No. 09-893

In the
Supreme Court of the United States

AT&T MOBILITY LLC, PETITIONER,

v.

VINCENT AND LIZA CONCEPCION, RESPONDENTS.

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

BRIEF FOR THE STATES OF ILLINOIS, MARYLAND, MINNESOTA, MONTANA, NEW MEXICO, TENNESSEE, AND VERMONT AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

When an otherwise unenforceable class-action ban is embedded in an arbitration agreement, is a state-law ruling precluding its enforcement under generally applicable contract law preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (“FAA”)?

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INTEREST OF THE *AMICI CURIAE*

States have long declined to enforce contracts that are unconscionable or offensive to public policy. These and other state law contract defenses are an important means of protecting consumers against predatory or unfair treatment. In urging FAA preemption of a state-law determination that an adhesive class-action waiver is unconscionable, petitioner asks federal courts to second-guess decades of state contract law, without any administrable standard to guide them. Because the decision below preserves States' historical ability to develop and enforce contract law, the *Amici* States have a significant interest in the outcome of this appeal. Moreover, preempting state law here would effectively eliminate consumer class actions, an important complement to government efforts at safeguarding consumers against fraudulent and deceitful practices.

STATEMENT

1. As alleged in the complaint, respondents agreed to purchase cellular telephone service from petitioner in reliance on its promise that purchasers would receive a "free" cell phone. Pet. App. 1a, 19a. Respondents, who signed a wireless service agreement ("WSA") with a two-year term, received two cell phones without charge but paid $30.22 in sales tax, an amount calculated using the phones' full retail value. *Id.* at 2a-3a. Respondents subsequently filed this putative class action, alleging that petitioner had engaged in unfair and deceptive trade practices under California law by charging sales tax on phones it had marketed as "free." *Id.* at 1a, 17a-18a.

2. Petitioner moved to compel arbitration, seeking to enforce the WSA's arbitration clause, which required respondents to resolve any dispute arising out of the agreement through an informal claims process and, if that failed, through individual arbitration or in small-claims court. *Id.* at 4a, 19a-20a, 26a. The district court denied petitioner's motion, holding that the class-action waiver in the arbitration clause was unconscionable and therefore unenforceable under California contract law. *Id.* at 35a-47a. The court also rejected petitioner's argument that the FAA preempts California contract law. *Id.* at 47a n.11.

3. The court of appeals affirmed. *Id.* at 2a. The court first confirmed the lower court's holding that the arbitration clause and class-action waiver are unenforceable under state law. *Id.* at 4a-11a. Applying the test for unconscionability set forth in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the appellate court held that the class-action

waiver was unconscionable because (1) it appeared in a contract of adhesion, whose terms were not subject to negotiation; (2) disputes between the contracting parties were likely to involve small damages awards, giving consumers insufficient incentive to bring individual actions and effectively insulating petitioner from liability for wrongdoing; and (3) respondents had alleged that petitioner, the party with superior bargaining power, had deliberately cheated large numbers of consumers out of individually small sums of money. Pet. App. 7a-9a. The court calculated that "aggrieved customers will predictably not file claims," thereby "greatly reducing" petitioner's liability "for allegedly mulcting small sums of money from many consumers." *Id.* at 10a-11a & n.8 (internal markings omitted).

The court went on to sustain the district court's holding that the FAA does not preempt this application of California contract law. *Id.* at 12a-16a. As the appellate court explained, "'it is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable'" under the FAA. *Id.* at 5a (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007), itself citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-687 (1996)). In particular, § 2 of the Act provides that an arbitration clause "'shall be valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Ibid.* (quoting 9 U.S.C. § 2). Rejecting petitioner's argument that the *Discover Bank* rule singles out arbitration agreements for nonenforcement and thus is not within the scope of § 2's saving clause, the appellate court stated that the

rule represents a "refinement" of California's general unconscionability doctrine, *id.* at 12a (internal quotations omitted), echoing the state supreme court's determination that "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that * * * applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements" and thus "does not specifically apply to arbitration agreements, but to contracts generally," *Discover Bank*, 113 P.3d at 1112.

4. This Court granted certiorari on May 24, 2010.

SUMMARY OF ARGUMENT

Although under the FAA "[c]ourts may not * * * invalidate arbitration agreements under state laws applicable only to arbitration provisions," this Court has long held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" the Act. *Casarotto*, 517 U.S. at 687; accord *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010). The California contract defense that petitioner challenges is "generally applicable." Accordingly, the FAA does not preempt it, and the novel preemption rule that petitioner offers fails on multiple grounds.

First, rather than merely protecting arbitration agreements from discrimination—as the text and history of the FAA command—petitioner would single out these agreements for special treatment, requiring their enforcement under circumstances that would invalidate a contract to litigate under state law. Not only does petitioner's approach contravene the FAA's language and purpose, but it also would be unworkable in practice, requiring federal courts to rethink state courts' application of their own contract doctrines. This, in turn, would contravene the federalism-based principle that state courts are the final arbiters of questions of state law and engender needless litigation on questions of federal preemption.

Second, petitioner's alternate, "conflict" preemption argument is equally offensive to state sovereignty. By focusing on purported statutory purposes with no basis in the FAA's text, petitioner blurs the distinction between the legislative and judicial roles and upsets

the bargain struck with the States—who were repeatedly assured that the Act would not interfere with state contract law—at the time of the FAA's enactment.

Finally, although petitioner would eliminate consumer class actions altogether, these suits are an effective supplement to government efforts to protect consumers against fraud and sharp dealing. Both federal and state consumer-protection laws openly encourage class actions, as a means of furnishing individual relief, notifying victims who otherwise might not know they have been injured, and deterring wrongdoing. The efforts of "private attorneys general" are especially valuable in this era of state budget cuts and limited resources, and petitioner's attempt to do away with consumer class actions is a further affront to the States' interests.

