, informality, and cost-savings benefits in several ways.

First, and most obviously, class treatment means that rather than resolving a one-on-one bilateral dispute, the proceeding involves "many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. As the Court recently recognized in *Stolt-Nielsen*, that shift is not a mere adjustment to the "procedural mode." *Id.* Rather, it is a "fundamental change[]" that radically transforms the nature of the proceedings and the parties' bargain. *Id.*

Second, precisely because hundreds or thousands of parties have been swept into the fold, class treatment significantly raises the financial stakes of the arbitration. When arbitration is individualized, businesses willingly assume the risk of an adverse award subject to only minimal review because that risk is dwarfed by the overall cost savings and likelihood of prevailing in some other number of individual cases. Class arbitration, however, raises the stakes in a way that fundamentally alters that calculus; "the relative benefits of class-action arbitration are much less assured." *Id.* at 1775-76. A single, erroneous arbitral award, once multiplied by a vast number of class members, could potentially be

devastating and business-imperiling. *See id.* at 1776 (commercial stakes of class arbitration are "comparable to those of class-action litigation"). Parties willing to forgo the more extensive review associated with litigation in exchange for streamlined procedures will likely not make the same trade-off if class arbitration is required, given such substantial risks.

Third, class arbitration combines the enormous costs of class actions with the bare-bones procedural protections of arbitration. Arbitration, for example, allows for only "severely limited" judicial review of the arbitrator's decision, *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) — "among the narrowest known to law." *Dominion Video Satellite, Inc. v. Echostar Satellite LLC*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted); Clancy et al., 63 BUS. LAW at 70 n.80 (as of late 2007, no court had ever reversed an arbitrator's class certification order). A party seeking to vacate a class arbitration award may not obtain vacatur upon a showing of "serious error," but rather must demonstrate a "'manifest disregard' of the law." *Stolt-Nielsen*, 130 S. Ct. at 1766-67.

At the same time, class arbitration injects a host of complexities that threaten the principal benefit of arbitration — namely, efficiency. Parties to class arbitration must engage in substantial discovery to determine whether the numerosity, typicality, commonality, and adequacy-of-representation requirements are satisfied for the putative class. Parties must also submit briefing and participate

in hearings about whether the class prerequisites are satisfied. Indeed, the American Arbitration Association's ("AAA") rules for class arbitrations largely mirror the Federal Rules of Civil Procedure from the private judicial system — the very system intended to be bypassed for the simpler alternative of arbitration. *See* AAA, *Commercial Arbitration Rules And Mediation Procedures*, http://www.adr.org/sp.asp?id=21936.

Fourth, class arbitration draws out the resolution process, thus compounding the costs for the parties. *Cf.* AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, http://www.adr.org/si.asp?id=5027 (AAA-administered consumer arbitrations proceed to an award in approximately 4-6 months). The discovery process for class certification can itself span many months or years. The quantum of evidence, witnesses, and discovery involved in addressing a carrier's practices on a statewide or nationwide basis is exponentially larger than that needed to address a single customer's dispute. And because the commercial stakes of a class arbitration award are so high, the likelihood of appeal is greater despite the limited scope for judicial review — thus adding the additional complexities, costs, and delays of motions to vacate and cross-motions to confirm arbitrators' decisions.

Even when the defendant prevails in or settles a class arbitration, finality is hardly assured. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), established that class actions "implicate the due process principle … that one is not bound by a

judgment *in personam* in a litigation in which he is not designated as a party." *Id.* at 846. It remains to be seen, then, whether absent class members could successfully challenge an arbitrator's decision on due process grounds — for example, contending that they had no say in the selection of the arbitrator. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 113 (2000).

Ultimately, compelling parties who entered agreements for individual arbitration to accommodate class-wide claims unravels much of what made arbitration an attractive, fair, and efficient option in the first place. As *Stolt-Nielsen* makes clear, insisting on class arbitration is not some procedural tweak, but a fundamental reshaping of the parties' bargain. The resulting new arrangement is not one many businesses would willingly accept. That is not mere supposition when it comes to wireless carriers. As noted, many wireless carriers agreed to arbitrate on the express condition that arbitration be individualized. *See supra* at 8-9 n.3. For wireless carriers, the Ninth Circuit's decision eliminates many if not all of the assumed and established benefits of traditional arbitration.

