



# INDEX

	Page
INTRODUCTION .....	1
<i>Barnes v. Helfenbein</i> , 1976 OK 33, 548 P.2d 1014.....	1
<i>EEOC v. Waffle House, Inc.</i> , 534 U.S. 279 (2002).....	1
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	1
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	1
9 U.S.C. § 2.....	1, 2
SUMMARY OF THE RECORD.....	2
A.    Bilbrey Sues Cingular.....	2
B.    Bilbrey Agrees To Arbitrate All Of His Claims Against Cingular, Including Those Arising Out Of His Relationship With Cingular’s Predecessors.....	3
C.    Cingular Moves To Compel Arbitration Upon Learning Of Bilbrey’s WSA .....	4
D.    Cingular Renews Its Motion To Compel Arbitration And Makes Its Revised Arbitration Provision Available To Bilbrey .....	5
E.    The District Court Denies Cingular’s Motion To Compel Arbitration .....	6
<i>Rogers v. Dell Computer Corp.</i> , 2005 OK 51, 127 P.3d 560 .....	7
15 O.S. § 817 .....	7
Okla. Sup. Ct. R. 1.60(i) .....	7
ARGUMENT.....	7
<i>Armijo v. Prudential Ins. Co. of Am.</i> , 72 F.3d 793 (10th Cir. 1995).....	7
<i>Fleming Cos. v. Tru Discount Foods</i> , 1999 OK CIV APP 18, 977 P.2d 367.....	7
<i>Towe, Hester &amp; Erwin v. Kansas City Fire &amp; Marine Ins. Co.</i> , 1997 OK CIV APP 58, 947 P.2d 594 .....	7
I.    THE AGREEMENT TO ARBITRATE BETWEEN BILBREY AND CINGULAR IS FULLY ENFORCEABLE.....	7
A.    Cingular’s Arbitration Provision Is Not Unconscionable Under Oklahoma Law.....	7

**INDEX**  
(continued)

	<b>Page</b>
Jean R. Sternlight & Elizabeth J. Jensen, <i>Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?</i> 67 L. & CONTEMP. PROBS. 75 (2004) .....	7
William S. Boyd School of Law, Univ. of Nev., Las Vegas, <i>Jean Sternlight</i> , <a href="http://www.law.unlv.edu/faculty/sternlight/sternlight.html">http://www.law.unlv.edu/faculty/sternlight/sternlight.html</a> .....	8
<b>1.</b> Cases in Oklahoma and around the country have upheld class-arbitration waivers .....	8
<i>AutoNation USA Corp. v. Leroy</i> , 105 S.W.3d 190 (Tex. Ct. App. 2003).....	10
<i>Barnes v. Helfenbein</i> , 1976 OK 33, 548 P.2d 1014.....	8
<i>Billups v. Bankfirst</i> , 294 F. Supp. 2d 1265 (M.D. Ala. 2003) .....	10
<i>Brown v. KFC Nat’l Mgmt Co.</i> , 921 P.2d 146 (Haw. 1996) .....	10
<i>Caley v. Gulfstream Aerospace Corp.</i> , 428 F.3d 1359 (11th Cir. 2005), pet. for cert. pending (filed Jan. 30, 2006).....	9
<i>Copeland v. Katz</i> , 2005 WL 3163296 (E.D. Mich. Nov. 28, 2005) .....	10
<i>Dambrosio v. Comcast Corp.</i> , 2005 WL 3543794 (E.D. Pa. Dec. 27, 2005).....	9
<i>Discover Bank v. Superior Court</i> , 113 P.3d 1100 (Cal. 2005) .....	10
<i>Edwards v. Blockbuster, Inc.</i> , 400 F. Supp. 2d 1305 (E.D. Okla. 2005).....	8, 9
<i>Hubbert v. Dell Corp.</i> , 835 N.E.2d 113 (Ill. App. Ct. 2005).....	10
<i>Hutcherson v. Sears Roebuck &amp; Co.</i> , 793 N.E.2d 886 (Ill. App. Ct. 2003) .....	10
<i>Iberia Credit Bureau, Inc. v. Cingular Wireless LLC</i> , 379 F.3d 159 (5th Cir. 2004) .....	9
<i>In re Currency Conversion Antitrust Litig.</i> , 361 F. Supp. 2d 237 (S.D.N.Y. 2005).....	10
<i>Jenkins v. First Am. Cash Advance of Ga., LLC</i> , 400 F.3d 868 (11th Cir. 2005), cert. denied, ___ U.S. ___ (Feb. 27, 2006).....	9
<i>Jones v. Genus Credit Mgmt. Corp.</i> , 353 F. Supp. 2d 598 (D. Md. 2005) .....	10

**INDEX**  
(continued)

	<b>Page</b>
<i>Kinkel v. Cingular Wireless, LLC</i> , 828 N.E.2d 812 (Ill. App. Ct. 2005), <i>review granted</i> , 839 N.E.2d 1025 (Ill. 2005) .....	10
<i>Lloyd v. MBNA Am. Bank, N.A.</i> 27 Fed. Appx. 82 (3d Cir. 2002).....	9
<i>Lomax v. Woodmen of the World Life Ins. Soc’y</i> , 228 F. Supp. 2d 1360 (N.D. Ga. 2002).....	10
<i>Lux v. Good Guys</i> , 2005 WL 1713421 (C.D. Cal. July 11, 2005), <i>motion for reconsideration</i> <i>denied</i> , 2006 WL 357820 (C.D. Cal. Feb. 8, 2006).....	10
<i>O’Quin v. Verizon Wireless</i> , 256 F. Supp. 2d 512 (M.D. La. 2003) .....	10
<i>Pick v. Discover Fin. Servs., Inc.</i> , 2001 U.S. Dist. LEXIS 15777 (D. Del. Sept. 28, 2001).....	10
<i>Provencher v. Dell, Inc.</i> , 409 F. Supp. 2d 1196 (C.D. Cal. 2006).....	9
<i>Ragan v. AT&amp;T Corp.</i> , 824 N.E.2d 1183 (Ill. App. Ct. 2005) .....	10
<i>Rains v. Found. Health Sys. Life &amp; Health</i> , 23 P.3d 1249 (Colo. Ct. App. 2001) .....	10
<i>Rosen v. SCIL, LLC</i> , 799 N.E.2d 488 (Ill. App. Ct. 2003) .....	10
<i>Schultz v. AT&amp;T Wireless Servs., Inc.</i> , 376 F. Supp. 2d 685 (N.D. W. Va. 2005) .....	10
<i>Snowden v. CheckPoint Check Cashing</i> , 290 F.3d 631 (4th Cir. 2002) .....	9
<i>Stein v. Geonerco, Inc.</i> , 17 P.3d 1266 (Wash. Ct. App. 2001) .....	10
<i>Stenzel v. Dell, Inc.</i> , 870 A.2d 133 (Me. 2005) .....	10
<i>Strand v. U.S. Bank Nat’l Ass’n ND</i> , 693 N.W.2d 918 (N.D. 2005).....	10
<i>Ting v. AT&amp;T</i> , 319 F.3d 1126 (9th Cir. 2003) .....	10
<i>Truesdell v. State Farm Fire &amp; Cas. Co.</i> , 960 F. Supp. 1511 (N.D. Okla. 1997).....	8
<i>Tsadilas v Providian Nat’l Bank</i> , 786 N.Y.S.2d 478 (N.Y. App. Div. 2004) .....	10
<i>Vigil v. Sears Nat’l Bank</i> , 205 F. Supp. 2d 566 (E.D. La. 2002) .....	10

**INDEX**  
(continued)

	<b>Page</b>
<i>Walther v. Sovereign Bank</i> , 872 A.2d 735 (Md. 2005) .....	10
<i>West Virginia ex rel. Dunlap v. Berger</i> , 567 S.E.2d 265 (W.Va. 2002) .....	10
<i>Wilson v. Mike Steven Motors, Inc.</i> , 2005 WL 1277948 (Kan. Ct. App. May 27, 2005) .....	10
<i>Zawikowski v. Beneficial Nat’l Bank</i> , 1999 U.S. Dist. LEXIS 514 (N.D. Ill. Jan. 11, 1999).....	10
<b>2.</b> Cingular’s arbitration provision encourages customers to vindicate small claims through arbitration or small claims court. ....	10
<i>Blitz v. AT&amp;T Wireless Services, Inc.</i> (Mo. Cir. Ct., Nov. 28, 2005) .....	11
<i>Iberia Credit Bureau, Inc. v. Cingular Wireless LLC</i> , 379 F.3d 159 (5th Cir. 2004) .....	12, 13
<i>Jenkins v. First Am. Cash Advance of Ga., LLC</i> , 400 F.3d 868 (11th Cir. 2005), cert. denied, __ U.S. __ (Feb. 27, 2006).....	11
<i>Johnson v. W. Suburban Bank</i> , 225 F.3d 366 (3d Cir. 2000).....	12
<i>Klassen v. Lazik</i> , 2004 OK CIV APP 46, 91 P.3d 90 .....	13
<i>Pulver v. 1st Lake Props., Inc.</i> , 681 So.2d 965 (La. App. 1996).....	13
<i>Snowden v. CheckPoint Check Cashing</i> , 290 F.3d 631 (4th Cir. 2002) .....	12
<i>Strand v. U.S. Bank Nat’l Ass’n ND</i> , 693 N.W.2d 918 (N.D. 2005).....	12
<i>Taylor v. Citibank USA, N.A.</i> , 292 F. Supp. 2d 1333 (M.D. Ala. 2003) .....	12
12 O.S. § 1761 .....	13
Jack Wilson, “No-Class-Action Arbitration Clauses,” <i>State-Law Unconscionability, And the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action</i> , 23 QUINNIPIAC L. REV. 737 (2004) .....	13
<b>3.</b> If anything, Cingular’s arbitration provision creates strong pressures for Cingular to satisfy customers’ demands rather than resist potentially valid claims .....	14