ARGUMENT

I. PETITIONER'S NOVEL PREEMPTION RULE NOT ONLY DEFIES THE FAA'S STATED PURPOSE, BUT IT WOULD LEAD TO MORE, NOT LESS, LITIGATION.

The FAA serves a well-defined aim. To overcome a perceived, historical judicial hostility to arbitration, the Act makes agreements to arbitrate future disputes as enforceable as other contracts, and it provides a streamlined procedure for holding recalcitrant parties to such agreements. At the same time, the Act is careful to leave traditional contract law defenses undisturbed, making arbitration clauses as enforceable as, but no more enforceable than, other contracts.

Petitioner's approach is impossible to square with the Act. Its rule would immunize agreements to arbitrate from contract law defenses that would invalidate other, non-arbitration contracts, contrary to the saving clause in § 2. And it would do so by requiring federal courts to undertake a protracted and standardless rethinking of state contract law traditions, ironically encouraging more of the litigation that arbitration agreements seek to avoid.

A. The FAA Undid Courts' Historical Refusal To Enforce Predispute Arbitration Agreements By Forbidding Courts From Singling Out These Agreements For Disfavor.

1. Modeled on a 1920 New York law, see Ian R. MacNeil, *American Arbitration Law* 68 (1992), Congress passed the FAA in 1925 to overturn courts' longstanding refusal to specifically enforce contracts to

arbitrate future disputes, *id.* at 20 (observing that party's refusal to adhere to predispute arbitration clause "was a breach of the arbitration agreement, but it was a breach for which only damages, not specific performance, were available, and these were largely ineffective") (footnotes omitted); see also *Arbitration of Interstate Commercial Disputes: Joint Hearing Before a Subcomm. of the Comms. on the Judiciary* ("*1924 Joint Hearing*"), 68th Cong. 35 (1924) ("[F]ollowing an anachronism in the English law, arbitration agreements have not been enforced by our courts in the United States."). A popular explanation for this historical prejudice against arbitration was "the jealousy of the English courts for their own jurisdiction," which purportedly led these courts to "refuse[] to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." H.R. Rep. No. 96, at 1-2 (1924), quoted in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 n.6 (1985).

Arbitration's promoters in the early Twentieth Century thus held one aim above all others—"elimination of the rule of revocability of arbitration agreements." MacNeil, *supra*, at 28. And § 2 of the FAA did precisely that. It abolished the longstanding "judicial hostility to arbitration agreements," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995), by declaring such agreements to be "valid, irrevocable, and enforceable," 9 U.S.C. § 2; see also *1924 Joint Hearing* at 16 (statement of Julius Henry Cohen) ("What does this bill do? It destroys the anachronism in the law."); *Byrd*, 470 U.S. at 219 (Act's "purpose was to place an arbitration agreement upon the same footing as other contracts, where it belongs,

and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate") (internal quotations and citation omitted).

2. At the same time, Congress was careful not to displace any contract law beyond the anachronistic rule that had singled out arbitration agreements for non-enforcement. Section 2 thus qualifies the foregoing language—that promises to arbitrate are "valid, irrevocable, and enforceable"—with the following: "save upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause makes clear that, while the FAA does away with courts' historical refusal to enforce arbitration agreements, it does not require courts to treat these agreements any *better* than other contracts. In the words of the FAA's principal drafter, the goal was to make promises to arbitrate future disputes "*as* inviolable as any other business contract," Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 278 (1926) (emphasis added),[1] thus placing arbitration agreements "upon the same footing as other contracts, where [they]

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[1] Cohen's role as the Act's primary drafter was well known. See, *e.g.*, *Sales & Contracts to Sell in Interstate & Foreign Commerce, & Federal Commercial Arbitration: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 13 (1923) ("Julius Henry Cohen did it, primarily."); MacNeil, *supra*, at 85 ("This first draft of the [FAA] by Julius Henry Cohen covered the same subjects as the New York Arbitration Law of 1920 and, with one exception, in a virtually identical manner") (footnote omitted).

belong[ ]," H.R. Rep. No. 96, at 1 (1924). In short, "[a]s the 'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

3. For States, the saving clause is critical, for it ensures that the FAA preserves state contract law—even where that law has the effect of voiding an arbitration clause—by making arbitration agreements subject to all "general contract defenses." *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984). Under the saving clause, "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, 492 n.9 (1987) (emphasis in original); cf. *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (preempting state law that "impose[d] prerequisites to enforcement of an arbitration agreement that [were] not applicable to contracts generally").

In this way, the saving clause memorialized repeated assurances that the Act would not interfere with state contract law, beyond eliminating the old judicial preference for litigation over arbitration. Members of Congress were told that the FAA would not "infringe[] upon the right of each State to decide for itself what contracts shall or shall not exist under its laws," for "whether or not a contract exists" in the first place "is a question of the substantive law of the jurisdiction wherein the contract was made." *1924 Joint Hearing* at 37; see also *Sales & Contracts to Sell in Interstate & Foreign Commerce, & Federal*

Commercial Arbitration: Hearing Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 5 (1923) (statement of Sen. Walsh) (arbitration agreements remain "open to all defenses, equitable and legal, that would have existed at law"). Similarly, House members received confirmation that—while the FAA would "correct[] * * * what seems to be an anachronism in our law, inherited from English jurisprudence" (refusing to specifically enforce agreements to arbitrate)—the Act would "not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to." 65 Cong. Rec. H1931 (daily ed. Feb. 5, 1924) (statement of Rep. Graham).

