No. 07-976

# In the Supreme Court of the United States

T-MOBILE USA, INC., ET AL.,

*Petitioners*,

v.

JENNIFER L. LASTER, ET AL.,

*Respondents*.

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

## BRIEF OF AT&T MOBILITY LLC AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**TABLE OF AUTHORITIES—continued**

**Page(s)**



**STATUTES, RULES AND REGULATIONS**



**MISCELLANEOUS**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**TABLE OF AUTHORITIES—continued**

**Page(s)**

## BRIEF OF AT&T MOBILITY LLC AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

AT&T Mobility LLC ("ATTM") submits this brief as amici curiae in support of neither party.[1]

## INTEREST OF THE *AMICUS CURIAE*

ATTM (formerly Cingular Wireless LLC) is the largest wireless company in the United States, serving more than 70 million customers.[2] Since ATTM, then known as Cingular, began operating in October 2000, it has always included an arbitration provision in the terms and conditions of service that govern its customer agreements. ATTM uses individual arbitration as part of its dispute-resolution process because arbitration is a prompt, fair, inexpensive, and less adversarial method of resolving disputes with customers. As this Court has recognized, "arbitration's advantages often would seem helpful to *individuals*, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (emphasis added). Moreover, because arbitra-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both parties received timely notice of ATTM's intent to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] ATTM is a co-defendant in the present case. Like T-Mobile, ATTM moved to compel arbitration and appealed to the Ninth Circuit when the district court denied its motion. Unlike T-Mobile, ATTM dismissed its appeal after the Ninth Circuit released its opinion in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976, 981-87 (9th Cir. 2007).

tion lowers ATTM's dispute-resolution costs, it ultimately benefits all ATTM customers in the form of lower prices.

ATTM has revised its arbitration provision on a number of occasions in an effort to make arbitration more attractive and convenient for its customers and to address case law and commentary critical of certain features that were common to early-generation arbitration provisions. ATTM's current provision, which became effective in December 2006 and is reproduced in the appendix, includes a number of innovative features that were designed to make individual arbitration a practical and efficient means for consumers to resolve their disputes with ATTM. Among other things, this provision:

- allows customers to arbitrate non-frivolous claims for free;
- expressly recognizes the customer's right to recover attorneys' fees whenever a court could award fees;
- provides in addition for an award of *double* attorneys' fees if the customer is awarded more than the amount of ATTM's last settlement offer;
- provides for a minimum award to the customer of at least $5,000 in the same circumstance;
- imposes no limitation on the arbitrator's power to award punitive damages;
- does not require that the arbitration be kept confidential;

- gives the customer complete discretion to decide whether arbitration shall be conducted in person, by telephone, or on the papers; and
- specifies that arbitration will be conducted in the county of the customer's billing address.

If a court ever were to hold that ATTM's 2006 arbitration provision nonetheless is unconscionable merely because it requires that arbitration be conducted on an individual basis (thereby precluding class actions in either arbitration or court), ATTM believes that such an interpretation of state contract law would be preempted by the Federal Arbitration Act ("FAA"). But thus far, the only court to address an unconscionability attack on this path-breaking arbitration provision has held that the provision is fully enforceable.

Because there is, as yet, no divergence of decisions regarding the enforceability of ATTM's new arbitration clause—or of the arbitration clauses employed by other companies that have undergone a similar evolution—ATTM believes that it is premature for this Court to wade into the thorny issue of whether the FAA sometimes, always, or never precludes States from declining to enforce class waivers in arbitration provisions. To be sure, we agree with T-Mobile that the FAA precludes States from striking down class waivers so long as the arbitration provision does not affirmatively burden the consumer's ability to obtain full redress. We submit, however, that the need for this Court to intervene could be eliminated, or the issue could be more sharply focused, by awaiting the further evolution of both consumer arbitration provisions and the law governing their enforceability. For these reasons,

ATTM has a strong interest in the issue presented in the petition in this case.