**INDEX**  
(continued)

**Page**

AAA, <i>Supplementary Procedures For Consumer-Related Disputes</i> , Section C-8 (effective Sept. 15, 2005) (available at <a href="http://www.adr.org">http://www.adr.org</a> ).....	14
4. Cingular’s customers could rationally prefer cost-free individual arbitration over the possibility of being part of a class action.....	14
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265 (1995).....	15
<i>Boomer v. AT&amp;T Corp.</i> , 309 F.3d 404 (7th Cir. 2002).....	15
<i>Metro East Ctr. for Conditioning &amp; Health v. Qwest Commc’ns Int’l, Inc.</i> , 294 F.3d 924 (7th Cir. 2002).....	15
Class Action Fairness Act of 2005, Pub. L. No. 109–2, § 2(a)(3), codified at 28 U.S.C. § 1711 note.....	15
Ernst & Young, <i>Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases</i> , available at <a href="http://www.arb-forum.com/media/EY_2005.pdf">http://www.arb-forum.com/media/EY_2005.pdf</a> .....	16
Harris Interactive, <i>Arbitration: Simpler, Cheaper, and Faster than Litigation</i> (Apr. 2005), <a href="http://www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf">http://www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf</a> .....	16
Joshua S. Lipshutz, Note, <i>The Court’s Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits</i> , 57 STAN. L. REV. 1677 (2005).....	15
Penn, Schoen & Berland Associates, U.S. Chamber of Commerce, Institute for Legal Reform, <i>Polling on The Class Action System: National Results</i> (Mar. 2003), at <a href="http://www.instituteforlegalreform.com/resources/classaction.pdf">http://www.instituteforlegalreform.com/resources/classaction.pdf</a> .....	16
Tidwell et al., <i>Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations</i> (Aug. 1999), available at <a href="http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009528.pdf">http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009528.pdf</a> .....	16
Stephen J. Ware, <i>Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements</i> , 2001 J. DISP. RESOL. 89 .....	15

**INDEX**  
(continued)

	<b>Page</b>
B. The FAA Precludes Holding Cingular’s Arbitration Provision To Be Unconscionable.....	17
<i>Rollings v. Thermodyne Industries, Inc.</i> , 1996 OK 6, 910 P.2d 1030.....	17
1. Section 2 of the FAA precludes holding arbitration provisions to be unconscionable merely because they waive the right to pursue a class action .....	17
<i>Barnes v. Helfenbein</i> , 1976 OK 33, 548 P.2d 1014.....	19
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. ___, 126 S. Ct. 1204 (2006).....	17
<i>Doctor’s Associates v. Casarotto</i> , 517 U.S. 681 (1996).....	18
<i>Iberia Credit Bureau, Inc. v. Cingular Wireless LLC</i> , 379 F.3d 159 (5th Cir. 2004) .....	18
<i>Iberlin v. TCI Cablevision, Inc.</i> , 855 P.2d 716 (Wyo. 1993).....	19
<i>Lakeside Boating &amp; Bathing, Inc. v. State</i> , 402 N.W.2d 419 (Iowa 1987).....	19
<i>Lovey v. Regence BlueShield of Idaho</i> , 72 P.3d 877 (Idaho 2003).....	19
<i>Management Enters., Inc. v. Thorncroft Co.</i> , 416 S.E.2d 229 (Va. 1992).....	19
<i>Norwest Fin. Mississippi, Inc. v. McDonald</i> , 905 So. 2d 1187 (Miss. 2005).....	19
<i>Oblix, Inc. v. Winiecki</i> , 374 F.3d 488 (7th Cir. 2004) .....	18
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	17, 18
<i>Smith v. Mitsubishi Motors Credit of Am., Inc.</i> , 721 A.2d 1187 (Conn. 1998) .....	19
<i>Walther v. Sovereign Bank</i> , 872 A.2d 735 (Md. 2005) .....	19
<i>Waters v. Min Ltd.</i> , 587 N.E.2d 231, 234 (Mass. 1992).....	19
<i>Zuver v. Airtouch Commc’ns, Inc.</i> , 103 P.3d 753 (Wash. 2004).....	18
9 U.S.C. § 2.....	17, 18, 19
RESTATEMENT (SECOND) OF CONTRACTS (1981).....	19

**INDEX**  
(continued)

		<b>Page</b>
2.	Conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration would conflict with Congress’s objectives in enacting the FAA and would therefore be preempted .....	20
	<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265 (1995).....	20
	<i>Caley v. Gulfstream Aerospace Corp.</i> , 428 F.3d 1359 (11th Cir. 2005) .....	24
	<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	24
	<i>Iberia Credit Bureau, Inc. v. Cingular Wireless LLC</i> , 379 F.3d 159 (5th Cir. 2004) .....	24
	<i>Livadas v. Bradshaw</i> , 512 U.S. 107 (1994).....	23
	<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth</i> , 473 U.S. 614 (1985).....	20
	<i>Pyburn v. Bill Heard Chevrolet</i> , 63 S.W.3d 351 (Tenn. Ct. App. 2001), <i>appeal denied</i> (Tenn. Nov. 19, 2001).....	23
	<i>Rollings v. Thermodyne Industries, Inc.</i> , 1996 OK 6, 910 P.2d 1030 .....	20
	<i>Schultz v. AT&amp;T Wireless Servs., Inc.</i> , 376 F. Supp. 2d 685 (N.D. W. Va. 2005) .....	23
	<i>United States v. Locke</i> , 529 U.S. 89 (2000).....	20
	<i>Voss v. City of Oklahoma City</i> , 1980 OK 148, 618 P.2d 925 .....	20
	<i>Wilko v. Swan</i> , 346 U.S. 427 (1953), <i>overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.</i> , 490 U.S. 477 (1989).....	22
	9 U.S.C. § 2.....	20
	9 U.S.C. § 10.....	22
	12 O.S. § 2023 .....	22
	Elizabeth P. Allor, <i>Note, Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts</i> , 71 CAL. L. REV. 1239 (1983) .....	21
	Lindsay R. Androski, <i>Comment, A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses</i> , 2003 U. CHI. LEGAL F. 631 .....	21

**INDEX**  
(continued)

	<b>Page</b>
http://www.adr.org/Classarbitrationpolicy .....	22
H.R. REP. No. 97-542 (1982).....	20
<i>Joint Hearings on S. 1005 and H.R. 646 Before the Sub- comms. of the Comms. on the Judiciary, 68th Cong., 1st Sess., at 7 (1924)</i> .....	20
Jean R. Sternlight, <i>As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?</i> , 42 WM. & MARY L. REV. 1 (2000) .....	21
Jack Wilson, “ <i>No-Class-Action Arbitration Clauses,</i> ” <i>State-Law Unconscionability, And the Federal Arbitra- tion Act: A Case for Federal Judicial Restraint and Con- gressional Action</i> , 23 QUINNIPIAC L. REV. 737 (2004) .....	21, 23
 II. BILBREY’S ALTERNATE ARGUMENTS FOR AFFIRMING THE DIS- TRICT COURT’S ORDER ARE MERITLESS .....	 24
 A. The Scope of Bilbrey’s Arbitration Agreement Includes His Claims In This Litigation, Which Arose Out Of Bilbrey’s Agreement For Wire- less Service With Cingular’s Predecessor .....	 25
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265 (1995) .....	28
<i>Frederick v. First Union Sec., Inc.</i> , 122 Cal. Rptr. 2d 774 (Cal. Ct. App. 2002) .....	25
<i>Garrity v. McCaskey</i> , 612 A.2d 742 (Conn. 1992).....	25
<i>Koontz v. S.W. Speakers Bureau, Inc.</i> , 1994 WL 390221 (Tex. App.–Dallas July 28, 1994, writ denied).....	26
<i>Lloyd v. MBNA Am. Bank</i> , 2001 WL 194300 (D. Del. Feb. 22, 2001), <i>aff’d</i> , 27 Fed. Appx. 82 (3d Cir. 2002). .....	26
<i>Mehler v. Terminix Int’l Co.</i> , 205 F.3d 44 (2d Cir. 2000).....	26
<i>Old Republic Ins. Co. v. St. Paul Fire &amp; Marine Ins. Co.</i> , 53 Cal. Rptr. 2d 50 (Cal. Ct. App. 1996).....	26
<i>Pasotex Petroleum Co. v. British-Am. Oil Producing Co.</i> , 1966 OK 247, 431 P.2d 373 .....	28
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	28
<i>Scherk v. Alberto-Culver Co.</i> , 417 U.S. 506 (1974).....	28
<i>Voss v. City of Oklahoma City</i> , 1980 OK 148, 618 P.2d 925 .....	25
<i>Wilcox v. Valero Ref. Co.</i> , 256 F. Supp. 2d 687 (S.D. Tex. 2003) .....	27