New York's 1920 arbitration law, on which the FAA was based and which included language identical to § 2 of the FAA, see *supra* p. 7, provided additional assurance of the continued vitality of state contract defenses, for that law preserved New York contract law from interference. See Osmond K. Fraenkel, *The New York Arbitration Law*, 32 Colum. L. Rev. 623, 625 (1932) ("All the usual reasons a contract right may be lost may be asserted in response to a petition to compel arbitration."). Indeed, by the time Congress passed the FAA, the New York statute had been interpreted to avoid any interference with the state common law of contract: a "provision for arbitration [is] of no more binding force than any other [contract] provision," for "[t]he Arbitration Law was passed to provide a means for enforcing an agreement to arbitrate; it did not otherwise change the law of contracts which is as applicable to such an agreement as to other terms and conditions." *Zimmerman v. Cohen*, 139 N.E. 764, 765

(N.Y. 1923); accord *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 291 (N.Y. 1921).

* * *

In the end, then, while § 2 displaces state laws that "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue," or that "rely on the uniqueness of an agreement to arbitrate" as grounds to refuse enforcement, *Perry*, 482 U.S. at 492 n.9, and while "[c]ourts may not * * * invalidate arbitration agreements under state laws applicable *only* to arbitration provisions," "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2," *Casarotto*, 517 U.S. at 687 (emphasis in original). "By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Ibid.* (internal quotations omitted).

B. Petitioner's Proposed Rule Would Single Out Arbitration Agreements For Special Treatment, Require Federal Courts To Second-Guess State Court Decisions Interpreting State Law, And Encourage Needless Litigation.

Applying the foregoing principles, the FAA does not preempt application of California's unconscionability or public policy doctrines to bar class-action waivers in contracts of adhesion. This Court has identified unconscionability, specifically, as a "generally applicable contract defense[]" that survives preemption under § 2's

saving clause. *Casarotto*, 517 U.S. at 687. Nor does application of the defense single out arbitration for disfavored treatment in practice. On the contrary, as petitioner concedes, see Pet. Br. 28-31, the limits on class-action waivers that California contract law imposes apply to arbitration and litigation alike. Because California's unconscionability doctrine treats arbitration and litigation the same, California law is fully consistent with the FAA's goal of abolishing the outmoded rule disfavoring arbitration as an alternative to formal litigation.

Where, as here, a state contract defense is one of general application, and even in application it does not single out arbitration for disfavored treatment, it falls squarely within § 2's saving clause. Such a reading of § 2 is easily applied, avoids asking federal courts to second-guess and rewrite state contract doctrine, and saves parties and the federal courts from needless additional litigation.

1. Petitioner's Proposed Rule Would Make Arbitration Agreements More Enforceable Than Other Contracts.

Although petitioner repeatedly speaks as if the *Discover Bank* rule is "arbitration-specific," Pet. Br. 19; see also *id.* at 34, 37, 39, 47, petitioner elsewhere concedes, as it must, that California's rule disfavoring class-action waivers applies to arbitration and litigation contracts alike, see *id.* at 28-31. (Indeed, the first decision in the *Discover Bank* line struck down a class-action waiver in a contract to *litigate*. See *Discover Bank*, 113 P.3d at 1106-1108 (discussing 2001 California case).) Petitioner thus admittedly seeks a

rule requiring courts to enforce arbitration clauses even where, as here, state contract law would bar an analogous agreement to litigate. In short, dissatisfied with the equal treatment that § 2 ensures, petitioner asks this Court to cloak arbitration clauses in a special immunity from contract law defenses that apply to other, non-arbitration contracts. Petitioner offers two arguments in support of this unprecedented rule, both of which fail.

1. Initially, petitioner contends that arbitration clauses enjoy a special immunity from state contract law—even generally applicable law—when that law affects arbitration *procedure*. See Pet. Br. 16, 25-26. But that is absurd. On its face, the saving clause in § 2 exempts generally applicable contract law—not generally applicable contract law "that has no effect on arbitration procedure." And if petitioner were correct, it would mean, paradoxically, that contract doctrines prohibiting the enforcement of some arbitration clauses altogether would survive preemption, while defenses (like the one challenged here) that permit arbitration but place some limits on its practice would be preempted.

Petitioner's argument also proves far too much. If state contract law were preempted whenever it affected arbitration procedure, enforcement of even the most blatantly unfair arbitration agreements would follow. For example, the FAA would displace state public policy bans on gambling contracts, which would otherwise void agreements to resolve future disputes by having the arbitrator flip a coin. Less fantastically, the Act would preempt the routine application of state law to void clauses requiring clearly one-sided arbitration

procedures. See, *e.g.*, *Ferguson v. Countywide Credit Indus., Inc.*, 298 F.3d 778, 786-787 (9th Cir. 2002) (discovery provisions in arbitration agreement that favor defendant at plaintiff's expense support unconscionability holding); *Burch v. Second Judicial Dist. Ct.*, 49 P.3d 647, 650-651 (Nev. 2002) (contract permitting selection of potentially biased arbitrator unconscionable); *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1243-1244 (Mont. 1998) (contract requiring arbitration in distant forum void as contrary to public policy). In short, petitioner's claim that contracts involving arbitration procedure are somehow exempt from § 2's saving clause defies both the plain language of that section and common sense.

2. Petitioner's next tack is to claim that the only state law that survives preemption under § 2 is a law that applies to all contracts, and that the *Discover Bank* rule fails this test because it applies only to contracts involving future dispute resolution. See Pet. Br. 28-31. This line of argument fails on multiple grounds.