## SUMMARY OF ARGUMENT

We agree with T-Mobile that the question whether the FAA preempts a state-law rule invalidating an arbitration provision merely because it requires arbitration to be conducted on an individual basis is an important and recurring one. We submit, however, that the time is not yet right for this Court to decide the issue.

As we discuss below, consumer arbitration provisions have been evolving. At first, many provisions plainly favored the business that drafted them. Invoking state unconscionability principles, several courts struck down these clauses, concluding that they impeded customers' ability to receive full redress for their claims.

In response, businesses committed to the use of arbitration, including ATTM, jettisoned this first generation of arbitration provisions and developed a second generation, which eliminated most of the features that courts had singled out for criticism. Some courts and commentators continued to criticize the second generation of arbitration provisions on the ground that they still did not go far enough to make individual arbitration a realistic means of resolving small claims. Although continuing to maintain that its second-generation provision was fully enforceable and that the FAA would preempt any holding to the contrary, ATTM nevertheless responded to these criticisms by promulgating a third-generation arbitration provision, which, among other things, includes affirmative inducements for consumers and their attorneys to pursue individual arbitration.

To date, the only court to render a ruling on ATTM's third-generation provision has held that it is fully enforceable. State-law challenges to this provision currently are pending in district courts in the Third, Sixth, Seventh, Ninth, and Eleventh Circuits. Decisions as to the enforceability of this provision—and, if necessary, as to whether the FAA would preempt any interpretation of state law under which the provision would be unenforceable—are imminent.

Other companies have created different kinds of third-generation clauses. For example, a number of companies now permit their customers to opt out of arbitration with no adverse consequences. Others offer a lower price in exchange for the customer's agreement to arbitrate.

ATTM submits that the Court should await a case involving one of these third-generation arbitration provisions (either ATTM's or one like it) before resolving the knotty question of whether and, if so, when, the FAA preempts the application of state unconscionability law to declare an arbitration provision containing a class waiver unenforceable. By awaiting such a case, instead of deciding the issue now, the Court will allow the continued evolution of both arbitration clauses and the law governing their enforceability.

Indeed, a decision now, in the context of T-Mobile's arbitration provision, would threaten to bring that process of evolution to a complete stop. A ruling that courts cannot refuse to enforce T-Mobile's provision would eliminate any incentive for other companies to emulate ATTM's innovative attempts to make arbitration affirmatively attractive for customers. Meanwhile, a ruling upholding the invalidation of T-Mobile's clause could embolden some courts

to strike down third-generation clauses, like ATTM's, that contain affirmative inducements to invoke individual arbitration. That in turn could be the death knell for consumer arbitration entirely, as few businesses are likely to be willing to expose themselves to the risk of a class-wide arbitration as a condition of having an enforceable arbitration provision.

If the Court were to refrain from intervening at this time, on the other hand, it is possible that the lower courts might uniformly uphold third-generation clauses like ATTM's, thereby obviating the need for the Court to decide the preemption issue. And if the lower courts instead were to divide on that question, the issue then would be much more sharply focused: whether the FAA preempts what is effectively a categorical state-law rule that the inclusion of a class waiver in a consumer arbitration provision is unconscionable.

The current case does not present that clear-cut question. To begin with, it is debatable whether T-Mobile's arbitration provision permits arbitrators to award attorneys' fees under applicable fee-shifting statutes. It therefore is not certain that this case even presents the question whether the FAA preempts States from refusing to enforce class waivers when the arbitration provision does not affirmatively limit the remedies available to the customer.

Moreover, regardless of how the T-Mobile provision is construed, the issue here is certain to be much murkier than it would be in a case in which it is clear that the State has adopted an essentially per se rule against the enforcement of class waivers. Until such a case is presented, it makes little sense for this Court to take up a comparatively more difficult case

that may not finally resolve the issue. The petition here accordingly should be denied.

## ARGUMENT

### I. THE EVOLUTION OF CONSUMER ARBITRATION AGREEMENTS AND STATE UNCONSCIONABILITY LAW.

#### A. Some Courts Refused To Enforce First-Generation Arbitration Clauses That Limited Remedies, Required Consumers To Pay Significant Arbitration Fees, Or Otherwise Afforded An Unfair Advantage To The Drafter.