**INDEX**  
(continued)

	<b>Page</b>
<i>Zink v. Merrill Lynch Pierce Fenner &amp; Smith, Inc.</i> , 13 F.3d 330 (10th Cir. 1993) .....	26
9 U.S.C. § 2.....	25, 27
12 AM. JUR. § 433.....	28
15 O.S. § 237 .....	28
15 O.S. § 802(A).....	25
ALTA Owner’s Policy (10/17/92), available at <a href="http://www.alta.org/standards/index.cfm">http://www.alta.org/standards/index.cfm</a> .....	27
Am. Land Title Ass’n, <i>About ALTA—Board of Governors</i> , <a href="http://www.alta.org/about/board.cfm">http://www.alta.org/about/board.cfm</a> .....	27
Am. Land Title Ass’n, <i>Mark Bilbrey Brings Two Perspectives to ALTA</i> , TITLE NEWS (Nov./Dec. 2004), available at <a href="http://www.alta.org/publications/titlenews/04/06_01.cfm">http://www.alta.org/publications/titlenews/04/06_01.cfm</a> .....	27
Am. Land Title Ass’n, <i>Standards &amp; Forms—ALTA Arbitration Rules</i> , <a href="http://www.alta.org/standards/arbitration.cfm">http://www.alta.org/standards/arbitration.cfm</a> .....	27
ASS’NS YELLOW BOOK 268 (Christiane M. Muntone, ed., Winter 2006).....	27
<b>B. Cingular Did Not Waive Its Right To Compel Arbitration</b> .....	29
<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	29
<i>Northland Ins. Co. v. Kellogg</i> , 1995 OK CIV APP 84, 897 P.2d 1161 .....	29, 30
<i>Peterson v. Shearson/Am. Express, Inc.</i> , 849 F.2d 464 (10th Cir. 1988) .....	29
<i>Rush v. Oppenheimer &amp; Co.</i> , 779 F.2d 885 (2d Cir. 1985).....	30
<i>Towe, Hester &amp; Erwin v. Kansas City Fire &amp; Marine Ins. Co.</i> , 1997 OK CIV APP 58, 947 P.2d 594 .....	30
<b>CONCLUSION</b> .....	30

## INTRODUCTION

The Federal Arbitration Act (FAA) “manifest[s] a liberal federal policy favoring arbitration agreements.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288-89 (2002) (internal quotation marks and citation omitted). To advance that policy, Congress enacted the FAA in 1925 to “reverse the longstanding judicial hostility to arbitration agreements” and “to place [these] agreements upon the same footing as other contracts.” *Id.*

In keeping with this policy, Section 2 of the FAA “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The single exception to this rule is that courts may refuse to compel arbitration and stay the judicial proceedings if “the agreement to arbitrate \* \* \* is revocable ‘upon such grounds as exist at law or in equity for the revocation of *any* contract.’” *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting 9 U.S.C. § 2) (emphasis added).

Notwithstanding these well-established principles, the district court denied Cingular’s motion to compel arbitration of plaintiff Mark Bilbrey’s dispute because Bilbrey’s arbitration provision requires him to arbitrate his dispute on an individual basis rather than as a representative of a class. That holding is wrong for two reasons. First, the court misapplied Oklahoma unconscionability law, under which a contract is deemed to be unconscionable only if its terms are “so one-sided as to oppress or unfairly surprise one of the parties.” *Barnes v. Helfenbein*, 1976 OK 33, 548 P.2d 1014, 1020. There is nothing in Oklahoma law to suggest that an agreement not to be part of a class action is “so one-sided” a bargain that it is oppressive to the customer. The standard certainly cannot be met in *this* case, because Cingular’s arbitration provision permitted Bilbrey to arbitrate for free, made attorneys’ fees available to him to a greater extent than they would be in court, permitted Bilbrey to pursue

arbitration in Canadian County, and allowed Bilbrey to proceed in small claims court as an alternative to arbitration. These features make individual dispute resolution via either arbitration or small claims court inexpensive, easy, and efficient.

Second, the FAA preempts the district court's holding that Cingular's arbitration provision is unconscionable. Section 2 of the FAA specifies that arbitration provisions may be invalidated *only* on the basis of state-law principles that apply neutrally to all contractual provisions. The court did not, and could not, point to any neutral principle of Oklahoma law that justified its holding that Cingular's class-arbitration prohibition is unconscionable. To the contrary, in refusing to enforce Bilbrey's arbitration agreement, it deviated from Oklahoma's stringent standards for proving unconscionability. Moreover, even if the district court had neutrally applied Oklahoma unconscionability law, its holding would be preempted because it conflicts with the purposes of the FAA. As we will explain, classwide procedures are fundamentally inconsistent with the goal of arbitration, which is to resolve disputes simply, quickly, and cheaply. By conditioning the enforceability of arbitration provisions on the availability of class arbitration, the district court's ruling (if upheld) would eviscerate these benefits and would lead to the elimination of consumer arbitration in Oklahoma. Simply put, that result is entirely inconsistent with the FAA's policy of furthering the resolution of disputes through arbitration.

Finally, we anticipate that Bilbrey will seek to defend the district court's ruling on alternative grounds. Those alternative grounds also lack merit.

## **SUMMARY OF THE RECORD**

### **A. Bilbrey Sues Cingular.**

Bilbrey was a customer of Southwestern Bell Mobile Systems (SBMS). He became a "month-to-month" customer of SBMS in June 1998; *i.e.*, he was free to cancel his wireless

service without paying an early-termination fee. Supp. to Cingular Reply in Support of Mot. to Compel Arb. (“Supp. Cingular Reply”), Ex. 4, Lopez Aff. ¶¶ 5-6, R. 429-30. Cingular became the successor-in-interest to SBMS in October 2000. Cingular Reply in Support of Mot. to Compel Arb., R. 319-20; Cingular Mot. Summ. J., Ex. A, Tacker Aff. ¶¶ 15-18, R. 92-93.

Bilbrey sued Cingular in February 2001. He alleges that Cingular measures the length of a wireless telephone call by starting at the “time of channel seizure” (Petition ¶ 13, R. 4). This method, Bilbrey claims, constitutes unjust enrichment; breach of contract; fraud and deceit; and a deceptive trade practice in violation of, among other things, the Oklahoma Consumer Protection Act. Petition ¶¶ 16-19, R. 4-5. Bilbrey seeks to recover money damages for himself and on behalf of a putative class of “several million” customers who “reside in many different states.” Petition ¶ 5, R. 2.

**B. Bilbrey Agrees To Arbitrate All Of His Claims Against Cingular, Including Those Arising Out Of His Relationship With Cingular’s Predecessors.**

Three months after filing his lawsuit, Bilbrey obtained a new Nokia wireless phone because his previous phone was stolen. *See* Cingular Mot. to Compel Arb. (“Cingular Arb. Mot.”), Ex. A, R. 203, Bilbrey Response to Mot. to Compel Arb. (“Bilbrey Arb. Resp.”), R. 233. Cingular offered Bilbrey the new phone at no charge (*see* Supp. Cingular Reply, Ex. 4, Lopez Aff. ¶ 7, R. 430), provided that Bilbrey agree to a standard Wireless Service Agreement (WSA) with Cingular, which consists of one double-sided, legal-sized piece of paper. Bilbrey signed the WSA on May 23, 2001. Cingular Arb. Mot., Ex. A, R. 203. The Terms and Conditions of the WSA contain an arbitration provision, which provides, in relevant part:

**INDEPENDENT ARBITRATION** \* \* \* CINGULAR and you agree to arbitrate any and all disputes and claims \* \* \* arising out of or relating to this

Agreement, or to any prior Agreement for products or service between you and CINGULAR or any of your or CINGULAR's affiliates or predecessors in interest. \* \* \* CINGULAR and you acknowledge that this agreement evidences a transaction in interstate commerce and that the United States Arbitration Act and Federal Arbitration Law shall govern the interpretation and enforcement of \* \* \* this or a prior agreement. \* \* \*

*Id.*, R. 204. The provision also allows either the customer or Cingular to bring an action in small claims court as an alternative to arbitration. *Id.*

The WSA prominently alerted Bilbrey to the existence of the Terms and Conditions generally, and the arbitration provision in particular. To begin with, the front side of the WSA contains the following notification: “**TERMS AND CONDITIONS** - Other important terms and conditions of service \* \* \* are contained in the Terms and Conditions \* \* \* provided to you. \* \* \* I acknowledge that the Terms and Conditions are on the back of this page \* \* \*.” *Id.*, R. 203. Bilbrey initialed directly below that acknowledgment. *Id.* The front side of the WSA also includes the following statement: “**I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT AND THE TERMS AND CONDITIONS \* \* \*. I AGREE TO BE BOUND THEREBY.**” *Id.* Bilbrey signed directly below that acknowledgment as well. *Id.*

Moreover, the very first paragraph of the Terms and Conditions notified Bilbrey of the existence of the arbitration provision:

**IMPORTANT NOTICE: THIS AGREEMENT CONTAINS MANDATORY ARBITRATION AND OTHER IMPORTANT PROVISIONS LIMITING THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE. PLEASE REFER TO THE SECTION ENTITLED “ARBITRATION” FOR DETAILS.**

*Id.*, R. 204.

**C. Cingular Moves To Compel Arbitration Upon Learning Of Bilbrey's WSA.**

In the meantime, Cingular had filed an answer and an amended answer, each of

which raised as a defense that Bilbrey “and/or some or all of the putative class members are barred by the terms of their contracts which subject disputes to binding arbitration \* \* \*.” Answer ¶ 36, R. 11; Amended Answer ¶ 37, R. 18.