C. If States May Superimpose Class Action Procedures On Arbitration Agreements, Businesses Will Drop Arbitration Altogether And Consumers Will Suffer.

If States are free to condition the enforceability of arbitration agreements on the availability of

class-wide arbitration procedures, companies are likely to abandon arbitration altogether. Thus, in practice, conditioning the enforceability of arbitration agreements on the availability of class arbitration amounts to a bar on arbitration. Because the Ninth Circuit's decision means that parties' requests for individual arbitration will not be honored by the courts, many companies will opt not to engage in arbitration going forward.

The abandonment of arbitration for litigation is a contractual certainty for many wireless carriers: The arbitration clauses in the terms of service of many CTIA members expressly provide that their arbitration clauses have no force if the class waiver is deemed unenforceable. Sprint Nextel's service agreement, for example, states that "[i]f for any reason any court or arbitrator holds that this restriction is unconscionable or unenforceable, then our agreement to arbitrate doesn't apply and the dispute *must be brought in court*." Sprint Nextel Service Agreement (emphasis added), http://shop.sprint.com/en/legal/legal_terms_privacy_popup.shtml. Verizon's agreement similarly provides that "[i]f for some reason the prohibition on class arbitrations … cannot be enforced, then the agreement to arbitrate will not apply." Verizon Wireless Service Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp. Comcast, meanwhile, inserted a "Special Note Regarding Arbitration for California Customers" in its service agreement in the wake of the Ninth Circuit's decision to announce that it would "not seek to enforce the arbitration provision above" against

any Comcast customer in the State. Comcast Service Agreement, *available at* http://www.comcast.net/terms/.

Even when the contract itself does not provide an explicit escape hatch, the practical effect of a state-law insistence on class arbitration will be a frustration of the federal purpose of encouraging arbitration. Comcast's response to the First Circuit's decision in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), is illustrative of those pressures to abandon arbitration altogether. In *Kristian*, a class of cable subscribers alleged various antitrust violations, leading Comcast to file a motion to compel arbitration on their claims. The First Circuit allowed plaintiffs' antitrust claims to proceed in a class arbitration, deeming Comcast's individual-claim-only provision in its arbitration agreement unenforceable. The First Circuit pointedly noted, however, that Comcast could withdraw its motion to compel arbitration "if it d[id] not like the conditions that now apply to the arbitral forum." *Id.* at 63 n.25. Comcast promptly dropped its motion to compel arbitration. *See Kristian v. Comcast Corp.*, 469 F. Supp. 2d 1 (D. Mass. 2006). The prospect that wireless carriers and other businesses will be disinclined to engage in arbitration going forward, once the process is sapped of its traditional benefits, is thus a real and not merely hypothetical danger.

Nor would wireless carriers and other businesses be inclined to adopt a bifurcated approach — engaging in individual arbitration *while* litigating class actions in court. The

significant costs of arbitration are worthwhile to a carrier only where it knows that *all* customer disputes will be resolved through the arbitral process. Arbitration is hardly cost-free for consumer businesses. The businesses typically shoulder substantial costs that consumers would bear themselves if the disputes were litigated. Under American Arbitration Association rules, consumer costs are generally capped at $125 for claims under $10,000; the carriers pay the balance, subsidizing costs that can amount to thousands of dollars per day. *See* AAA, *Non-Binding Arbitration Rules For Consumer Disputes And Business Disputes*, http://www.adr.org/sp.asp?id=35917. Many carriers, in fact, include even more favorable provisions.[4] But when there is no assurance that all claims will be arbitrated in lieu of litigation, and a carrier must shoulder the additional costs of class action litigation, subsidizing the costs of individual arbitration is no longer a rational business option. The simplest way forward, from the carrier's perspective, would be to disengage from arbitration altogether.