Many early consumer arbitration clauses included some combination of the following features: a requirement that the consumer pay significant arbitration fees; a preclusion of important remedies, such as punitive damages or the right to recover attorneys' fees under applicable fee-shifting statutes; a confidentiality requirement; a provision that allowed the drafter the option of bringing specified claims in court rather than only in arbitration; or a requirement that arbitration take place in an inconvenient location. In a number of cases, courts deemed such features "unconscionable" or otherwise unenforceable under state law and therefore refused to enforce the arbitration provision that included them.

For example, in *State ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265 (W. Va. 2002), a jewelry retailer's financing agreement included an arbitration clause that, in addition to requiring individual arbitration, (i) obligated the customer to pay half of all arbitration fees, (ii) prohibited the arbitrator from awarding punitive damages, and (iii) excepted from arbitration

the categories of claims that the defendant was likely to bring. See *id.* at 270, 277-78, 280 n.12, 281. The court held that such a provision was unconscionable because it "would prohibit or substantially limit" the plaintiff—who alleged actual damages of only $8.46—from vindicating his legal rights. See *id.* at 278, 280.

Similarly, in a case involving allegations of predatory lending, a federal district court refused to enforce an arbitration clause because of the combined effect of provisions that (i) obligated the borrower to pay at least half of all arbitration fees; (ii) required that the arbitration be confidential; (iii) prohibited class-wide proceedings; and (iv) preserved judicial remedies for the lender. *ACORN* v. *Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1170-74 (N.D. Cal. 2002). As to the clause's confidentiality requirement, the court expressed concern that such a provision would "effectively conceal[]" from "critical" "scrutiny" the lenders' advantage as "repeat players" in arbitration and would also prevent successful claimants from alerting other consumers to arbitral rulings declaring particular practices unlawful. See *id.* at 1172.

The Pennsylvania Superior Court likewise refused to enforce an arbitration clause in a consumer's contract with a pest control company that prohibited the arbitrator from awarding "(i) the repair or replacement of any damage to the identified property, (ii) loss of anticipated rents and/or profits, (iii) direct, indirect, special, incidental, consequential, exemplary or punitive damages, or (iv) damages or penalties relating to or arising out of any claim alleging any deceptive trade practice." *Carll* v. *Terminix Int'l Co.*, 793 A.2d 921, 923 (Pa. Super. 2002). The

agreement also required the consumer to bear half of the arbitrator's fees and expenses and appeared to preclude any award of attorneys' fees. See *ibid.*

More recently, a Missouri appellate court struck down a consumer arbitration clause that limited the arbitrator to awarding a refund of charges incurred by the consumer and prohibited any award of "incidental or consequential damages, * * * punitive or exemplary damages, or attorneys' fees." *Whitney* v. *Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 304 n.3 (Mo. App. 2005) (emphasis omitted). The clause also required the consumer to pay part of the cost of arbitration and to arbitrate individually. See *id.* at 304. Given that the consumer alleged only $24.64 in actual damages, the court concluded that the provision was unconscionable. See *id.* at 311-14.

Other of these "first-generation" clauses required the customer to arbitrate all of his or her claims but allowed the business to pursue its claims in court. *E.g.*, *Showmethemoney Check Cashers, Inc.* v. *Williams*, 27 S.W.3d 361 (Ark. 2000) (refusing to enforce an arbitration clause in a payday lending agreement that required arbitration of "[a]ll disputes and controversies of every kind and nature between the parties * * * except, only, insofar as actions of [the lender] to collect amounts due it"). In such circumstances, the Arkansas Supreme Court concluded, "[t]he laudable policy behind enforcing arbitration agreements"—*i.e.*, "provid[ing] a less expensive, more expeditious means of settling litigation and relieving congested court dockets"—is perverted because the arbitration provision is used as a "shield against litigation by one party while simultaneously reserving solely to itself the sword of a court action." *Id.* at 367.