In May 2001, Cingular moved for summary judgment on the ground that Bilbrey’s relationship was with SBMS, and that Cingular was therefore not properly named as a defendant. But following discovery conducted by Bilbrey on this issue, Cingular withdrew its motion and stipulated that it would defend the action in its own name. Stipulation, R. 205-06; Docket, R. 589 (reflecting withdrawal of summary judgment motion).

In late February 2002—as soon as Cingular’s legal department became aware of Bilbrey’s WSA—Cingular moved to compel arbitration under the arbitration provision contained in the WSA. Cingular Arb. Mot., R. 193-204.

**D. Cingular Renews Its Motion To Compel Arbitration And Makes Its Revised Arbitration Provision Available To Bilbrey.**

The motion to compel arbitration was put on hold shortly thereafter, as the parties engaged in settlement discussions over a 15-month period. During that time, no discovery or motions practice took place. *See* Docket, R. 591 (containing no entries between Apr. 4, 2002 and June 11, 2003). These discussions were ultimately unsuccessful, and Cingular renewed its motion to compel arbitration in June 2003. Cingular Renewed Mot. to Compel Arb. (“Cingular Renewed Arb. Mot.”), R. 210.

In its renewed motion, Cingular explained that during the next billing cycle (July 2003) it would be sending to all of its then-current subscribers—including Bilbrey—an improved, consumer-friendly arbitration provision that would become effective immediately upon receipt. *Id.*, R. 209. Cingular made this change pursuant to a provision in the Agreement that authorizes it to change the terms and conditions upon written notice to its custom-

ers. Cingular committed in the renewed motion to making the revised provision available to Bilbrey immediately. *See id.*

The revised arbitration provision contains several features that are designed to make arbitration less expensive and more convenient for Cingular's customers and to respond to criticisms that had been raised by opponents of arbitration by: (i) specifying that Cingular will pay "all [American Arbitration Association (AAA)] filing, administration and arbitrator fees," unless the arbitrator finds the claim or the relief sought to be frivolous; (ii) obliging Cingular to "reimburse [the customer] for [her] reasonable attorneys' fees and expenses incurred for the arbitration" if the customer recovers the amount of his demand or more; (iii) providing that arbitration shall take place "in the county \* \* \* of [the customer's] billing address"; (iv) deleting the prior version's requirement that the existence, content, and results of the arbitration be kept confidential; (v) deleting the prior version's limitations on the availability of punitive damages; and (vi) specifying that the AAA, rather than the Wireless Industry Association, rules apply. Cingular Renewed Arb. Mot., Ex. A, R. 214-15. Like in the earlier arbitration provision, under the revised provision each party agreed to "bring claims against the other only in [that party's] individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.*, R. 215 (emphasis omitted). Also like the predecessor provision, the revised provision affords both parties the right to bring claims in small claims court. *Id.*

**E. The District Court Denies Cingular's Motion To Compel Arbitration.**

Following further briefing, the court heard argument on the motion in May 2004. At a hearing six months later, the court stated that it would deny Cingular's motion to compel arbitration. The district court issued a signed order to this effect on December 16, 2005.

Order Denying Arbitration, R. 535. This appeal followed.<sup>1</sup>

## ARGUMENT

Oklahoma appellate courts exercise *de novo* review of the denial of a motion to compel arbitration.<sup>2</sup> Because the ruling below was legally erroneous, this Court should reverse the district court's order.

### I. THE AGREEMENT TO ARBITRATE BETWEEN BILBREY AND CINGULAR IS FULLY ENFORCEABLE.

The district court's denial of Cingular's motion to compel arbitration is fundamentally mistaken in two respects. First, the court misconstrued Oklahoma unconscionability law. Second, the court disregarded the preemptive force of the FAA.

#### A. Cingular's Arbitration Provision Is Not Unconscionable Under Oklahoma Law.

The district court held that the prohibition of class arbitration in Cingular's arbitration provision "is against public policy." 11/29/04 Tr. at 6. In the court's view, "the damage amount of the claims is too little to be addressed on an individual basis" because "it would not be financially feasible" for customers "to bring those actions individually." *Id.* at 5. It based that conclusion on its "experience in ruling on these issues in other prior class actions" (*id.* at 4) as well as its review of a journal article by an academic who is opposed to consumer arbitration.<sup>3</sup>

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<sup>1</sup> This court has jurisdiction because an order denying a motion to compel arbitration is immediately "appealable by right." *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶ 3, 127 P.3d 560, 562 (citing Okla. Sup. Ct. R. 1.60(i); 15 O.S. § 817).

<sup>2</sup> See *Fleming Cos. v. Tru Discount Foods*, 1999 OK CIV APP 18, ¶ 11, 977 P.2d 367, 370; *Towe, Hester & Erwin v. Kansas City Fire & Marine Ins. Co.*, 1997 OK CIV APP 58, ¶ 4, 947 P.2d 594, 596 (quoting *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 796 (10th Cir. 1995)).

<sup>3</sup> See 11/29/04 Tr. at 2-3 (citing Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscion-*

The court's ruling ignores both Oklahoma's standard for unconscionability and the particular features of Cingular's arbitration provision that make it fully feasible for customers to pursue any claims they might have through individual arbitration.

**1. Cases in Oklahoma and around the country have upheld class-arbitration waivers.**

The standards for applying the "equitable concept of unconscionability" (*Barnes*, 548 P.2d at 1020) to invalidate a contractual provision are stringent. As this Court has explained:

Unconscionability is directly related to fraud and deceit. An unconscionable contract is one which no person in his senses, not under delusion would make, on the one hand, and which no fair and honest man would accept on the other. The basic test of unconscionability of a contract is whether \* \* \* clauses are so one-sided as to oppress or unfairly surprise one of the parties. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party.

*Id.*; see also *Truesdell v. State Farm Fire & Cas. Co.*, 960 F. Supp. 1511, 1516 (N.D. Okla. 1997) (citing *Barnes*).

Given this standard, it is unsurprising that the district court cited no Oklahoma law to support its holding that Cingular's class-arbitration waiver is unconscionable. Indeed, the federal district court for the Eastern District of Oklahoma subsequently took exactly the opposite position. See *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305 (E.D. Okla. 2005). In *Edwards*, the court rejected a challenge to a class-arbitration waiver under Oklahoma unconscionability law, instead compelling individual arbitration of a consumer's dispute with

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*able Abuse?* 67 L. & CONTEMP. PROBS. 75 (2004)); facsimile transmission from Judge Cunningham to counsel for parties, R. 490. As the title of her article suggests, Professor Sternlight—a former plaintiffs' lawyer—is not a neutral participant in the debate. Indeed, her own website explains that she "has focused substantial attention on attacking the imposition of mandatory arbitration on consumers and employees." William S. Boyd School of Law, Univ. of Nev., Las Vegas, *Jean Sternlight*, <http://www.law.unlv.edu/faculty/sternlight/sternlight.html>.

Blockbuster over a \$1.25 restocking fee for late videotapes and DVDs. *Id.* at 1307-09. The prohibition on class actions and class arbitrations contained in Blockbuster’s arbitration provision did not “render the Agreement unenforceable, or unconscionable” because “[s]uch provisions are a *common feature* of consumer arbitration agreements, and *numerous courts* have recognized that they are valid and fully enforceable.” *Id.* (emphasis added). Among other cases, Chief Judge Payne cited a decision of the U.S. Court of Appeals for the Fifth Circuit upholding Cingular’s original arbitration provision—*i.e.*, the one in Bilbrey’s WSA that was superseded by the version sent to him in July 2003. *See id.* (citing *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004)).<sup>4</sup>

Consonant with *Edwards*—and in stark contrast to the Canadian County district court’s ruling below—the overwhelming majority rule around the country is that arbitration provisions that prohibit class-wide arbitration are not unconscionable, at least so long as they do not require the consumer to pay greater costs than he or she would have to bear in court, prohibit the arbitrator from awarding a prevailing plaintiff his or her attorneys’ fees under applicable fee-shifting statutes, or forbid an arbitrator from awarding the full measure of relief available in court.<sup>5</sup>

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<sup>4</sup> Just as in *Edwards*, Cingular’s arbitration provision “mutually binds the customer and company to arbitrate all disputes,” and “the terms of the arbitration are customer-friendly” because Cingular’s provision “states [that] the arbitration will be governed by the [AAA’s] rules for consumer-related disputes” (400 F. Supp. 2d at 1309). *See* Cingular Renewed Arb. Mot., Ex. A, R. 214-15.

<sup>5</sup> *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (Georgia law), pet. for cert. pending (filed Jan. 30, 2006); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (Georgia law), cert. denied, \_\_\_ U.S. \_\_\_ (Feb. 27, 2006); *Iberia Credit Bureau*, 379 F.3d at 174-75 (5th Cir. 2004) (Louisiana law); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (Maryland law); *Lloyd v. MBNA Am. Bank, N.A.* 27 Fed. Appx. 82, 84 (3d Cir. 2002) (Delaware law); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1204-06 (C.D. Cal. 2006) (Texas law); *Dambrosio v. Comcast Corp.*, 2005 WL 3543794, at \*17 (E.D. Pa. Dec. 27, 2005) (Pennsyl-

2. **Cingular’s arbitration provision encourages customers to vindicate small claims through arbitration or small claims court.**

Cingular’s arbitration provision is fully enforceable under the majority rule: The consumer-friendly features of Cingular’s arbitration provision ensure that customers can effectively vindicate claims for even small amounts of money through individual arbitration.