First, a state contract doctrine that places limits on any agreement to resolve future disputes—whether by arbitration or litigation—does not violate the FAA. By treating arbitration and litigation alike, such a doctrine avoids the anachronistic judicial hostility to arbitration (relative to litigation) that the Act was meant to abolish. See *supra* Section I.A. To be sure, the FAA may preempt state-law rules that purport to apply equally to arbitration and litigation, only to invalidate arbitration agreements entirely and thereby require contracting parties to litigate—such as a rule making it unlawful to resolve any dispute other than by jury trial. See Pet. Br. 41. But even if petitioner is correct that fewer parties

will choose to arbitrate if it means using class arbitration, see *id.* at 55-56, this does not change the fact that class arbitration is a well-recognized means of resolving disputes, and a rule voiding certain class-action waivers does not compel the contracting parties to litigate.[2] See *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (recognizing that parties may contract for class arbitration); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality op.) (question whether parties contracted for class arbitration does not implicate "the validity of the arbitration clause"); *id.* at 454-455 (Stevens, *J.*, concurring in the judgment and dissenting in part) (FAA does not "preclude[]" agreement for class arbitration); American Arbitration Association, Supplementary Rules for Class Arbitrations (as effective

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[2] As for petitioner's contention that forum-selection clauses were unenforceable in the early Twentieth Century because they operated to "oust" a court of jurisdiction, Pet. Br. 30, the FAA's principal drafter and public advocate used the fact that these clauses *were* enforceable to argue that arbitration clauses should receive the same treatment. See Julius Henry Cohen, *Commercial Arbitration & the Law* 16-17 (1918) ("There is strong authority, also, as we shall presently find, for the legal proposition that parties may select the courts in which the case is to be tried in the event of controversy between them. Though this has been controverted, much the better authority supports this view.").

Oct. 8, 2003);[3] JAMS Class Action Procedures (as effective May 1, 2009).[4]

Second, even if petitioner were correct that use of the word "any" in § 2 means that a state contract doctrine survives preemption only if it applies across the board to all contracts, see Pet. Br. 28, California's *Discover Bank* rule satisfies that standard, just as similar rules in place across the country do. The unconscionability and public policy doctrines apply to "any" contract, not just those involving the resolution of future disputes—although, like other contract doctrines, they evolve over time and apply differently depending on the nature of the parties and the substance of their agreement. See *infra* pp. 19-21. Petitioner objects merely to the way California law applies these doctrines to class-action waivers, which by nature appear only in contracts involving future dispute resolution.

Indeed, although "unconscionability" had yet to become a term of art, the FAA's drafter recognized that, under the statute he favored and ultimately obtained, courts could void inequitable arbitration clauses like any other unfair contract provision: "when the parties do not stand on equal terms, *the aid of a Court of Equity can always be had, as in any other case of contract*." Cohen, *supra*, at 232 (quotation marks omitted)

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[3] These rules are available at http://www.adr.org/sp.asp?id =21936.

[4] These rules are available at http://www.jamsadr.com/ files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action _Procedures_2009.pdf.

(emphasis in original). And this Court identified unconscionability as an example of a generally applicable contract defense that survives preemption under § 2's saving clause. See *Casarotto*, 517 U.S. at 687. It is unimaginable that—as petitioner must presume—*Casarotto* had in mind a unique brand of unconscionability that neither evolves over time nor develops specific rules geared toward particular classes of contract.

In the end, to prevail, petitioner must explain why the *Discover Bank* rule is not what it purports to be—the application of general contract law doctrines to a specific type of agreement. More than that, petitioner must identify some principle by which federal courts can distinguish between a legitimate application of state law and the sort of illegitimate, or "idiosyncratic" application that petitioner insists is preempted. Pet. Br. 43. Petitioner offers none, and any conceivable principle would be unworkable in practice and represent an unprecedented federal intrusion into state common law.

2. Petitioner's Proposed Rule Would Require Federal Courts To Undertake A Standardless Reexamination Of State Contract Law.

Rather than a straightforward, easily administered rule prohibiting state law from discriminating against contracts to arbitrate, petitioner asks federal courts to second-guess state court decisions in the development and application of state contract law. Petitioner's brief illustrates the inquiry that petitioner envisions—one in which federal courts review the long histories of state

law doctrines, after which judges endeavor to draw their own, independent conclusions as to whether a doctrine represents a "new rule" that "distort[s]" contract law, or whether instead it represents the "refinement" of an existing rule. Pet. Br. 19, 47. Putting aside petitioner's flawed (and entirely unsupported) premise that state contract law should not evolve to create "new" rules—"unconscionability" itself did not exist as a well-defined doctrine until it appeared in the Uniform Commercial Code in the mid-Twentieth Century—it is difficult to conceive of an inquiry more destructive of the bedrock principle that the States themselves "'should utter the last word'" on questions of state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, *J.*, dissenting)).

And what criteria should courts use in deciding whether a state court's application of long-held contract doctrines to an arbitration clause is an illegitimate "new" rule or the legitimate "refinement" of an old one? In more than 11 pages detailing the history of California's unconscionability doctrine, see Pet. Br. 3-4, 32-39, 43-44, petitioner offers no administrable rule in answer to this question. And none is readily apparent.

1. It cannot be, as petitioner implies, that whether the FAA preempts an application of state contract doctrine turns on whether—in a federal court's estimation—that application squares with certain abstract elements central to that doctrine. Indeed, such a rule is all but impossible to apply to a doctrine like unconscionability, whose equitable precursors "def[y] precise formulation." E. Allen Farnsworth, Contracts

§ 4.27, at 305 (3d ed. 1999). Indeed, although unconscionability first appeared as part of the Uniform Commercial Code, "[n]owhere among the Code's many definitions is there one of unconscionability," for in the end "the term is undefinable," *id.* at § 4.28, at 310. Rather, "[t]he determination that a contract or term is or is not unconscionable is made in light of its setting, purpose and effect." Restatement (Second) of Contracts § 208 cmt. a (1981).