Still other first-generation clauses appeared to be designed to deter customers from pursuing claims by requiring that arbitration take place in a distant location. For example, in one case a credit repair service attempted to enforce an arbitration clause that would have required its already financially distressed customers to travel from Illinois to Florida to arbitrate and to pay arbitration fees of several thousand dollars. See *Arnold* v. *Goldstar Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 15564, at *22-*23, *32-*36 (N.D. Ill. Aug. 20, 2002). The district court denied the business's motion to compel arbitration, reasoning that the arbitration clause imposed "prohibitive expenses" that would prevent the plaintiffs from vindicating their rights under the Truth in Lending Act, 15 U.S.C. § 1679 *et seq.*

Finally, some particularly egregious consumer arbitration clauses granted one side advantages such as "the unilateral and exclusive right to decide the rules that [would] govern the arbitration and to select the arbitrators." *Burch* v. *Second Judicial Dist.*, 49 P.3d 647, 650-51 (Nev. 2002). The Nevada Supreme Court, among others, had little difficulty determining that such a clause was unconscionable. *Id.* at 651.

ATTM's first-generation arbitration provision was also criticized by some courts for, in some circumstances, failing to "provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged." *Kinkel* v. *Cingular Wireless, LLC*, 857 N.E.2d 250, 278 (Ill. 2006). In *Kinkel*, the Illinois Supreme Court declined to enforce ATTM's first-generation provision (which had already long since been superseded) because the plaintiff's claims were only $150 and her arbitration

provision required her to pay $125 in arbitration fees; the court also noted that ATTM's provision generally prohibited punitive damages. See *id.* at 257, 267-68, 278. But see, *e.g.*, *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 171-76 (5th Cir. 2004) (upholding ATTM's first-generation arbitration provision under Louisiana law).

### B. Case Law Addressing First-Generation Clauses Resulted In Improved, Second-Generation Consumer Arbitration Provisions.

ATTM and other companies responded to the decisions invalidating first-generation arbitration provisions by revising their arbitration agreements to address the concerns expressed in those decisions.[3] In general, these "second-generation" provisions require companies to pay most or all of the cost of arbitration; authorize arbitrators to award all substantive remedies available in court, including punitive damages and attorneys' fees; and eliminate other features deemed problematic, such as confidentiality requirements and inconvenient hearing locations.

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[3] See, *e.g.*, John M. Townsend, *State Court Enforcement of Arbitration Agreements*, at 9 (U.S. Chamber Inst. for Leg. Reform, Oct. 2006) (advising "businesses wishing to secure the benefits of an arbitral forum" to "avoid the temptation to craft arbitration clauses that appear to tilt the process against the consumer"), available at http://tinyurl.com/2pkuq4; Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, 1414 PLI/Corp 305, 315 (2004) ("My message to clients: Draft a fair clause!"); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. L. REV. 761, 784 (2003) (explaining that "unconscionable arbitration provisions spawn costly litigation," thereby defeating the purpose of arbitration from a business's perspective).

ATTM's second-generation provision went a step further by granting customers a *contractual* right to attorneys' fees in the event that they recover an amount equal to or greater than their demand.

Many courts have held that second-generation provisions of this sort are enforceable, rejecting arguments that they are "unconscionable" merely because they require arbitration on an individual basis. The Eleventh Circuit's opinion in *Jenkins* v. *First American Cash Advance*, 400 F.3d 868 (11th Cir. 2005), is typical of these decisions. There, the court reasoned that individual arbitration was feasible—and that a class waiver was not unconscionable—because "arbitration costs would not be expensive" and the arbitration agreement permitted an award of attorneys' fees under applicable law. See *id.* at 878 & n.8.

Other courts, however, have continued to express a broader concern that individual arbitration generally is not a viable mechanism for resolving small consumer claims. The California Supreme Court's decision in *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), is a notable example. On its face at least, the opinion does "not hold that all class action waivers are necessarily unconscionable." *Id.* at 1110. Instead, the court emphasized that a class waiver should be deemed to be unconscionable when it "*operate[s] to insulate a party from liability* that otherwise would be imposed under California law" and "becomes *in practice* the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another." *Id.* at 1109, 1110 (emphasis added; internal quotation marks and brackets omitted).