*First*, Cingular has eliminated any financial disincentive to arbitrating small claims by specifying in its arbitration provision that it will pay the **full cost** of arbitration so long as

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vania and Illinois law); *Copeland v. Katz*, 2005 WL 3163296, at \*4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Lux v. Good Guys*, 2005 WL 1713421 (C.D. Cal. July 11, 2005) (Nevada law), *motion for reconsideration denied*, 2006 WL 357820 (C.D. Cal. Feb. 8, 2006); *In re Currency Conversion Antitrust Litig.*, 361 F. Supp. 2d 237, 259 & n.11 (S.D.N.Y. 2005) (Arizona, Delaware, Nevada, New Hampshire, and South Dakota law); *Jones v. Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005) (Maryland law); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-77 (M.D. Ala. 2003) (Alabama law); *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003) (Louisiana law); *Lomax v. Woodmen of the World Life Ins. Soc’y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002) (Georgia law); *Vigil v. Sears Nat’l Bank*, 205 F. Supp. 2d 566, 572 (E.D. La. 2002) (Arizona law); *Pick v. Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, at \*16 (D. Del. Sept. 28, 2001) (Delaware law); *Zawikowski v. Beneficial Nat’l Bank*, 1999 U.S. Dist. LEXIS 514, at \*5 (N.D. Ill. Jan. 11, 1999) (Illinois law); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (Colorado law); *Brown v. KFC Nat’l Mgmt Co.*, 921 P.2d 146, 166-67 & n.23 (Haw. 1996) (Hawaii law); *Ragan v. AT&T Corp.*, 824 N.E.2d 1183, 1193-94 (Ill. App. Ct. 2005) (New York law); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494-95 (Ill. App. Ct. 2003) (Illinois law); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 894-96 (Ill. App. Ct. 2003) (Arizona law); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 125-26 (Ill. App. Ct. 2005) (Texas law); *Wilson v. Mike Steven Motors, Inc.*, 2005 WL 1277948, at \*7 (Kan. Ct. App. May 27, 2005) (Kansas law); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (Texas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 749-51 (Md. 2005) (Maryland law); *Tsadilas v Providian Nat’l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004) (New York law); *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (North Dakota law); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (Texas law); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1270-71 (Wash. Ct. App. 2001) (Washington law). *But see Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (determining that in “some circumstances” class action waivers in arbitration provisions are unconscionable); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (affirming conclusion that class action ban was unconscionable); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812 (Ill. App. Ct. 2005) (refusing to follow *Rosen* and *Hutcherson*), review granted, 839 N.E.2d 1025 (Ill. 2005); *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002) (rejected by *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005)).

the claim is not frivolous and, in addition, giving customers a broader entitlement to *attorneys' fees* than they would enjoy in court.<sup>6</sup> Several courts have relied on precisely these sorts of provisions to reject unconscionability attacks on class-action prohibitions.

For example, the U.S. Court of Appeals for the Eleventh Circuit was recently faced with an unconscionability challenge to an arbitration provision that precluded class actions. In that case, “[t]he Arbitration Agreements expressly permit[ed] [the plaintiff] and other consumers to recover attorneys’ fees and expenses ‘if allowed by statute or applicable law’” and required the company to “advance [the plaintiff’s] arbitration expenses, such as filing and administrative fees, if she submit[ed] a written request.” *Jenkins*, 400 F.3d at 878 & n.8. The court held that, because of these features, “the \* \* \* contention that consumers would likely be unable to obtain legal representation [for small claims] without the class action vehicle is unfounded.” *Id.* at 878.

Similarly, a federal district court recently rejected an unconscionability attack on a class-action prohibition in equivalent circumstances, noting that concerns about the lack of incentives for plaintiffs to bring claims on an individual basis are misplaced when an arbitration provision allows for the recovery of attorneys’ fees and costs. Indeed, the court noted:

This concern \* \* \* is *not present* in an individual suit seeking damages under statutory provisions that provide prevailing plaintiffs with multiple damages,

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<sup>6</sup> The provision places no limits on an arbitrator’s authority to award attorneys’ fees under applicable federal or state law. See <http://www.cingular.com/disputeresolution> (the arbitration provision preserves “any right that [a customer] may have under applicable law” to obtain attorneys’ fees). See also *Blitz v. AT&T Wireless Services, Inc.* (Mo. Cir. Ct., Nov. 28, 2005), slip. op. 2 (holding that Cingular’s arbitration provision “does not restrict the award of attorneys’ fees if such fees are available under applicable federal or state law”).

Indeed, Cingular’s arbitration provision goes beyond what case law requires by specifying that Cingular will reimburse customers for their reasonable attorneys’ fees if the arbitrator awards them the amount of their demand or more—even if their claim would not otherwise qualify for a fee award under governing law (for example, if the claim is for breach of contract).

costs and attorneys' fees, because the existence of these remedies provides parties and lawyers with incentives to pursue their cases. \* \* \* Indeed, the *central purpose behind statutory attorneys fees* is to encourage lawyers to accept cases in which damages may be small or nominal. Although [the plaintiff] and his lawyers may be unwilling to litigate this case due to the fact that it may not provide them with enough financial incentive to justify their efforts, this court cannot conclude that either the Plaintiff or his attorneys are so lacking in economic incentive to warrant a finding that [defendant's] class action prohibition is unconscionable.

*Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1343-44 (M.D. Ala. 2003) (emphasis added; footnotes and citations omitted).

Finally, in a case involving an earlier version of Cingular's arbitration provision that (unlike the current version) did not expressly provide for an award of attorneys' fees to successful plaintiffs, the Fifth Circuit nonetheless held that the arbitration provision "does not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability" in part because "an arbitrator would presumably be empowered to award [attorneys' fees] in enforcing a [Louisiana Unfair Trade Practice Act] plaintiff's substantive rights." *Iberia*, 379 F.3d at 175 & n.19.<sup>7</sup>

The reasoning of these cases applies with even greater force here: If "the \* \* \* contention that consumers would likely be unable to obtain legal representation [for small claims] without the class action vehicle is unfounded" when the defendant is obligated to advance the costs of arbitration and the arbitrator is authorized to award attorneys' fees under fee-shifting statutes (*Jenkins*, 400 F.3d at 878), it is all the more so when, as here, the defendant has contractually agreed to reimburse prevailing claimants for their reasonable

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<sup>7</sup> See also, e.g., *Snowden*, 290 F.3d at 638 (rejecting argument that small Truth in Lending Act claim was not economically viable unless brought on a class-wide basis as "unfounded in light of \* \* \* the fact that attorney's fees are recoverable \* \* \* in a TILA action."); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000); *Strand*, 693 N.W.2d at 926 ("All substantive remedies available to Strand in a judicial action, including an award of attorney fees, would be available in arbitration.").

attorneys' fees *in all cases* and also has agreed to *pay* the full costs of arbitration outright—not merely to “advance” those costs.<sup>8</sup> For this reason, the core concern that the district court articulated—its perception that “it would not be financially feasible” for customers to arbitrate claims on an individual basis (11/29/04 Tr. at 5)—is entirely misplaced here.

*Second*, Cingular’s provision does not limit customers only to arbitration; it also affords them the opportunity to pursue their claims in small claims court. *See* page 2, *supra*. That alternate forum is speedy, simple, and inexpensive—and is another avenue for Cingular’s customers to obtain redress for any valid claims they may have without the need for a class action. *See* 12 O.S. § 1761 (explaining that the “hearing and disposition of” small claims court actions “shall be informal with the sole object of dispensing speedy justice between the parties”); *see also Klassen v. Lazik*, 2004 OK CIV APP 46, ¶ 6, 91 P.3d 90, 92 (“The small claims court is an informal court and the rules of evidence are greatly relaxed.”). Indeed, small claims court is often a *better* option than a class action for the resolution of small claims because “[c]ertification of \* \* \* a class [can] promote complicated lengthy legal embattlement,” while small claims court allows parties to resolve disputes “expeditiously and with minimum costs and fees.” *Pulver v. 1st Lake Props., Inc.*, 681 So.2d 965, 970 (La. App. 1996). For precisely this reason, the U.S. Court of Appeals for the Fifth Circuit recently rejected a contention that Cingular’s original arbitration provision made it impossible to pursue small claims. *See Iberia*, 379 F.3d at 175 n.19 (“Cingular’s arbitration clause expressly permits customers to bring inexpensive small-claims actions”).

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<sup>8</sup> *See* Jack Wilson, “No-Class-Action Arbitration Clauses,” *State-Law Unconscionability, And the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 826-27, 841-42 (2004) (class-action prohibition should not be deemed unconscionable, even when amount at stake is small, if the arbitration provision commits the defendant to pay the full cost of arbitration and a reasonable attorneys’ fee to prevailing parties).

**3. If anything, Cingular's arbitration provision creates strong pressures for Cingular to satisfy customers' demands rather than resist potentially valid claims.**

Moreover, as a practical matter, Cingular's arbitration provision encourages the satisfactory resolution of individual customers' disputes. The district court's concerns about financial obstacles to individual arbitration are misplaced here because Cingular's arbitration provision creates powerful incentives for Cingular to resolve disputes to its customers' satisfaction. If it resists a potentially valid claim rather than resolving it, Cingular bears all the costs of the arbitration and faces the strong possibility of paying a customer's attorneys' fees. What Cingular would have to pay in arbitration fees alone (\$1700) would likely exceed the value of many consumer disputes—and certainly Bilbrey's dispute with Cingular.<sup>9</sup> As a result, customers have unique leverage to cause Cingular to resolve even colorable claims prior to arbitration. In short, by making individual arbitration so cheap and efficient for customers, Cingular has voluntarily surrendered any advantage it otherwise might have had based on comparative economic strength.