Likewise, "public policy," though a centuries-old basis for denying enforcement in contract, is constantly evolving. "[P]olicies vary over time," and "[a]s the interests of society change, courts are called upon to recognize new policies, while established policies become obsolete or are comprehensively dealt with by legislation." Farnsworth, *supra*, § 5.2, at 327. As a Member of this Court put it more than a century ago, "[t]he standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interest, at a more advanced stage are treated as legal and binding." *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 233-234 (1892) (statement of Brown, *J.*). Nor is there anything "new" or "idiosyncratic" in considering aspects of both the unconscionability and public policy doctrines at once, including the commonplace rule that refuses to enforce exculpatory clauses aimed at avoiding liability for intentional misconduct. See, *e.g.*, Restatement (Second) of Contracts § 208 cmt. a (1981) (recognizing that unconscionability "also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy").

And while petitioner questions whether the public policy doctrine can ever survive preemption under § 2's saving clause—on the theory that it was "public policy" that courts invoked when they formerly singled out arbitration clauses for non-enforcement in equity, see Pet. Br. 41—this critique is nonsensical. Like all contract doctrines, the FAA prohibits use of public policy to single out arbitration clauses for disfavored treatment. See *supra* p. 12. But so long as a public policy defense does not "take[] its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry*, 482 U.S. at 492 n.9, as the old, judicial hostility did, then the defense survives preemption under § 2.

2. Nor can the test for preemption be whether a particular application or extension of state contract law was the readily predictable result of prior decisions. The question is not the degree to which state law has changed, evenly or abruptly, over time—as it may be, for example, in the takings context. See, *e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992). Again, contract law is not static, see *supra* pp. 19-20, and § 2 does not purport to make it so. Rather, proper application of its saving clause turns on whether state contract doctrines, as they change, reanimate the old judicial hostility to arbitration by singling it out for disfavored treatment.

3. This case illustrates the standardless morass into which petitioner's rule would invite federal courts. Again, the unconscionability inquiry necessarily considers context, see *supra* p. 20, and in *Discover Bank*, the California Supreme Court relied squarely on its past unconscionability and public policy decisions to reach its holding. California courts have espoused the benefits of

class-action litigation for nearly 40 years, see *Discover Bank*, 113 P.3d at 1105, and the state courts had interpreted state unconscionability and public policy doctrine to invalidate class-action waivers for nearly a decade before *Discover Bank*, starting with a case involving non-class *litigation*, not arbitration, *id.* at 1106-1108. Moreover, the *Discover Bank* court carefully recited and applied longstanding California unconscionability doctrine in refusing to enforce the class-action waiver in the adhesion contract there. See *id.* at 1108.

Nor can petitioner credibly claim that California has applied its contract law idiosyncratically, for many States refuse to enforce class-action waivers under the unconscionability and/or public policy doctrines.[5] If the

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[5] See *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529 (Ala. 2002) (unconscionability); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266 (D. Ariz. 2007) (unconscionability); *S.D.S. Autos, Inc. v. Chrzanowksi*, 976 So. 2d 600 (Fla. Dist. Ct. App. 2007) (public policy); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007) (unconscionability); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006) (unconscionability); *Feeney v. Dell Inc.*, 908 N.E.2d 753 (Mass. 2009) (unconscionability and public policy); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000) (unconscionability); *Wong v. T-Mobile USA, Inc.*, No. 05-73922, 2006 WL 2042512 (E.D. Mich. July 20, 2006) (public policy); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005) (unconscionability); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (unconscionability); *Homa v. Am. Express Co.*, 558 F.3d 225 (3d Cir. 2009) (New Jersey) (unconscionability); *Cohen v. Chase Bank, N.A.*, 679 F. Supp. 2d 582 (D.N.J. 2010) (public policy); *Fiser v. Dell Computer*

California courts have departed wildly from contract law traditions in disfavoring adhesive class-action waivers, then so have state and federal courts around the country.

In the end, petitioner asks federal courts to undertake a searching, but ultimately standardless, review of decades of state contract law on myriad common law doctrines—from capacity, to fraud in the inducement, to consideration, to unconscionability and public policy—and then to make a subjective determination on the legitimacy of decisions applying those doctrines to arbitration clauses. Nothing would do more violence to the assurance that, if enacted, the FAA would mean "no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws." *1924 Joint Hearing* at 37.

Corp., 188 P.3d 1215 (N.M. 2008) (unconscionability and public policy); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008) (unconscionability); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004) (public policy); *Schwartz v. Alltel Corp.*, No. 86810, 2006 WL 2243649 (Ohio Ct. App. June 29, 2006) (unconscionability); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. Ct. App. 2007) (unconscionability); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006) (unconscionability); *Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2010) (unconscionability and public policy); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (unconscionability and public policy); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002) (unconscionability); *Cottonwood Fin., Ltd. v. Estes*, 784 N.W.2d 726 (Wis. Ct. App. 2010) (unconscionability).

3. Petitioner's Proposed Rule Would Mean More, Not Less, Litigation.

The FAA sought not merely to abolish the anachronistic rule barring enforcement of agreements to arbitrate future disputes; it sought to accomplish this aim with a minimum of litigation. Sections 3 and 4 provide a mechanism for staying the litigation of disputes that should be in arbitration, and for federal courts to compel arbitration swiftly as needed. As this Court has recognized, "[t]he Arbitration Act calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983); see also Cohen & Dayton, *supra*, at 267 (sections 3 and 4 "assure a prompt, speedy and non-technical determination of the merits of the application"); *1924 Joint Hearing* at 34 (noting that these "clauses * * * assure a prompt, speedy and nontechnical determination"); H. Rep. No. 96, at 2 (1924) (procedure for enforcing arbitration agreements "is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties").

Petitioner's rule would turn this intent on its head and encourage complex, protracted federal litigation over whether a state-law contract defense is preempted. Rather than answer a relatively simple question—does the defense single-out arbitration for disfavored treatment—petitioner invites federal courts to undertake an amorphous historical analysis of state contract law, an example of which occupies more than

11 pages of petitioner's brief in this Court. Even if such a rule would help petitioner win this case, it would saddle future parties with costly, needless litigation over whether to arbitrate, precisely what the FAA seeks to avoid.