Applying *Discover Bank*, the Ninth Circuit recently held that ATTM's second-generation provision is unconscionable and unenforceable. See *Shroyer*, 498 F.3d at 981-87. In *Shroyer*, ATTM sought to distinguish *Discover Bank* on the ground that ATTM's provision required ATTM to pay the entire cost of arbitration (unless the customer's claim is deemed frivolous) and also required the arbitrator to award reasonable attorneys' fees to any customer who obtained relief equal to or greater than his or her demand (regardless of whether the customer would be entitled to attorneys' fees under applicable law). *Id.* at 986. The Ninth Circuit concluded, however, that these differences did not alter the result under *Discover Bank* because the California Supreme Court was "concerned that when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation." *Ibid.* (emphasis by the court).

The Washington Supreme Court voiced similar concerns with ATTM's second-generation provision. See *Scott* v. *Cingular Wireless, LLC*, 161 P.3d 1000 (Wash. 2007). That court held "only that class action waivers that *prevent* vindication of rights secured by the [state consumer protection act] are invalid," explaining that "whether any particular class action waiver is unenforceable will turn on the facts of the particular case." *Id.* at 1009 n.7 (emphasis by the court). The court further stated that it could "certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the [state consumer protection act] and would thus be enforceable." *Ibid.* (internal citation omitted).

In concluding that the *Scott* plaintiffs would be unable to vindicate their rights under ATTM's second-generation provision, the Washington Supreme Court, like the Ninth Circuit and the California Supreme Court before it, emphasized the "small amount" of damages at issue (*id.* at 1009), predicting that no consumer would pursue small individual claims relating to alleged billing overcharges (*id.* at 1007).[4] See also *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008) (invalidating T-Mobile's arbitration provision under *Scott*).

### C. Businesses Are In The Process Of Developing New, Third-Generation Arbitration Provisions That The Courts Are Only Now Beginning To Address.

In an effort to make arbitration more attractive to its customers, and in anticipation of the concerns raised in *Scott* and *Shroyer*, ATTM had already made further improvements to its arbitration provision by the time those cases were decided.[5] In creating its third-generation provision, which went into effect in December 2006, ATTM consulted with, among others, Professor Richard A. Nagareda of Vanderbilt

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[4] In contrast with *Shroyer* and *Scott*, courts in Illinois and Missouri rejected unconscionability challenges to ATTM's second-generation provision. *Franczyk* v. *Cingular Wireless, LLC*, No. 03 CH 14203 (Ill. Cir. Ct. June 13, 2005); *Blitz* v. *AT&T Wireless Servs., Inc.*, No. 054-00281 (Mo. Cir. Ct. Nov. 28, 2005).

[5] Because ATTM believes that the preemption issue is best resolved in a case involving its revised provision or one like it, ATTM dismissed its appeal in this case after the Ninth Circuit decided *Shroyer*.

University Law School, whose scholarship focuses on aggregate dispute resolution.[6]

ATTM's third-generation arbitration provision—like its predecessor—allocates the entire cost of arbitration to ATTM (unless the customer's claims are deemed frivolous); permits either party to proceed in small claims court in lieu of arbitration; provides for arbitration under the AAA's consumer arbitration rules and in the county of the customer's billing address; and contains no confidentiality requirement or limitation on the arbitrator's authority to award punitive damages. See App., *infra*, 1a-4a.

