No. 09-893

In the
Supreme Court of the United States

AT&T MOBILITY, LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION,
Respondents.

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

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

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INTEREST OF THE *AMICUS CURIAE*[1]

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

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership and to the judicial system as a whole. Based on its members' extensive practical experience, DRI is uniquely qualified to explain to the Court why the decision below creates an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements, which benefit customers and businesses alike, and prevents counsel from reliably advising clients as to the enforceability of such agreements. In addition, DRI desires to explain why, in its members' experience, class actions are fundamentally incompatible with arbitration and its benefits and why this specific case is an ideal vehicle for resolving the question presented.

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. The parties were notified of the intention to file this brief ten days prior to its due date, and their letters consenting to its filing are on file with the Court.

INTRODUCTION

The petition in this case presents a recurring issue of singular importance under the Federal Arbitration Act ("FAA"): whether a State may refuse to enforce an arbitration agreement solely because it does not permit class arbitration, notwithstanding the fact that the parties can fully vindicate their claims in individual arbitration. The enforceability of literally tens of millions of arbitration agreements turns on the answer to this question.

As the petition explains, the Ninth Circuit's ruling conflicts with the FAA in every way imaginable: By requiring specific arbitral procedures as a condition of enforcement of arbitration agreements, it conflicts with the FAA's primary purpose of ensuring that arbitration agreements are enforced according to their terms, including terms specifying arbitral rules and procedures. By invoking a novel brand of unconscionability devised specifically to strike down arbitration agreements, it runs afoul of the principle that the state law applied to arbitration agreements must be the same law applied to contracts generally. And by undermining arbitration's recognized advantages and creating powerful disincentives to the use of arbitration agreements, it conflicts with the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."

Because the petition fully outlines these issues, as well as the lower-court conflict, this *amicus* brief addresses additional reasons that the Court should resolve the question presented. First, the practical effect of the decision below is to impose a realistically impossible burden on a party seeking to enforce an arbitration

agreement: to *disprove* the supposed need for the "deterrent effect" of a class action. This novel burden creates an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements that are fair and beneficial to consumers and businesses alike.

Second, class-wide procedures are inherently incompatible with the traditional advantages and essential characteristics of arbitration—*e.g.*, informality, streamlined proceedings, expedition, low cost, and narrowly limited judicial review. It is therefore clear that California's and the Ninth Circuit's unwavering insistence on arbitral procedures to which parties will never voluntarily agree is but another attempt to "chip away at [the FAA] by indirection." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001).

Third, the decision below makes the enforceability of arbitration agreements highly unpredictable for businesses with customers dispersed regionally and nationally. This uncertainty substantially undermines the federal right to enforce arbitration agreements and conflicts with the FAA's purpose of making such agreements predictably enforceable, regardless of the forum.

Finally, by refusing to enforce the remarkably pro-consumer agreement at issue in this case, the Ninth Circuit made clear that it has adopted a per se rule that consumer contracts providing for arbitration on an individual basis are unenforceable, even when, as here, the parties can fully vindicate their claims in individual arbitration. Thus, the case presents the FAA preemption issue in its most straightforward form.

ARGUMENT

I. The Decision Below Creates Insurmountable Obstacles To The Enforcement Of Arbitration Agreements.

As described in the petition, AT&T Mobility ("ATTM") has included a "Premium" and "Attorney Premium" in its arbitration agreement. Pursuant to these provisions, if a customer recovers more in arbitration than ATTM's last pre-arbitration settlement offer, the customer is entitled to a $7,500 "Premium," and the customer's attorney is entitled to recover double attorneys' fees plus costs. As the district court explained, these innovative features serve a "noble purpose" by "virtually guarantee[ing]" that, "even for claims of questionable merit," ATTM will "*accept liability*" promptly and make whole any customer who takes the few minutes necessary to complete a one-page form available on ATTM's website. Pet. App. 39a-40a. Moreover, even for claims not resolved prior to arbitration, the "Premium remains available as a substantial inducement for the consumer to pursue the claim in arbitration." *Id.*

Not surprisingly, then, the court concluded that "a reasonable consumer may well prefer quick informal resolution with likely full payment" under the ATTM arbitration provision to the remote possibility of "class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Id.* at 42a. As a matter of hornbook contract law, this should dispose of any contention that the provision is "unconscionable" for the straightforward reason that a contract cannot be *both* preferable to a reasonable consumer *and*

so conscience-shocking that only a delusional consumer would accept it. *See* Pet. 6.