**4. Cingular's customers could rationally prefer cost-free individual arbitration over the possibility of being part of a class action.**

In light of the consumer-friendly features of Cingular's arbitration provision, the district court's implicit holding that the class waiver in that provision is oppressively one-sided is manifestly erroneous. To the contrary, there are many reasons why consumers might prefer an arbitration provision that allows full and cost-free resolution of his own disputes over retaining the right to bring class actions for the benefit of *other* customers.

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<sup>9</sup> Because Cingular has agreed to pay all arbitration fees, whenever an arbitration goes to a one-day hearing, Cingular would have to pay \$750 in administrative fees, a \$200 case service fee, and \$750 in arbitrator fees. See AAA, *Supplementary Procedures For Consumer-Related Disputes*, Section C-8 (effective Sept. 15, 2005) (available at <http://www.adr.org>). Under the AAA rules, customers are entitled to a hearing as a matter of right. *Id.*, Sections C-5 and C-6.

One reason is that individual arbitration is the least expensive means of dispute resolution and hence serves to moderate the cost of wireless phones and wireless service. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (“We agree that Congress, when enacting this law, had the needs of consumers, as well as others, in mind. \* \* \* [A]rbitration’s advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.”). “[A]rbitration offers cost-saving benefits to telecommunication providers and ‘these benefits are reflected in a lower cost of doing business that in competition are passed along to customers.’”<sup>10</sup>

Customers may also understand that individual arbitration under Cingular’s consumer-friendly provision will provide them with better results than participating in a class action, in which the compensation for class counsel often significantly reduces class members’ compensation.<sup>11</sup> Studies have shown that “consumers are likely to fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation” and that “parties who participate in arbitration proceedings are generally satisfied, both in terms of the fairness of the process and the equity of the outcome.”<sup>12</sup> Con-

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<sup>10</sup> *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) (quoting *Metro East Ctr. for Conditioning & Health v. Qwest Commc’ns Int’l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002)). *See also* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 94 (explaining that class arbitration, by increasing the cost of doing business, raises prices for consumers).

<sup>11</sup> *See* Class Action Fairness Act of 2005, Pub. L. No. 109–2, § 2(a)(3) (codified at 28 U.S.C. § 1711 note) (“Class members often receive little or no benefit from class actions, and are sometimes harmed such as where \* \* \* counsel are awarded large fees, while leaving class members with \* \* \* awards of little or no value \* \* \*”).

<sup>12</sup> Joshua S. Lipshutz, Note, *The Court’s Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1712 (2005) (footnotes omitted).

sumer perceptions match the reality.<sup>13</sup>

Finally, consumers might prefer individual arbitration out of general antipathy to class actions. For example, a March 2003 survey found that “67% of Americans believe that lawyers benefit most from the current class action suit system while 61% think that *consumers* (32%) and *class members* (29%) *benefit least* from the current system.” Penn, Schoen & Berland Associates, U.S. Chamber of Commerce, Institute for Legal Reform, Polling on The Class Action System: National Results (Mar. 2003), at <http://www.institute-forlegalreform.com/resources/classaction.pdf> (emphasis added). When that many people have lost confidence in the class action, a provision that permits cost-free arbitration in exchange for renouncing the right to file a class action cannot be deemed oppressively one-sided.

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In sum, the class waiver in *Cingular’s* consumer-friendly arbitration provision does not run afoul of Oklahoma’s strict standard for unconscionability. The district court erred in concluding otherwise.

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<sup>13</sup> One study of parties involved in NASD securities arbitrations found that over 93% of the participants agreed that their claim was handled “fairly and without bias.” Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* (Aug. 1999), at 20, available at [http://www.nasd.com/web/groups/med\\_arb/documents/mediation\\_arbitration/nasdw\\_009528.pdf](http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009528.pdf). Another study determined that consumers who took part in arbitrations involving consumer-lending disputes prevailed in 55 percent of cases that went to an arbitration hearing, a figure that increases significantly if settlements are taken into account. Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, at 2, available at [http://www.arb-forum.com/media/EY\\_2005.pdf](http://www.arb-forum.com/media/EY_2005.pdf). And a recent Harris Interactive poll found that “[a]rbitration is widely seen” by participants “as faster (74%), simpler (63%), and cheaper (51%) than going to court.” Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster than Litigation* (Apr. 2005), at 5, <http://www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf>.

**B. The FAA Precludes Holding Cingular’s Arbitration Provision To Be Unconscionable.**

The district court erred for the independent reason that the FAA precludes holding an arbitration provision to be unconscionable merely because it requires individual arbitration. In *Rollings v. Thermodyne Industries, Inc.*, 1996 OK 6, 910 P.2d 1030, this Court recognized that agreements to arbitrate are fully enforceable under Oklahoma law (*see id.* at 1035-36) and therefore did not need to reach the preemptive effect of the FAA. Although two Justices, disagreeing with the majority’s analysis, would have held the arbitration agreement unenforceable as a matter of Oklahoma law, they nonetheless concurred in the Court’s decision upholding the arbitration agreement because they recognized that “[t]he U.S. Constitution’s Supremacy Clause must control” arbitration agreements involving interstate commerce, and thus, “[s]ettled federal jurisprudence absolutely commands that \* \* \* a state \* \* \* antiarbitration hurdle \* \* \* yield to the provisions of the FAA.” *Id.* at 1042 (Opala, J., concurring in the result, joined by Wilson, C.J.).

**1. Section 2 of the FAA precludes holding arbitration provisions to be unconscionable merely because they waive the right to pursue a class action.**

As the Supreme Court recently reiterated, “Section 2 [of the FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts[.]” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. \_\_, \_\_, 126 S. Ct. 1204, 1207 (2006). Under Section 2,

[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, “save upon such grounds as exist at law or in equity for the revocation of *any* contract.” \* \* \* A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.

*Perry*, 482 U.S. at 492-93 n.9 (citation omitted; emphasis in original) (quoting 9 U.S.C. § 2).

Thus, agreements to arbitrate may be invalidated on state-law grounds only “*if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.*” *Id.* (emphasis in original).

This principle does not simply prohibit the invalidation of “arbitration agreements under state laws applicable *only* to arbitration provisions.” *Doctor’s Associates v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original). It also bars courts from fashioning rules that invoke broad concepts of contract law but in fact apply only or predominantly to the arbitration setting. In upholding the original version of Cingular’s arbitration provision, the U.S. Court of Appeals for the Fifth Circuit explained:

That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. \* \* \* [S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.

*Iberia*, 379 F.3d at 167; *see also Oblix, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004) (“[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.”); *Zuver v. Airtouch Commc’ns, Inc.*, 103 P.3d 753, 766 n.12 (Wash. 2004) (rejecting argument that court “should apply a special standard of review to provisions in arbitration agreements which limit parties’ remedies” because “[t]he United States Supreme Court \* \* \* has expressly stated that courts may not rely on the uniqueness of agreements to arbitrate as justification for imposing special requirements”).

Oklahoma has no *generally applicable* prohibition against contractual waivers of class actions: There is no statute or judicial decision deeming all contractual class-action waivers unenforceable whether or not they are part of an arbitration prohibition. Accordingly, under Section 2 of the FAA, Oklahoma is not free to declare *arbitration provisions* to be unconscionable merely because they happen to prohibit class actions. Any such effort is

preempted.

Moreover, Cingular’s arbitration provision can be deemed to be unconscionable only under an idiosyncratic unconscionability standard that does not apply equally to all contractual terms. As discussed above, under generally applicable Oklahoma law, a contract term is unconscionable only if it is oppressively one-sided. *Barnes*, 548 P.2d at 1020.<sup>14</sup> For the reasons we have explained, it is impossible to conclude that a contract that affords customers cost-free arbitration and allows for a broader entitlement to attorneys’ fees than in court in exchange for giving up the right to bring a class action is oppressively one-sided. *See* pages 14-16, *supra*. Perhaps not everyone would make the same choice. But as this Court has recognized, Oklahoma law does not authorize courts to substitute their judgment for the parties to a contract except in the rare instance when the unconscionability standard is met: “Courts are concerned only with the legality of the contract. The fairness or unfairness, folly or wisdom, or inequality of contracts are questions exclusively within the rights of the parties to adjust at the time the contract is made.” *Barnes*, 548 P.2d at 1021. Because the district court’s ruling deviated from these generally applicable principles of Oklahoma law, it is preempted by Section 2 of the FAA.

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<sup>14</sup> Put another way, “[a]n unconscionable contract is one which no person in his senses, not under delusion would make, on the one hand, and which no fair and honest man would accept on the other.” *Id.* This way of expressing the stringency of the unconscionability standard is by no means unique to Oklahoma. *See, e.g., Walther v. Sovereign Bank*, 872 A.2d 735, 744 (Md. 2005) (“[t]raditionally, a bargain was said to be unconscionable in an action at law if it was ‘such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other’”) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981)); *Norwest Fin. Mississippi, Inc. v. McDonald*, 905 So. 2d 1187, 1193 (Miss. 2005); *Lovey v. Regence BlueShield of Idaho*, 72 P.3d 877, 882 (Idaho 2003); *Smith v. Mitsubishi Motors Credit of Am., Inc.*, 721 A.2d 1187, 1190 (Conn. 1998); *Iberlin v. TCI Cablevision, Inc.*, 855 P.2d 716, 728 (Wyo. 1993); *Management Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992); *Waters v. Min Ltd.*, 587 N.E.2d 231, 234 (Mass. 1992); *Lakeside Boating & Bathing, Inc. v. State*, 402 N.W.2d 419, 422 (Iowa 1987).