The third-generation provision in addition contains three new features that were designed to make

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[6] Professor Nagareda has adopted an intermediate position on the enforceability of class waivers; he neither accepts that all class waivers are categorically unenforceable when claims are small nor endorses the view that class waivers are categorically enforceable so long as the arbitration provision does not restrict the remedies available to the consumer. Under the approach set forth in his 2006 *Columbia Law Review* article, many arbitration provisions would likely be unenforceable when claims are small, because those provisions do not provide a sufficient incentive for consumers and attorneys to pursue such claims. See *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1904 (2006) ("The real question about a given waiver of class-wide arbitration is whether, if enforced, it effectively would write private enforcement out of the underlying statute. This question calls for courts to examine carefully the framework for the bringing of claims on an individual basis—specifically, the financial arrangements to do so in the absence of aggregation."). Professor Nagareda, who had completed the last round of changes to this article and posted it on the Social Science Research Network prior to being contacted by ATTM, has testified that, under the framework set forth in his article, ATTM's revised provision should not be deemed unconscionable.

individual arbitration attractive to ATTM's customers and their attorneys (if any), even when the amount of the claim is modest. First, in most cases that would be brought by a consumer, the agreement provides for a minimum award (denominated a "premium") if the arbitrator awards the customer more than the amount of ATTM's last settlement offer.[7] The premium is defined as $5,000 or the jurisdictional limit in the customer's local small claims court, whichever is greater. *Id.*, 5a. In some jurisdictions, the small claims court jurisdictional limit—and, therefore, the premium under ATTM's arbitration provision—is as much as $15,000 or even $25,000.[8]

Second, under the same circumstances, ATTM will "pay [the customer's] attorney, if any, ***twice*** the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the customer's] claim in arbitration." App., *infra*, 5a (emphasis added). The arbitration provision also makes clear that this "right to attorneys' fees and expenses * * * supplements any right to attorneys' fees and expenses [the customer] may have under applicable law." *Id.*, 5a-6a.[9] Hence, customers who are

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[7] This opportunity to obtain the premium is available whenever the arbitral award is less than or equal to the greater of $5,000 or the jurisdictional limit of the small claims court in the county of the customer's residence. App., *infra*, 5a.

[8] See 10 Del. Code § 9301(1) ($15,000); Ga. Code § 15-10-2(5) ($15,000), Tenn. Code § 16-15-501(d)(1) ($25,000).

[9] At the same time, to avoid deterring customers from pursuing arbitration, the arbitration provision expressly disclaims any right to attorneys' fess that ATTM might have under applicable law.

awarded less than ATTM's last settlement offer may still be entitled to an award of attorneys' fees to the same extent as they would be in court.

Third, in an effort to make arbitration as convenient as possible for ATTM's customers, the arbitration provision grants the customer the exclusive right to "choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing." *Id.*, 4a.

The "premium" in the revised ATTM provision thus creates a meaningful "potential for individual *gain*" (*Shroyer*, 498 F.3d at 986) and addresses the concern that individuals will not think it worthwhile to pursue "small amounts" of damages (*Discover Bank*, 113 P.3d at 1110; *Scott*, 161 P.3d at 1009). Similarly, the "attorney premium" in the revised provision addresses the concern expressed by some courts that attorneys will be disinclined to represent individual consumers with small claims. See, *e.g.*, *Scott*, 161 P.3d at 1007. Finally, by giving the customer the exclusive right to decide whether the arbitration will be in-person, telephonic, or based solely on the papers, the revised provision addresses the concern that customers will conclude that it is not "worth the time, energy, and stress to pursue" a claim individually. *Ibid.*

Practitioners currently are encouraging other companies to build financial incentives into their arbitration provisions. For example, during a recent CLE program, one well-known attorney in this field reported that he has advised clients to adopt a "bump-up" approach, under which the arbitrator's award automatically is increased to $100 above the limit for small claims court. See CLE Program,

*Class Action Arbitration Clauses Under Fire; Crafting Agreements to Withstand Court Scrutiny* (May 16, 2007) (comments of Alan S. Kaplinsky), CD available for purchase at http://www.straffordpub.com/products/classarb2/ (last visited Feb. 21, 2008).

Other companies, such as Comcast and Discover Bank, have created a different type of third-generation clause by affording customers a period of time in which they may "opt out" of the arbitration agreement.[10] See http://www6.comcast.net/terms/subscriber/, at ¶ 13(c) (last visited Feb. 21, 2008); http://tinyurl.com/yohr8e (Discover Bank); see also, *e.g.*, http://tinyurl.com/365r7r, at ¶ 22 (CorTrust Bank); http://tinyurl.com/2rwhq3 (E*TRADE Financial).