California has, however, imposed an additional obstacle to the enforcement of arbitration agreements. Under California's rule, an agreement to arbitrate individually will not be enforced unless the party seeking to enforce it first proves that a class action is unnecessary to deter the alleged (but unproven) fraud or "wrongdoing." Pet. App. 9a-11a, 42a-47a. Applying this novel rule, the district court refused to enforce ATTM's arbitration provision because, in its view, ATTM did not produce sufficient "evidence" of arbitral deterrence to overcome "California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct." *Id.* at 44a-46a. Or, as the Ninth Circuit put it, even though "[t]he provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim"—which is "a good thing"—it is still invalid "under California law" because "not *every* aggrieved customer will file a claim." *Id.* at 11a n.9 (emphasis added).

As the petition outlines, this novel rule distorts generally applicable unconscionability principles and conflicts with the FAA in several respects. Pet. 25-34. For example, it flips the settled rule that "the party asserting unconscionability as a defense has the burden of establishing that condition." *Woodside Homes of Cal., Inc. v. Super. Ct.*, 107 Cal. App. 4th 723, 727-28 (2003); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.").

California's novel rule also creates serious—if not insurmountable—practical obstacles to the enforcement of arbitration agreements. To begin with, the requirement that the defendant *disprove* the supposed necessity of the "deterrent effect" of a class action implicitly assumes that, if the plaintiff is allowed to avoid his or her obligation to arbitrate, a class will be certified and prevail on the merits and that class members will ultimately recover. This series of assumptions, however, conflicts with the realities of class-action litigation—*e.g.*, that most putative class actions are never certified, *see, e.g.*, Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 634-35 (2006), that those that are certified often settle for "pennies on the dollar with few consumers actually submitting claims," Pet. App. 42a, and that, as a result, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed," Class Action Fairness Act ("CAFA"), Pub. L. 109–2, § 2(a)(3), Feb. 18, 2005.

These implicit assumptions also saddle defendants with the untenable burden of disproving the propriety of class certification—turning on its head the ordinary rule that there is *no* "presumption" in favor of certification and that the *plaintiff's* burden of proof that Rule 23's requirements are met is *not* "a lenient one." *In Re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2009) (a motion to certify a class is subject to "rigorous analysis" and cannot be granted "in the face of doubt"). It is, however, realistically impossible for a defendant to make such a showing in a motion to compel arbitration. Because the right to compel arbitration may be waived by pursuing litigation in court, parties are admonished

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

It is also contrary to the "very purpose" of the FAA to require a defendant to negate an assumption that it has engaged in "wrongdoing" that requires "deterrence" *before* its right to arbitrate the merits of the *only* basis for that assumption—the plaintiff's allegations—will be enforced. *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1274 (2009) ("[The FAA's] very purpose is to have an arbitrator, rather than a court, resolve the merits."); *cf. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (courts may not rely on "public policy" as a basis for addressing the merits of an arbitral dispute). This sort of one-sided, preliminary consideration of the substantive allegations not only infringes on the arbitrator's role under the FAA but also conflicts with "Congress' clear intent ... to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

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

In any event, given the Ninth Circuit's statement that "the problem with [the arbitration provision] under California law ... is that not *every* aggrieved customer will file a claim," Pet. App. 11a n.9 (emphasis added), even proof of a sizable number of arbitration demands based on the same allegations as the complaint does not appear to satisfy the defendant's burden. Rather, so long as there remains even *one* allegedly "aggrieved customer" who has not pursued arbitration, the agreement will not be enforced. Such reasoning confirms that the California's test is in fact impossible to satisfy and illusory.

Finally, it is similarly unclear how a defendant could ever prove to the California courts' satisfaction that arbitration is an "adequate ... deterrent" to its own "wrongdoing" (Pet. App. 45a) short of ceasing whatever practice

is alleged to be unlawful. In addition to further illustrating the impossibility of California's test, this line of reasoning conflicts with the FAA by requiring the defendant to, in effect, admit that it has acted unlawfully simply to obtain enforcement of its agreement to arbitrate. *Preston v. Ferrer*, 552 U.S. 346, 355-56 (2008).