**2. Conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration would conflict with Congress’s objectives in enacting the FAA and would therefore be preempted.**

Any holding that an arbitration provision must allow for class-wide arbitration in order to be enforceable is also preempted under traditional principles of conflict preemption because it “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress” in enacting the FAA. *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks and citation omitted).

Section 2 of the FAA declares pre-dispute arbitration agreements “valid, irrevocable, and enforceable” because “arbitration saves time, saves trouble, saves money.” *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess., at 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce). As Congress later explained, arbitration usually is “cheaper and faster than litigation,” has “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling.” H.R. REP. No. 97-542, at 13 (1982). The U.S. Supreme Court, too, has recognized the superior “simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985). *See also Rollings*, 910 P.2d at 1033 (“Arbitration allows for a speedy and less costly resolution of conflicts”) (citing *Voss v. City of Oklahoma City*, 1980 OK 148, 618 P.2d 925, 928).

Class-action procedures, by contrast, are antithetical to the low-cost and efficient resolution of disputes that is the hallmark of arbitration. While the average length of an AAA arbitration from filing to award is less than six months (*see Allied-Bruce*, 513 U.S. at 280-81), class actions can take years. These complex matters invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including depositions of all class representatives (and

often other witnesses) for purposes of determining such statutory prerequisites as typicality and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; and (v) the inevitable interlocutory appeal.

If, after all of that, a class is certified, there would have to be full and adequate notice to class members and an opportunity to opt out. Discovery commensurate with the now-increased stakes of the litigation would then begin and likely continue for years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, there would need to be another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And if the defendant chooses not to settle, there would need to be a class-wide trial—one in which the plaintiffs are required to establish any individualized elements of their claims and the defendant is afforded the opportunity to put on any individualized defenses.

Whether conducted by a court or by an arbitrator, all of the procedures necessary to the fair administration of a class action make arbitration more expensive and more time consuming—and, in the process, eradicate the distinction between arbitration and litigation.<sup>15</sup> In fact, some commentators believe that “class arbitration may actually prove *more* burdensome than class litigation.” Wilson, *supra*, 23 QUINNIPIAC L. REV. at 774 (emphasis added); *see also* Lindsay R. Androski, *Comment, A Contested Merger: The Intersection of Class Ac-*

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<sup>15</sup> Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 44-45 (2000) (“[S]everal attorneys who have actually participated in classwide arbitrations have found that the procedure, at least as used to date, differs very little from litigation and thus offers few, if any, advantages.”); Elizabeth P. Allor, *Note, Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 CAL. L. REV. 1239, 1253 (1983) (“[W]hen conducted on a classwide basis, arbitration is unlikely to remain inexpensive and efficient.”).

*tions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 649 (hybrid class arbitration “subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration”).

The procedures for class arbitrations promulgated by the AAA bear this out. Those rules require the arbitrator to make a written “class determination award” addressing a lengthy list of criteria equivalent to those identified in Title 12, section 2023 of the Oklahoma Statutes, provide for a proceeding in court to confirm or vacate that award, provide for the arbitrator to preside over the notification of class members, and then anticipate full-blown proceedings on the merits and a carefully reasoned “final award” once the class determination award becomes final and class members have been given notice and an opportunity to opt out. Like a federal court, the arbitrator also is given strict standards for reviewing and approving any settlement once a class has been certified. *See* <http://www.adr.org/Class-arbitrationpolicy>. In short, the process is every bit as complicated as a judicial class action.

Engrafting time-consuming and expensive class-action procedures onto an arbitral proceeding not only would effectively eliminate the distinction between arbitration and litigation, but also would present businesses with a “worst-of-all-worlds” scenario. While class arbitration would increase the stakes exponentially over an individual arbitration, any class-wide arbitral award would remain reviewable only for fraud, corruption, bias, misbehavior, and the like (9 U.S.C. § 10) or “manifest disregard” of the law (*Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)). This standard of review will often be insufficient to avoid an erroneous, yet potentially massive, class-wide judgment.

In such circumstances, few businesses would be willing to roll the dice by including

an arbitration provision in their consumer contracts; “[c]lass arbitration just seems to present too many risks.” Wilson, *supra*, 23 QUINNIPIAC L. REV. at 778. Indeed, for precisely these reasons, Cingular’s arbitration provision provides that the prohibition of class arbitration is non-severable. Cingular Renewed Arb. Mot., Ex. A, R. 214-15.

Thus, the consequence of conditioning the enforcement of consumer arbitration provisions on the business’s amenability to class-wide arbitration would not be fairer or more efficient arbitration—but rather *more litigation* and *less arbitration*. Nothing could more clearly “frustrate the purpose” (*Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994)) of the FAA.

Several courts have either expressly or implicitly recognized that any state-law rule that precludes class-arbitration waivers would be preempted by the FAA. For example, the Tennessee Court of Appeals has held that, regardless of any state-law concern about “the unavailability of class action relief,” “the Supremacy Clause of the Federal Constitution \* \* \* preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action.” *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 364 (Tenn. Ct. App. 2001), *appeal denied* (Tenn. Nov. 19, 2001). Similarly, a federal district court in West Virginia recently rejected the state supreme court’s holding that arbitration provisions that contain class-arbitration waivers are unconscionable when the damages sought are small, finding that holding to be preempted by the FAA. *Schultz*, 376 F. Supp. 2d at 691.

Moreover, two federal courts of appeals, although not using the term “preemption,” have expressed the view that a state-law rule conditioning the enforceability of an arbitration provision on the availability of class-wide arbitration is incompatible with the objectives of arbitration. Most significantly, the Fifth Circuit rejected a claim that the class-arbitration

prohibition in Cingular’s original arbitration provision was unconscionable, explaining that “the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration’s ability to offer ‘simplicity, informality, and expedition,’ characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.” *Iberia Credit Bureau*, 379 F.3d at 174 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)).

More recently, the Eleventh Circuit explained that a prohibition of class-wide arbitration is “consistent with the goals of ‘simplicity, informality, and expedition’ touted by the Supreme Court in *Gilmer*.” *Caley*, 428 F.3d at 1378 (quoting *Gilmer*, 500 U.S. at 31). To say that a prohibition of class-wide arbitration is consistent with the goals of the FAA is the same thing as saying that a state-law rule that bans such provisions, despite the parties’ agreement to them, is inconsistent with the goals of the FAA and hence is preempted.

In short, to superimpose class-action procedures on arbitration—as the district court held was necessary—would fundamentally alter the nature of arbitration and its utility as a dispute resolution mechanism, ultimately resulting in the elimination of consumer arbitration in Oklahoma. That is entirely at odds with the purposes of the FAA, which is designed to encourage and foster arbitration. Simply put, Congress has determined that arbitration agreements between two parties must be enforced as they are written; the district court erred in holding that a public policy preference for the class-action device trumps Congress’s choice.

## **II. BILBREY’S ALTERNATE ARGUMENTS FOR AFFIRMING THE DISTRICT COURT’S ORDER ARE MERITLESS.**

Bilbrey pressed several other arguments before the district court, but that court did not reach them. Nevertheless, we expect that Bilbrey will advance two of those arguments

as alternative bases for affirmance. This Court should reject each of them.

**A. The Scope of Bilbrey’s Arbitration Agreement Includes His Claims In This Litigation, Which Arose Out Of Bilbrey’s Agreement For Wireless Service With Cingular’s Predecessor.**

The contract with Cingular that Bilbrey signed on May 23, 2001 (Cingular Arb. Mot., Ex. A, R. 203) includes an arbitration provision pursuant to which both he and Cingular agreed to arbitrate “*any and all disputes* and claims \* \* \* arising out of or relating to [that] Agreement, *or to any prior Agreement* for products or services between [him] and CINGULAR or any of [his] or CINGULAR’s affiliates or predecessors in interest” (*id.*, R. 204) (emphasis added). Bilbrey argued below that it is “manifestly unfair” to apply this arbitration provision to the instant dispute—even if by its terms it would apply—because “this case was on file and was being actively litigated” before he agreed to arbitration. *See* Bilbrey Arb. Resp., R. 233-34. This argument ignores the plain text of the FAA, as well as established precedent.

*First*, the FAA provides in no uncertain terms that “an agreement in writing to submit to arbitration an *existing controversy*” arising out of a “contract evidencing a transaction involving commerce” is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2 (emphasis added).<sup>16</sup> Because of this statutory authority, “[c]ourts regularly enforce agreements to arbitrate pending lawsuits.” *Frederick v. First Union Sec., Inc.*, 122 Cal. Rptr. 2d 774, 778 (Cal. Ct. App. 2002).<sup>17</sup>

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<sup>16</sup> Under the Oklahoma Uniform Arbitration Act, too, “a written agreement to submit any *existing* controversy to arbitration \* \* \* [is] valid, enforceable, and irrevocable.” 15 O.S. § 802(A) (emphasis added); *see also* *Voss*, 618 P.2d at 927-28 (“The basis for the institution of an arbitration proceeding may be either an agreement which provides for arbitration of future controversies or for submission of existing controversies.”).