Similarly, some practitioners in this area are encouraging companies to offer "bifurcated pricing," which entails giving customers the option of agreeing to arbitrate in return for a lower price reflecting the cost savings that arbitration creates. Like an "opt-out" provision, this option would address the criti-

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[10] In most states, a contract will be deemed unenforceable on unconscionability grounds only if it is both procedurally and substantively unconscionable—*i.e.*, only if the manner in which the contract was entered into was unfair and its terms are substantively unfair. Some courts have suggested that the mere fact that a contract is non-negotiable is enough to satisfy the procedural component of unconscionability. See, *e.g.*, Pet. App. 17a. If the customer is offered a period of time in which to opt out of arbitration, the arbitration provision no longer can be said to be non-negotiable, and this basis for finding procedural unconscionability is thus eliminated. See, *e.g.*, *Sanders* v. *Comcast Cable Holdings, LLC*, 2008 WL 150479, at *7, *10 (M.D. Fla. Jan. 14, 2008) (holding that Comcast's arbitration provision and class waiver are not procedurally or substantively unconscionable based in part on the customer's right to opt out).

cism that customers lack a choice as to whether to agree to individual arbitration. See, *e.g.*, CLE Program Outline, *Class Action Arbitration Clauses Under Fire; Crafting Agreements To Withstand Court Scrutiny* (May 16, 2007) (suggesting use of an "[o]pt-out right or bifurcated pricing" in consumer arbitration agreements), available at http://www.straffordpub.com/products/classarb2/ProgramOutline.pdf (last visited Feb. 21, 2008); Robert Leventhal & Howard Cohen, *Mandatory Arbitration Clauses: Powerful When Used Correctly*, L.A. BUS. J., Nov. 3, 2003 ("customers could be offered a lower price if they agree to the arbitration provision").

Because these third-generation arbitration provisions are a relatively new development, there are, as yet, few judicial decisions addressing their enforceability. For example, although customers have raised unconscionability attacks on ATTM's revised arbitration provision in district courts within five circuits under the laws of eleven states, to date only one court has issued a ruling. That court held that ATTM's revised arbitration clause is fully enforceable. See *Davidson* v. *Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007). Decisions are imminent in several other cases.

## II. THIS COURT SHOULD WAIT FOR A CASE INVOLVING A THIRD-GENERATION ARBITRATION PROVISION TO ADDRESS WHETHER THE FAA SOMETIMES, ALWAYS, OR NEVER PREEMPTS STATES FROM DECLINING TO ENFORCE CLASS WAIVERS IN ARBITRATION PROVISIONS.

The certiorari petition describes the decision below as holding that T-Mobile's arbitration provision is unconscionable even though the plaintiff can re-

cover attorneys' fees if she prevails on her claims. See Pet. 13. Indeed, the claim of a circuit-split is dependent on that contention. See Pet. 15-16, 21-22. The courts below did not interpret the provision, however, and its meaning is not clear.

The T-Mobile arbitration provision at issue in this case states:

> You will pay your share of the arbitrator's fees except: (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. *You and we agree to pay our own other fees, costs and expenses including those for counsel, experts, and witnesses.*

Pet. App. 37a (emphasis added). Although T-Mobile argues that the provision permits recovery of attorneys' fees authorized under the applicable substantive law,[11] the three decisions available on electronic databases that have addressed the issue have concluded that T-Mobile's provision does ***not*** allow for fee shifting. *Chalk* v. *T-Mobile USA, Inc.*, 2006 WL 2599506, at *6-*7 (D. Or. Sept. 7, 2006); *Lowden* v. *T-Mobile USA, Inc.*, 2006 WL 1009279, at *8 (W.D. Wash. Apr. 13, 2006), *aff'd*, 512 F.3d 1213 (9th Cir.