In sum, California's novel and elusive approach to unconscionability not only imposes insurmountable obstacles to the enforcement of tens of millions of arbitration agreements but also "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995). Only a ruling by this Court can obviate the need for this costly and repetitive litigation.

II. Class Actions Are Inherently Incompatible With Arbitration.

In assessing California's insistence that consumer arbitration agreements must authorize class-wide procedures, it is essential to understand that (i) arbitration's advantages, repeatedly cited by Congress and this Court, are nonexistent in class arbitration and (ii) class-wide procedures are inherently incompatible with core features of arbitration. The decision below thus amounts to an attack on arbitration itself, an effort to "chip away at [the FAA] by indirection." *Adams*, 532 U.S. at 122.

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

Just last Term, the Court reiterated that the fact "that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow inadequate; the relative informality of arbitra-

tion is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1471 (2009) (emphasis added). It is well-recognized that "[b]y agreeing to arbitrate ..., a party" "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985). "Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280. For this reason, it is clear that "Congress, when enacting [the FAA], had the needs of consumers ... in mind." *Id.* However, these advantages of traditional, individual arbitration do not exist in class arbitration, which by its nature is protracted, complex, and expensive.

First, in contrast to the informality, streamlined proceedings, and expedition that are hallmarks of individual arbitration, class arbitration requires complex procedures that blur the distinction between litigation and arbitration. For example, the class arbitration rules of the American Arbitration Association ("AAA") largely copy the Federal Rules of Civil Procedure. *See* AAA, Supplementary Rules for Class Arbitrations, *at* http://www.adr.org/sp.asp?id=21936. Therefore, just as in court, class arbitration requires discovery, full briefing, an evidentiary hearing, and a written ruling on class certification. If a class is certified, absent class members must be notified and given an opportunity to opt out. The parties must then engage in protracted and expensive merits discovery typical of high-stakes class litigation. And, finally, there must be a full hearing—with an opportunity for the defendant to present individualized defenses—and a written award on the merits. Alterna-

tively, if there is a settlement, there must be another round of notice to class members, an opportunity to file objections, more briefing, a fairness hearing, and a written ruling. Indeed, class arbitration may actually prove *more* complex, lengthy, and burdensome than a judicial class action because the AAA Rules authorize a stay of proceedings to allow the parties to seek judicial review of the arbitrator's class-certification ruling. *See id.*

As these procedures suggest, the cost savings of individual arbitration do not translate to class arbitration either. In addition to the high costs of typical judicial class actions, "[c]lass arbitrations ... require the significant additional fees and costs of the arbitrators themselves.... In effect, a class arbitration is a class action proceeding in which there may be multiple judges, each charging by the hour." David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 64 (2007). In addition, given the vastly increased stakes of class arbitration and the narrow grounds for vacating an award, a defendant may feel compelled to attempt to mitigate its risk by insisting on a panel of three arbitrators despite the added expense. Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration: A Practical Perspective*, 60 DISP. RES. J. 74, 78 (July 2005) ("Having three heads is better than one, and it prevents a so-called 'rogue' arbitrator from running off in the wrong direction."). Finally, to the extent that a party values arbitrators with experience presiding over class actions (*i.e.*, retired judges), it can expect to pay premium arbitrators' fees. Thus, given that it entails substantial arbitrators' fees that have "no equivalent in a traditional, judicial class action," class arbitration may well prove more expensive

than its judicial counterpart. Clancy & Stein, *supra*, at 64. At minimum, it is clear that, unlike individual arbitration, it is *not* a "less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

The emerging data on class arbitration confirm that the procedure is just as cumbersome as a judicial class action, if not more so. Indeed, although the AAA opines that the procedure is "efficient," it can only hesitantly "suggest" that, although class arbitration certainly takes longer than individual arbitration, it "*may* take less time than the average class action in court."[2] However, the AAA's own statistics belie even its tentative optimism. For example, "the median time frame from filing [a AAA class arbitration] to settlement, withdrawal, or dismissal is 583 days with a mean of 630 days." AAA Brief at 24. While 18-21 months might be a reasonable and arguably even "efficient" period in which to resolve the merits of a class dispute, that is not what these statistics reflect. Rather, a whopping 85% of the cases included in the average were terminated *before any ruling on class certification*—and *none* "resulted in a final award on the merits." *Id.* at 23. Thus, like its court-administered counterpart, a class arbitration is likely to take years to complete.