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[4] T-Mobile, for example, "will pay *all* filing, administration and arbitrator fees for claims that total less than $75,000." T-Mobile Service Agreement (emphasis added), http://www.t-mobile.com/Templates/Popup.aspx?WT.zunav=ftr__TC&PAsset=Ftr_Ftr_TermsAndConditions&print=true. Verizon Wireless, meanwhile, offers a free voluntary mediation program and pays "any [arbitration] filing fee" and any other "administrative or arbitrator fees charged later" for customers who participate in the program. *See* Verizon Wireless Service Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp.

Thus, when courts superimpose class-wide treatment on individual-claim-only arbitration agreements, they are not engaged in some minor procedural tinkering. The inevitable effect of imposing class arbitration on unwilling parties is that many companies will withdraw from arbitration for all consumer disputes, whether individual or class-wide. Consumers with truly individualized disputes not suitable for class treatment will be much worse off, but the clearest victim will be the FAA's federal policy to promote and further arbitration.

D. The Decision Below Injects State-By-State Confusion Into The Enforceability Of Nationwide Agreements.

The consequences of the Ninth Circuit's decision for wireless carriers and other companies with nationwide businesses and customer agreements will not be easily cabined. Although the holding below was predicated on California unconscionability law, the consequences for wireless carriers extend nationwide.

Each wireless carrier, respectively, utilizes a single contract for customers nationwide and service that is provided nationwide. The enforceability of those nationwide customer service agreements will now vary from State to State, forcing carriers to adopt different rules for different geographical markets. A regime in which a carrier's uniform arbitration provisions are invalid in one State but valid in another undermines the benefits of having a uniform contract to govern customer relationships across the country. The

FAA's federal policy promoting arbitration should allow nationwide carriers to enforce a nationwide policy when it comes to arbitration.

If left to stand, the Ninth Circuit's decision means that — at a minimum — all individual-claim-only arbitration provisions as applied to California customers are unenforceable. The size of the California market alone cannot be understated; indeed, the locus of consumer protection litigation already lies in the California courts. *See* CTIA Br. Supporting Cert Petition, *AT&T Mobility, Inc. v. Concepcion, et. al.* (09-893), at 13-15; Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation Preliminary Report*, at 21 (Dec. 2009), http://www.law.northwestern.edu/searlecenter/uploads/CPA_Proof_113009_final.pdf. That trend is compounded by the Ninth Circuit's decision last year that out-of-state residents may also challenge arbitration agreements as violating California law. *See Masters v. DirecTV, Inc.*, No. 08-55825, 2009 WL 4885132 (9th Cir. Nov. 19, 2009) (California's "fundamental policy" against class-action waivers is not limited to California residents). Plaintiffs' lawyers now have every incentive to bring suit in California to avoid adverse FAA preemption rulings.

The potential impact of the decision below extends far beyond California, however. The decision below, if affirmed, will give state courts that have long been "skeptical of arbitration" a clear roadmap "to evade the Supreme Court's pro-arbitration directives while simultaneously

insulating their rulings from Supreme Court review." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1420 (2008). Indeed, state unconscionability laws have become increasingly prevalent grounds for holding arbitration agreements unenforceable in recent years. One academic estimates that whereas unconscionability challenges "once appeared in less than 1% of all arbitration-related cases, more recently they have appeared in 15-20% of all cases" involving arbitration. *Id.* at 1441.

As noted above, Comcast's response to the Ninth Circuit's decision was to insert a California-customer-specific non-enforcement policy into its nationwide service agreement. The move to incorporate state-specific rules, however, only underscores the incongruence of having a nationwide agreement whose enforceability varies from State to State.

The prospect of being forced into State-by-State enforceability litigation again defies both the federal purposes of the FAA and the parties' intent in adopting a nationwide service agreement. Going forward, it will further compel carriers to extricate themselves from arbitration altogether — and further underscore the stark conflict between the Ninth Circuit's decision below and the FAA's national policy favoring arbitration.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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