II. PETITIONER'S "CONFLICT" PREEMPTION THEORY WOULD DISPLACE STATE LAW WITHOUT ANY AUTHORITY FROM CONGRESS.

Having failed to establish any conflict with the anti-discrimination purpose expressed in § 2 of the Act—indeed, having asked this Court to abandon that purpose for a special rule *favoring* arbitration clauses—petitioner contends, in the alternative, that there are other, unstated, objectives implicit in the Act that add to the FAA's preemptive scope. But the sweeping "conflict" preemption that petitioner asks the Court to recognize has no grounding in the Act. It amounts to nothing more than self-serving speculation about additional objectives that some Members of Congress may have hoped to achieve. The unstated objectives that petitioner invites the Court to recognize, and the wide-ranging preemption that petitioner says should follow from these supposed objectives, illustrates precisely why so many Members of this Court have questioned the brand of preemption petitioner urges here.

The "purposes and objectives" theory of conflict preemption on which petitioner relies would displace state law "to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt Info. Sci., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S.

52, 67 (1941)). But once a court gives preemptive force to perceived "purposes" beyond those that appear on the face of the Act itself—such as § 2's clear directive to treat arbitration agreements like other contracts—it runs the many risks that Members of the Court have identified. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1207-1208, 1215-1217 (2009) (Thomas, *J.*, concurring in the judgment) (suggesting that Court abandon "purposes and objectives" preemption altogether); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (Thomas, *J.*, concurring in judgment in part and dissenting in part); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907-908 & n.22 (2000) (Stevens, *J.*, dissenting); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, *J.*, concurring in part and concurring in the judgment).

First, when a court expands preemption beyond what Congress expressly directs, the court risks treading on the "policy choices and value determinations constitutionally committed for resolution to the halls of Congress." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (raising same concerns about political question doctrine). "[T]he Constitution prohibits one branch [of federal government] from encroaching on the central prerogatives of another," *Miller v. French*, 530 U.S. 327, 341 (2000), and it is "the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation," *TVA v. Hill*, 437 U.S. 153, 194 (1978). "Purposes and objectives" preemption upsets this constitutional division of labor by empowering courts to "invalidat[e] state laws based on perceived conflicts with broad federal policy

objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth*, 129 S. Ct. at 1205 (Thomas, *J.*, concurring in the judgment). The doctrine thus permits "[a] free wheeling judicial inquiry into whether a state statute is in tension with federal objectives," one that "undercut[s] the principle that it is Congress rather than the courts that pre-empts state law." *Gade*, 505 U.S. at 111 (Kennedy, *J.*, concurring in part and concurring in the judgment); accord *Wyeth*, 129 S. Ct. at 1208 (Thomas, *J.*, concurring in the judgment). And it removes the power of preemption from "the hands of Congress," which is the body best "suited * * * to strike the appropriate state/federal balance." *Geier*, 529 U.S. at 907 (Stevens, *J.*, dissenting).

Second, "purposes and objectives" preemption risks unpredictable outcomes, for—beyond what appears on the face of the law itself—congressional intent may be difficult to discern. "Federal legislation is often the result of compromise between legislators and 'groups with marked but divergent interests,'" and "a statute's text might reflect a compromise between parties who wanted to pursue a particular goal to different extents." *Wyeth*, 129 S. Ct. at 1215 (Thomas, *J.*, concurring in the judgment) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002)); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (noting that "[s]tatutes are seldom crafted to pursue a single goal"). Preempting state law without any clear authority from Congress thus "risks upsetting the legislative bargains out of which the statutes were hammered." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 280 (2000). And it "leaves Congress, regulated industries, and consumers to guess at whether untested federal laws

have displaced state [law]." Robert S. Peck, *A Separation-of-Powers Defense of the "Presumption Against Preemption*," 84 Tul. L. Rev. 1185, 1187 (2010).

Petitioner's "conflict" preemption theory exemplifies these risks. Petitioner attributes several self-serving "purposes" to Congress—ensuring enforcement of arbitration agreements "in accordance with their terms," "allowing parties to select their own dispute-resolution procedures," and "removing impediments to arbitration." Pet. Br. 24, 49, 53. But unlike the anti-discrimination command in § 2, not one of these supposed goals appears anywhere in the Act itself. Petitioner's proposed rule would not only read them into the Act, but would use them to displace critical state laws, including contract defenses that protect residents from predatory or unfair treatment. See *supra* p. 23. And because the States had no notice that the FAA would preempt swaths of their contract law—indeed, they were assured otherwise, see *supra* pp. 10-12—petitioner's rule guts the "effectiveness of the federal political process in preserving the States' interests." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

Petitioner acknowledges but tries to brush aside concerns over its preemption theory. See Pet. Br. 48-49 n.15 (arguing that "[t]he conflict-preemption argument here is not based on 'generalized notions of congressional purpose'" and thus is not cause for "skepticism"). But this effort fails. Most obviously, petitioner is wrong to suggest that Justice Thomas in *Wyeth* rejected only those applications of "purposes and objectives" preemption that "wander far from the statutory text," while otherwise reaffirming the

doctrine. *Id.* at 48 n.15 (internal quotations omitted). In fact, Justice Thomas stated that "[t]his Court's entire body of 'purposes and objectives' pre-emption jurisprudence is inherently flawed," and he would reject the doctrine as a whole. 129 S. Ct. at 1211 (Thomas, *J.*, concurring in the judgment). In any event, as explained, petitioner's claim that its "conflict" preemption argument is "firmly rooted in the text and structure" of the FAA, Pet. Br. 48 n.15 (internal quotations omitted), is belied by the text of the Act itself.