The delay inherent in class arbitration is in stark contrast to the speed and efficiency of individual consumer arbitration, which, on average, results in an award on the merits in only six months—only four months if the

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[2] Brief of the AAA as *Amicus Curiae* in Support of Neither Party, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, No. 08-1198, at 24, 25 (emphasis added) [hereinafter, "AAA Brief"], *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1198_NeutralAmCuAAA.pdf.

case decided on documentary submissions alone,[3] a right that ATTM's arbitration provision grants exclusively to the customer.

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

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

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

1. This Court has imposed pleading standards in class actions designed to ensure that meritless cases are dismissed at an early stage before a defendant is subjected to expensive and protracted discovery. *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345

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

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

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

Reinforcing this concern, the AAA's statistics indicate that arbitrators are in fact more likely to certify a

class than either federal or state judges. Arbitrators granted 24 of the first 42 contested class-certification motions filed under the AAA Rules—a grant rate of 57.14%. *See* AAA Brief at 22. In contrast, in a Federal Judicial Center study on the impact of CAFA, federal judges granted only 18 of 62 contested motions—a rate of only 29.03%. Willging & Wheatman, *supra*, at 634-35. In the same study, state judges granted 12 of 27 contested motions—a rate of 44.44%. *Id.* Thus, AAA arbitrators appear nearly *twice* as likely to grant class certification as federal judges, and 12.7% more likely to certify a class than even state court judges—the very judges whose "[a]buses" provoked CAFA's enactment, CAFA, Pub. L. 109–2, § 2(a)(4), Feb. 18, 2005.

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

3. The extremely narrow scope of judicial review of arbitrators' class-certification decisions and final awards on the merits also poses intolerable risks for defendants. As this Court recently held, section 10 of the FAA lists the "exclusive" grounds for vacating an award, all of which "address egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Courts may *not* engage in "legal review generally." *Id.* In the context of individual arbitration, this limitation is necessary "to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. "If ... parties who lose in arbitration [could] freely

relitigate their cases in court, ... dispute resolution [would] be slower instead of faster[,] and reaching a final decision [would] cost more instead of less." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907 (11th Cir. 2006).

In a class arbitration, however, the vastly increased stakes coupled with narrow judicial review amplify the cost of arbitrator error to an unacceptable level. As Justice Scalia put the problem: "You might not want to put your company's entire future in the hands of one arbitrator." Tr. Oral Argument, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_02_634/argument. No rational defendant will do so willingly.

Moreover, even in court, a class-action defendant faced with such significant potential liability is "under intense pressure to settle," *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298-1299, "even if the [plaintiffs'] position is weak" on the merits, *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). In arbitration, the lack of meaningful review—both at the class-certification stage and on the merits—intensifies this pressure and exacerbates the problem of "blackmail settlements." Indeed, a prominent plaintiffs' attorney speaking at an American Trial Lawyers Association convention touted the fact that "decision[s] by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable" as "a feature which terrifies corporate defendants." Clancy & Stein, *supra*, at 71.

In an apparent attempt to address one aspect of this problem, the AAA authorizes the parties to pursue interlocutory judicial review of arbitrators' class-certification

decisions, describing the opportunity as "akin to ... interlocutory appellate review of district court class certification decisions." AAA Brief at 19. This comparison is inapt. As an initial matter, it is unclear that interlocutory review of such decisions is even permissible. "[A] district court does not have the power to review an interlocutory ruling by an arbitration panel"—*i.e.*, any "interim ruling that does not purport to resolve finally the issues submitted to [arbitration]." *Michaels v. Mariforum Shipping, S. A.*, 624 F.2d 411, 414 (2d Cir. 1980). An order granting class certification is a quintessential interlocutory ruling. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). But in any event, no court of which DRI is aware has reviewed such a ruling other than on the narrow grounds specified in 9 U.S.C. § 10, and more substantive review "akin to" federal appellate review appears to be foreclosed by *Hall Street*. Thus, even if allowable, the review contemplated by the AAA rules remains an inadequate safeguard.