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[11] T-Mobile asserted in the Ninth Circuit that the following sentence (which appears earlier in the same paragraph as the sentence quoted above) authorizes the arbitrator to award attorneys' fees to the same extent as a court: "An arbitrator may only award as much relief as a court having jurisdiction in the place of arbitration, limited to the same extent that a court would limit such relief and consistent with the provisions of the Agreement." Pet. App. 36a-37a.

2008); *Janda* v. *T-Mobile, USA, Inc.*, 2006 WL 708936, at *8 (N.D. Cal. Mar. 17, 2006).[12]

Because T-Mobile's argument under the FAA is premised on the proposition that its arbitration clause permits the award of all statutorily-authorized remedies, this Court is confronted at the outset with a question of contract interpretation: Does T-Mobile's provision prohibit an arbitrator from shifting attorneys' fees, as the sentence emphasized above appears to convey, or does it allow an arbitrator to award attorneys' fees whenever a court could do so, as T-Mobile contends? Of course, "state law, not federal, normally governs such matters" "of contract interpretation." *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 450 (2003) (plurality opinion).

Even if T-Mobile's reading of its arbitration provision is the more persuasive one, the fact that the provision does not *unambiguously* authorize fee shifting (and that T-Mobile provides no clarification on its web site) makes this case a less than ideal vehicle for addressing whether States may refuse to enforce class waivers in second-generation arbitration provisions consistent with the FAA.

More fundamentally—and wholly apart from this factual issue—as we have discussed, both the substance of consumer arbitration provisions and the law governing their enforceability are evolving. The

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[12] The arbitration provision at issue here is identical to the one in *Chalk*. The version at issue in *Lowden* and *Janda* contained the same affirmative statement that the parties are responsible for their own attorneys' fees but, in addition, specified that "[a]n arbitrator may not award relief in excess or inconsistent with the provisions of the Agreement." *Lowden*, 2006 WL 1009279, at *1, *8; *Janda*, 2006 WL 708936, at *1, *8.

coming wave of decisions addressing third-generation arbitration provisions could put the preemption issue to rest without necessitating this Court's involvement by making clear that these provisions are fully enforceable under state law. Alternatively, if one or more federal courts of appeals holds that even third-generation arbitration provisions are unenforceable under state law, the preemption issue will be much more sharply presented. In that circumstance, it will be clear that state law categorically precludes an enforceable consumer arbitration provision that requires individual arbitration, and the question for the Court will be whether the FAA preempts states from imposing a de facto across-the-board ban on consumer arbitration provisions that require individual arbitration. That is a far clearer issue than the one presented here, which involves an arbitration provision that does not unambiguously allow fee shifting and does not affirmatively provide inducements to customers and their lawyers to pursue small claims on an individual basis.

This Court has "in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). In some cases, "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of petitions for writs of certiorari). This is such a case.

The California Supreme Court, the Washington Supreme Court, and the Ninth Circuit have all professed that they are not applying a rule that would invalidate all consumer agreements that require individual arbitration. See *Discover Bank*, 113 P.3d at 1110 ("We do not hold that all class action waivers are necessarily unconscionable."); *Shroyer*, 498 F.3d at 983 (same); *Scott*, 161 P.3d at 1009 n.7 ("We can certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights[.]"). If that is true, and these courts ultimately conclude that third-generation arbitration provisions are not unconscionable, then such provisions will become the norm, and the preemption issue will become largely unimportant, if not entirely moot. That is a very good reason for the Court to deny review at this time. See Hon. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result."); *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of certiorari) ("A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.").

Alternatively, if these courts refuse to enforce third-generation consumer arbitration provisions, it will then be plain that they are in fact applying a per se rule that consumer agreements to arbitrate individually are unenforceable. Moreover, such consumer-friendly provisions will force these courts to articulate their per se rule in its clearest, final form.

And by clarifying the issue and the underlying rationale for these courts' state-law holdings, decisions in third-generation cases would "yield a better informed and more enduring final pronouncement by this Court." *Evans*, 514 U.S. at 23 n.1 (Ginsburg, J., dissenting).

## CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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