<sup>17</sup> *See also, e.g., Garrity v. McCaskey*, 612 A.2d 742 (Conn. 1992) (affirming confirmation of arbitration award made pursuant to agreement entered into while lawsuit was

Similarly, courts routinely compel arbitration of claims that arose before the parties entered into their arbitration agreement. For example, in *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330 (10th Cir. 1993), the plaintiff argued that an arbitration agreement he entered in 1982 did not apply to a 1980 transaction. Focusing on the terms of the arbitration clause, which covered “[a]ny controversy between [the parties],” the Tenth Circuit held that the arbitration agreement applied, explaining: “Plaintiff’s contention that an agreement to arbitrate a dispute must pre-date the actions giving rise to the dispute is misplaced. Such a suggestion runs contrary to contract principles which govern arbitration agreements.” *Id.* at 332 (alterations in original).<sup>18</sup>

Ignoring the plain language of the FAA and the many cases holding that an agreement to arbitrate pre-existing disputes is enforceable, Bilbrey argued below that he “had no intention of entering into a negotiation which would affect his ongoing litigation” (Bilbrey Arb. Resp., R. 247) when he agreed to arbitration; his lawyers asserted at oral argument—without evidence—that “Mr. Bilbrey knew absolutely nothing about an arbitration clause” (5/19/04 Tr. at 21). But that speculation ignores not only the general rule that parties are presumed to have read, and are accordingly bound by, the terms of their contracts, but also Bilbrey’s particular circumstances: he is a sophisticated businessman who works in an in-

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pending); *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 2d 50 (Cal. Ct. App. 1996) (parties entered into arbitration agreement after complaint and cross-complaint were filed); *Koontz v. S.W. Speakers Bureau, Inc.*, 1994 WL 390221 (Tex. App.—Dallas July 28, 1994, writ denied) (affirming confirmation of arbitration award where parties entered into an arbitration agreement while lawsuit was pending).

<sup>18</sup> See also, e.g., *Mehler v. Terminix Int’l Co.*, 205 F.3d 44, 48, 49 (2d Cir. 2000) (enforcing arbitration agreement retroactively because when an arbitration agreement is broad in scope, “the court must compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”) (quotation marks and citation omitted); *Lloyd v. MBNA Am. Bank*, 2001 WL 194300 (D. Del. Feb. 22, 2001) (requiring arbitration of dispute that arose arising prior to addition of arbitration provision to credit card agreement), *aff’d*, 27 Fed. Appx. 82 (3d Cir. 2002).

dustry in which contracts requiring the binding arbitration of consumer disputes are commonplace.<sup>19</sup> To imply that Bilbrey was somehow unfairly surprised by the existence of an arbitration agreement defies law and reality.<sup>20</sup> Accordingly, there is nothing unconscionable about binding him to the plain terms of his agreement.

As such, it is irrelevant that Bilbrey's claims were an "existing controversy" (9 U.S.C. § 2) at the time the parties entered into the agreement to arbitrate this dispute; the FAA by its terms makes such agreements enforceable.

*Second*, Bilbrey's argument ignores not only the plain text of the FAA but also the neutrality principle underlying that statute. As we discussed earlier (*see* page 18, *supra*), agreements to arbitrate may be invalidated on state-law grounds only "if that law arose to

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<sup>19</sup> Bilbrey is the immediate past president of and a current member of the Board of Governors of the American Land Title Association. Am. Land Title Ass'n, *About ALTA—Board of Governors*, <http://www.alta.org/about/board.cfm>. *See also* ASS'NS YELLOW BOOK 268 (Christiane M. Muntone, ed., Winter 2006). According to a press release of that organization, Bilbrey is a "vice president at First American Title Insurance Company, one of the nation's largest underwriters" and is president of Warranty Title & Abstract, Inc. *See* Am. Land Title Ass'n, *Mark Bilbrey Brings Two Perspectives to ALTA*, TITLE NEWS (Nov./Dec. 2004), available at [http://www.alta.org/publications/titlenews/04/06\\_01.cfm](http://www.alta.org/publications/titlenews/04/06_01.cfm). The title insurance industry regularly includes binding arbitration provisions in its standard insurance policies (*see* "ALTA Owner's Policy (10/17/92)," available at <http://www.alta.org/standards/index.cfm>), and posts on its web site a set of Title Insurance Arbitration Rules for arbitrations conducted before the National Arbitration Forum. *See* Am. Land Title Ass'n, *Standards & Forms—ALTA Arbitration Rules*, <http://www.alta.org/standards/arbitration.cfm>.

<sup>20</sup> In his briefing below (*see* Bilbrey Arb. Resp., R. 233), Bilbrey cited a single, inapposite case—*Wilcox v. Valero Ref. Co.*, 256 F. Supp. 2d 687 (S.D. Tex. 2003). *Wilcox* turned on the fact that the defendant imposed an arbitration provision on the plaintiff, its employee, *unilaterally*, by mailing that provision to his home and telling him that if he continued to work for the company after a specific date he would be deemed to have accepted the arbitration provision. *See id.* at 689. Because, as an at-will employee, the plaintiff had little practical choice other than to accept the arbitration program, the court concluded that it was procedurally unconscionable for the employer to "bind him to its dispute resolution program after he had essentially initiated his lawsuit in the courts \* \* \*." *Id.* at 691-92. Here, by contrast, Bilbrey *voluntarily signed* the contract containing the arbitration provision in order to obtain a free phone.

govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Perry*, 482 U.S. at 492 n.9. (emphasis in original).

The rule for which Bilbrey advocates—that an arbitration provision covering “any and all” disputes arising out of the current or “any prior” contract between the parties may not be construed to apply to a dispute that was already in existence unless it expressly advert to the dispute—runs afoul of this neutrality requirement. Bilbrey identifies no existing principle of Oklahoma contract law that specifies that a contract that expressly supersedes prior agreements (as the May 2001 contract does) must specifically identify all the ways in which it may affect pre-existing rights of the parties. That is because there is no such principle. To the contrary, Oklahoma law is that “[a] contract need not be rescinded by an express agreement to that effect. The rule is well settled that the parties to a contract may rescind it by making a new contract inconsistent therewith.” *Pasotex Petroleum Co. v. British-Am. Oil Producing Co.*, 1966 OK 247, 431 P.2d 373, 380 (quoting 12 AM. JUR. § 433); *see also* 15 O.S. § 237 (a “contract in writing may be altered by a contract in writing”).

Therefore, any rule requiring that an agreement to arbitrate any and all disputes arising between the parties identify with specificity any disputes already in litigation is non-neutral and evinces the type of anti-arbitration bias that the FAA was intended to counteract. The FAA’s “basic purpose” is to “put arbitration provisions on the ‘same footing’ as a contract’s other terms.” *Allied-Bruce*, 513 U.S. at 275 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Bilbrey, by contrast, seeks a rule placing arbitration provisions on a *less favorable* footing than other contractual provisions.

\* \* \* \* \*

Bilbrey chose to sign a contract pursuant to which *all* disputes—pre-existing or aris-

ing in the future—must be arbitrated. That agreement is enforceable under the FAA. At the time he entered this agreement he was represented by counsel; had he wanted to, he could have shown this agreement to his attorneys, who could have reviewed it. That he evidently did not is certainly no reason to refuse to enforce the contract as written. Indeed, Bilbrey is in no way harmed by this contract; all he agreed to do was shift the forum in which his dispute would be resolved. The only ones even arguably harmed by this contract are Bilbrey’s *attorneys*, who can no longer prosecute this case on a class-wide basis. They, however, have no standing to complain.

**B. Cingular Did Not Waive Its Right To Compel Arbitration.**

Bilbrey also sought to avoid arbitration by claiming that Cingular waived its right to arbitration because it did not move to compel arbitration until 9 months after he signed his arbitration agreement.<sup>21</sup> This contention also lacks merit. “[W]aiver of contractual arbitration provisions is not easily inferred.” *Northland Ins. Co. v. Kellogg*, 1995 OK CIV APP 84, 897 P.2d 1161, 1162. Courts must approach waiver claims in view of the “strong presumption in favor of provisions for arbitration” and “with a healthy regard for the federal policy favoring arbitration.” *Id.* Thus, the “party asserting waiver has the burden of proof regarding that issue.” *Id.*; see also *Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 466 (10th Cir. 1988) (“A party asserting a waiver of arbitration has a *heavy* burden of proof.”) (emphasis added). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver \* \* \*.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

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<sup>21</sup> This delay was not deliberate. Cingular’s law department simply didn’t learn about the arbitration agreement until shortly before Cingular filed its motion.

Although Oklahoma courts consider many factors in determining whether a party has waived its right to arbitrate, it is well established that waiver cannot be found if the party opposing arbitration fails to prove that it was prejudiced by the delay.<sup>22</sup> “The prejudice must be the result of delay in asserting the right to arbitrate—not from prejudice or acts inherent in the arbitration process.” *Northland*, 897 P.2d at 1162. Bilbrey has not alleged, let alone demonstrated, any prejudice as a result of Cingular’s delay in moving to compel arbitration. *See* Bilbrey Arb. Resp., R. 247-50. This failure dooms his argument. *See* *Rush*, 779 F.2d at 887.

### CONCLUSION

The Court should reverse the district court’s order denying the motion to compel arbitration.

Respectfully submitted.

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<sup>22</sup> *See* *Towe, Hester & Erwin*, 947 P.2d at 599 (party did not waive its right to arbitration because party opposing arbitration “did not show that it was prejudiced by the timing of” that motion); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985) (“Given [the] dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated.”).

## CERTIFICATE OF SERVICE

Now on this 16th day of March, 2006, I hereby certify that a true and correct copy of Appellant's Brief in Chief was served by hand delivery or by overnight delivery service to the following:

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