4. Finally, it remains uncertain whether class arbitration is capable of protecting class members' due-process rights and producing legally binding results. Most courts have held that due-process protections do not apply to private arbitration because the parties "voluntarily" consent to the arbitral process. *E.g.*, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991). How this reasoning applies to class arbitration remains unclear. For example, do absent class members "voluntarily" consent to a class arbitration, even if they never receive actual notice of its pendency? If not, will an arbitration that fails to "provide minimal procedural due process protection" bind absent class members? *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Are arbitrators even

capable of providing such protections? *See generally, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (2006) (concluding that, without significant ongoing judicial supervision, they are not).

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

III. The Decision Below Undermines The FAA By Creating Unpredictability In The Law.

As the petition explains, the lower courts are deeply divided concerning the enforceability of arbitration provisions such as ATTM's. The current unpredictability of the law from jurisdiction to jurisdiction substantially undermines the certainty and value of the federal right to enforcement of arbitration agreements for businesses with customers dispersed regionally or nationally.[4] *Mos-*

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[4] This unpredictability is exacerbated by the Ninth Circuit's recent heads-I-win-tails-you-lose rulings that, on one hand, a non-California company cannot specify that the law of its home state governs its contracts with California residents because of California's supposedly "materially greater interest" in those contracts, *Omstead v. Dell, Inc.*, --- F.3d ----, 2010 WL 396089 (9th Cir. Feb. 5, 2010) (Texas company); *Oestreicher v. Alienware Corp.*, 322 F. App'x 489 (9th Cir. 2009) (Florida company), while, on the other hand, a California company cannot specify that the laws of its nonresident cus-

es H. Cone, 460 U.S. at 25 n.32 (the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate"). It is therefore essential that the Court resolve the question presented so that arbitration agreements enforceable in the vast majority of jurisdictions in which they are used are not rendered unenforceable by the anti-arbitration hostility of a few courts.

To be sure, the FAA does permit courts to apply generally applicable state contract law to arbitration agreements and thus allows for *some* degree of variation in their interpretation and enforcement. In general, however, this causes few difficulties because "contract law is not at its core diverse, nonuniform, and confusing." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995) (quotation marks omitted). Rather, the core common law pertaining to issues such as contract formation and contract defenses is largely settled and uniform, and its application to arbitration agreements is therefore consistent with the FAA's purpose of making arbitration agreements predictably enforceable.

The law of "unconscionability," in contrast, *is* diverse, nonuniform, and confusing. As Paul Bland, a prominent plaintiffs' attorney who has litigated this issue extensively, has explained, "the law of unconscionability *differs a great deal from state to state.*"[5] "Unconsciona-

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tomers' home states govern their contracts because of California's supposedly "materially greater interest" in the company's conduct, *Masters v. DirecTV, Inc.*, 2009 WL 4885132 (9th Cir. Nov. 19, 2009). The ultimate result in all these cases was to invalidate a consumer agreement requiring individual arbitration.

[5] Paul Bland, *Stripping the Meaning from Meaningful Choice*, TortDeform: The Civil Justice Defense Blog, July 2007 (emphasis

bility is one of the most amorphous terms in the law of contracts." Joseph M. Perillo, 7 CORBIN ON CONTRACTS § 29.1, at 377 (rev. ed. 2002).

Relying on this imprecision and the concomitant opportunity for evasion of the FAA, some courts have manipulated the doctrine to invalidate arbitration agreements not because of any "gross imposition on the particular [plaintiff] at issue"—the traditional, generally applicable basis for a finding of unconscionability—but based instead on "broadly based considerations of public policy."[6] Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1443-44 (2008). Such manipulation conflicts with this Court's recent reaffirmation that, under the FAA, "the enforceability of [an] arbitration agreement [cannot] turn on [state] public policy." *Buckeye*, 546 U.S. at 446 (quotation mark omitted). Moreover, as Justice Ginsburg aptly observed, "public policy has been called an unruly horse." Tr. Oral Argument, at 34, *Buckeye*, 546 U.S. 440, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1264.pdf.