III. CLASS ACTIONS BOLSTER GOVERNMENT EFFORTS TO PROTECT CONSUMERS.

Finally, petitioner and its *amici* attempt to downplay the importance of class litigation to public policy in the States, but this line of argument presumes that government enforcement power is unlimited, and it ignores the role consciously left to private litigants in deterring and remedying misconduct. Although government plays the primary role in enforcing consumer-protection laws, private, class litigation is an effective complement to government efforts to obtain relief for consumers injured by fraud or sharp dealing, particularly where the prospect of small damage awards makes it "uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); see also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) ("It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action."). Class litigation also serves to notify victims who might not know they have been injured, educate the public about

questionable business activities and practices, deter wrongdoing, and bring patterns of misconduct to light. See 2 Newberg on Class Actions §§ 5.49, 5.51, at 467-469, 470-472 (4th ed. 2002).

Ignoring these substantial benefits, petitioner and its *amici* argue that class-wide proceedings are unnecessary because government enforcement of federal and state consumer-protection laws adequately defends consumers against abusive business practices. See Pet. Br. 45-46; Brief of *Amicus Curiae* American Bankers Association, *et al.* ("Bankers Br.") 26-29; Brief for *Amici Curiae* the States of South Carolina and Utah 4-6. But while government efforts to protect consumers are substantial, class litigation is an important element of the enforcement scheme. As this Court recognized:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

Often, federal and state laws openly encourage private class-action litigation as a supplement to public enforcement. "Whereas some countries choose to enforce their laws by establishing large and powerful government bureaucracies, the United States has

generally taken a different approach." Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 Law & Contemp. Probs. 75, 98 (2004). This country's consumer-protection agencies tend to be "small * * * compared to those of other nations, such as many European countries," government instead relying on affected individuals to bring their own lawsuits as "private attorneys general." *Ibid.* Accordingly, federal and state consumer-protection laws often authorize private individual and class litigation, as well as government enforcement, employing class actions as a way to "enhance[] the private attorney general legislative objective." 2 Newberg, *supra*, at 469.

The federal Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*—"[t]he most voluminous source of class actions in the area of consumer credit," 6 Newberg, *supra*, at 380—is a prime example of this combined approach. To further its mandate that consumers receive "meaningful disclosure of credit terms," TILA authorizes enforcement by designated federal agencies and state attorneys general. 15 U.S.C. §§ 1601(a), 1607, 1640(e). It also creates an "[i]ndividual and class action for damages" against "any creditor who fails to comply with any requirement imposed" by the statute. *Id.* § 1640(a). Thus, the statute "create[s] a system of private attorneys general to aid its enforcement." *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978); accord *de Jesus v. Banco Popular de Puerto Rico*, 918 F.2d 232, 234 (1st Cir. 1990); *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037,

1040 (6th Cir. 1984); *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982).[6]

The importance of class litigation to Congress' enforcement scheme is evident from TILA's text and legislative history. Although the law dates from 1968, Congress amended it to authorize private class actions in 1974 "to counter the manifest judicial unwillingness to impose class liability under the Act," *Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 400 (6th Cir. 1980), and to add "'an important encouragement to the voluntary compliance which is so necessary to insure nation-wide adherence to uniform disclosure,'" *id.* at 400-401 n.6 (quoting S. Rep. No. 93-278, at 14-15 (1973)); accord *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1338 (11th Cir. 2000) ("the legislative history of § 1640 shows that Congress thought class actions were a significant means of achieving compliance with the TILA"). Since 1974, Congress has twice raised the maximum dollar ceiling on TILA class action recoveries—from $100,000 (or 1% of the net worth of the creditor) to $500,000 in 1976 and, in July 2010, to $1 million. See 15 U.S.C. § 1640 (as amended

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[6] Other federal consumer-protection statutes similarly authorize class actions notwithstanding the availability of federal and state government enforcement, reflecting Congress' conclusion that the addition of class litigation promotes consumer protection. See, *e.g.*, 15 U.S.C. § 1679g(a)(2)(b) (Credit Repair Organizations Act); 15 U.S.C. § 1691e(a)-(b) (Equal Credit Opportunity Act); 15 U.S.C. § 1692k(a)(2)(B) (Fair Debt Collection Practices Act); 15 U.S.C. § 1693m(a)(2)(B) (Electronic Fund Transfers Act); see also 6 Newberg, *supra*, at 386-393 (collecting sources of class action litigation in consumer protection area).

by Pub. L. No. 94-240, 90 Stat. 257); Dodd-Frank Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376, § 1416.

The legislative history to the 1976 TILA amendments likewise shows "that Congress wished to encourage Truth-in-Lending class actions." *Watkins*, 618 F.2d at 401. That history describes Congress' concern that if the ceiling on TILA class recoveries "'is too low, it acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized.'" *Id.* at 401 & n.7 (quoting S. Rep. No. 94-590, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 431, 438). Congress' decision earlier this year to double the maximum TILA class-action recovery, while simultaneously expanding federal and state enforcement authority, see Dodd-Frank Act §§ 1416, 1422, further confirms that class actions are an important supplement to government enforcement efforts under the TILA.

Even decisions cited by petitioner's *amici* recognize that "Congress contemplated class actions as a part of the TILA enforcement scheme," and "that class actions were self-consciously promoted by Congress in amending the statute." *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); accord *Gay v. CreditInform*, 511 F.3d 369, 380 (3d Cir. 2007); *Randolph v. Green Tree Fin. Corp.–Ala.*, 244 F.3d 814, 817 (11th Cir. 2001) (all cited at Bankers' Br. 21).[7] As

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[7] To be sure, these cases reject the view that federal consumer-protection statutes, including TILA, "create an unwaivable right to bring a class action." *Johnson*, 225 F.3d at 377; accord *Randolph*, 244 F.3d at 817-818. But they do

courts consistently have recognized, "a class action is an available, important means of remedying violations of" consumer-protection statutes, including TILA, *Bowen*, 233 F.3d at 1337, because "the small amounts of money involved and the difficult financial situations of many of the litigants may inhibit individualized litigation," *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000).