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added), *at* http://www.tortdeform.com/archives/2007/07/stripping_the_meaning_from_mea.html.

[6] Indeed, Judge Bea understood California unconscionability law to include "a bizarre component to it that no matter how conscionable to the individual [an arbitration agreement is], the public policy of California is to use class actions...." Oral Argument, *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), at 7:55, *at* http://www.ca9.uscourts.gov/datastore/media/2009/09/17/08-56394.wma.

For this reason, courts' misuse of the bargain-focused unconscionability doctrine[7] to advance broad "public policy" goals has created substantial unpredictability in arbitration law. This is problematic because businesses often use the same arbitration agreement in contracts with customers nationwide. Thus, as the petition demonstrates, identical or near-identical provisions have been upheld in many jurisdictions while being invalidated in others. As a result, it has become impossible for DRI's members to reliably advise clients as to how to draft arbitration agreements that will be fair and "universally enforceable." *Allied-Bruce*, 513 U.S. at 279. In *Southland*, this Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). That, however, is precisely the result of courts' misuse of the unconscionability doctrine.

IV. This Case Is An Ideal Vehicle For Resolving The Question Presented.

This case presents an ideal vehicle for resolving the question presented because the "third-generation" arbitration provision at issue represents the culmination of an evolution of consumer arbitration provisions. Early, "first-generation" provisions often limited the substantive remedies available in arbitration and/or required consumers to bear significant arbitration costs. Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring*

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[7] *See Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1390 (1996) ("Substantive unconscionability focuses on the actual terms of the agreement" "at the time the contract was made.").

the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape, 18 CORNELL J.L. & PUB. POL'Y 477, 503-04 (2009). Many courts deemed such provisions unconscionable and refused to enforce them. *Id.* at 504. In response, companies introduced "second-generation" provisions that eliminated substantive remedial restrictions and required businesses to pay all or nearly all of the cost of arbitration. *Id.* at 504-06. Still, however, a minority of courts refused to enforce these provisions, expressing concerns that they provided consumers with inadequate "incentives" to pursue individual claims. *Id.* at 508-09.

Apparently taking its cues from such decisions, ATTM revised its arbitration agreement to, among other things, make available the "Premium" and "Attorney Premium." *Id.* at 512-16; Pet. 7-10. As the district court found, the revised agreement "provides sufficient incentive for individual consumers with disputes involving small damages to pursue (a) the informal claims process to redress their grievances, and (b) arbitration in the event of an unresolved claim." Pet. App. 42a. Thus, there can be no question that an individual customer "effectively may vindicate his or her" claims under the ATTM provision. *Randolph*, 531 U.S. at 90 (alteration omitted). What is at issue, then, is *not* a fact-bound unconscionability determination but rather a per se rule that consumer contracts calling for traditional arbitration on an individual basis are invalid.[8] The preemption issue cannot be presented any more straightforwardly.

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[8] As Judge Reinhardt commented, while "[t]he California courts [have] said that [such agreements are] not always invalid, ... I don't think they've ever found one that was okay." Oral Argument, *supra* note 6, at 17:33.

The development of consumer arbitration agreements has reached its practical endpoint. DRI is aware of no arbitration provision that is more pro-consumer than ATTM's, and there is little, if anything, left for businesses to do in the way of creating additional "incentives" to arbitrate. The preemption issue brought to a head by California's persistent refusal to enforce even the most pro-consumer arbitration agreements is therefore ripe for decision. And this case in particular provides the Court with a unique opportunity to resolve the issue (a) without the potential complications that could accompany less consumer-friendly provisions and (b) in a way that provides clear guidance to contracting parties, lower courts, and the bar.

In addition, a ruling that the provision at issue is enforceable as a matter of "federal substantive law," "notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone*, 460 U.S. at 24, would encourage even more companies to adopt similar, pro-consumer arbitration provisions. But regardless of the result on the merits, all litigants and contracting parties would benefit from clarity on an issue that has become "unnecessarily complicat[ed]," "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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