Like the federal government, States have a variety of consumer-protection laws recognizing the importance of class actions. Every State has a statute prohibiting unfair and deceptive acts and practices ("UDAP") enforceable by the state attorney general and by private litigation, often private class litigation. See Mark E. Budnitz, *The Federalization & Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation & Enforcement*, 24 Ga. St. U. L. Rev. 663, 674 (2008). Thirteen States and the District of Columbia explicitly authorize consumer class actions on the face of their UDAP laws.[8] In other States, courts

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not question that a class-action waiver included in an arbitration clause may be set aside if unconscionable under state law. See, *e.g.*, *Gay*, 511 F.3d at 394-395 (discussing Credit Repair Organizations Act, 15 U.S.C. § 1679); *Johnson*, 225 F.3d at 378 n.5 (discussing TILA).

[8] See Cal. Civ. Code § 1781 (2009); Conn. Gen. Stat. Ann. § 42-110g(b) (2010); D.C. Code § 28-3905(k)(1)(E) (2010); Idaho Code Ann. § 48-608(1) (2010); Ind. Code. Ann. § 24-5-0.5-4(b) (2010); Kan. Stat. Ann. § 50-634(c) (2010); Mass. Gen. Laws Ann. ch. 93A, § 9(2) (2010); Mich. Comp. Laws Ann. § 445.911(3) (2010); Mo. Ann. Stat. § 407.025(2) (2010); N.H. Rev. Stat. Ann. § 358-A:10-a (2010); N.M. Stat.

have construed UDAP statutes to authorize class litigation.[9] By contrast, only six state UDAP acts expressly prohibit consumer class actions.[10]

In short, federal and state consumer-protection laws assume that private litigation, including class litigation, will work in tandem with regulatory action to protect consumers. The claim that potential government enforcement eliminates any need for class litigation ignores this design and presumes away the practical limits on government's enforcement power. Like federal regulators, state officials have limited resources and myriad competing duties. Indeed, contrary to the suggestion of petitioner's *amici*, see Bankers Br. 23-24 (noting California Public Utility Commission's enforcement authority), state utility commissions have restricted (if any) ability to regulate wireless phone service providers, having been discouraged from

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Ann. § 57-12-10(E) (2010); Ohio Rev. Code Ann. § 1345.09(B) (2010); R.I. Gen. Laws § 6-13.1-5.2(b) (2009); Wyo. Stat. Ann. § 40-12-108(b) (2010).

[9] See, *e.g.*, *W.S. Badcock Corp. v. Myers*, 696 So. 2d 776, 779-780 (Fla. Dist. Ct. App. 1996); *Brooks v. Midas-Int'l Corp.*, 361 N.E.2d 815, 819-820 (Ill. App. Ct. 1977); *Olive v. Graceland Sales Corp.*, 293 A.2d 658, 659-662 (N.J. 1972); *Burns v. Volkswagen of Am., Inc.*, 460 N.Y.S.2d 410, 413 (N.Y. Sup. Ct. 1982); *Mahoney v. Cupp*, 638 S.W.2d 257, 261 (Tex. App. 1982); *Dwyer v. J.I. Kislak Mortg. Corp.*, 13 P.3d 240, 242-243 (Wash. Ct. App. 2000).

[10] See Ala. Code § 8-19-10(f) (2010); Ga. Code Ann. § 10-1-399(a) (2010); La. Rev. Stat. Ann. § 51:1409(A) (2009); Miss. Code Ann. § 75-24-15(4) (2009); Mont. Code Ann. § 30-14-133(1) (2009); S.C. Code Ann. § 39-5-140(a) (2009).

exercising regulatory oversight by uncertainty regarding the scope of federal preemption and made wary of the legal costs they will incur if challenged by industry. See GAO, *FCC Needs to Improve Oversight of Wireless Phone Service*, GAO-10-34 (Nov. 2009) 30-31, 33-37.[11]

And although state attorneys general actively enforce consumer-protection laws, a recent survey of state and local consumer agencies shows that many have suffered substantial budget cuts in recent years. See Consumer Federation of America, *et al.*, 2009 Consumer Complaint Survey Report (July 27, 2010), at 3 (71% of responding agencies reported budget cuts in 2009, compared to 47% in 2008).[12] These cuts resulted in staff reductions, elimination of programs, reduced training opportunities, and even wholesale agency closings. See *id.* at 3-5, 36-37. At the same time that state and local consumer-protection agencies saw their resources reduced, many reported receiving a significantly increased number of consumer complaints. See *id.* at 5 (58% of responding agencies reported increase in complaints, averaging 23% per agency but in some cases as high as 62%). These reductions in resources provide further confirmation that private class litigation remains a crucial component of consumer-protection efforts.

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[11] The GAO Report is available at http://www.gao.gov/new.items/d1034.pdf.

[12] The report is available at http://www.consumerfed. org/elements/www.consumerfed.org/file/Consumer_Complaint Survey_Report072009.pdf.

Petitioner thus is wrong to suggest that the California Supreme Court was merely "speculat[ing]," Pet. Br. 45, when it concluded that government regulatory enforcement alone is not always sufficient to fully safeguard consumers from fraudulent and deceitful business practices. But petitioner's reliance on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), for its "speculation" argument, Pet. Br. 45-46, is misplaced for another reason. That decision, which did not address FAA preemption (and left open a challenge to a class-action waiver in an arbitration agreement, see *Randolph*, 531 U.S. at 92 n.7), merely concluded that a party seeking to invalidate an arbitration agreement on the ground that arbitration would be too costly must provide some evidence that proceeding under the contract would preclude her from vindicating her rights, see *id.* at 91-92. But no such evidence is needed here. Because many small-claims victims will not even know they have been injured without class litigation, there is no question that rights will go unvindicated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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