

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF ILLINOIS**

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DONNA M. KINKEL,  
Plaintiff-Respondent,

On Petition for Leave to Appeal  
from the Illinois Appellate Court,  
Fifth District, No. 5-03-0774

v.

CINGULAR WIRELESS LLC,  
Defendant-Petitioner.

There Heard on Appeal from the  
Circuit Court of the Third Judicial  
Circuit, Madison County, Illinois  
Hon. Phillip J. Kardis,  
Circuit Judge  
No. 02-L-1087

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**PETITION FOR LEAVE TO APPEAL OF CINGULAR WIRELESS LLC**

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JULY 8, 2005

### **PRAYER FOR LEAVE TO APPEAL**

Pursuant to Supreme Court Rule 315, Defendant Cingular Wireless LLC (“Cingular”) respectfully petitions this Court for leave to appeal from the decision of the Appellate Court dated May 2, 2005.

### **JURISDICTION**

The Appellate Court issued its opinion in this matter on May 2, 2005. A1-A18.<sup>1</sup> Both parties timely filed petitions for rehearing; Cingular’s petition for rehearing was denied on May 18, 2005 (A19), and respondent’s was denied on June 3, 2005 (A20). Cingular timely filed an affidavit of intent to file this Petition for Leave to Appeal on June 9, 2005. A21-A26. This Court has jurisdiction pursuant to Supreme Court Rule 315.

### **POINTS RELIED UPON FOR REVERSAL**

Despite the “well-established principle that arbitration is a favored alternative to litigation by state, federal and common law” (*Bd. of Managers of Courtyards at Woodlands Condo. Ass’n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 71 (1998)), in this case the Fifth District rendered a decision that will likely have the effect of causing businesses to avoid arbitration entirely. This litigation is a putative nationwide class action brought to challenge the “early termination fee” provision contained in the Wireless Service Agreement (“WSA”) pursuant to which defendant Cingular agreed to provide cellular telephone service to the plaintiff, Donna Kinkel, and its other customers. That contract also contains an arbitration provision, which, among other things, specifies that arbitration will be conducted on an individual basis. Based on that arbitration provision, Cingular moved to

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<sup>1</sup> Citations to the appendix required by Rule 315(b)(6) are noted as A\_\_. Citations to the appellate court record are noted as R. \_\_.

compel Kinkel to arbitrate this dispute. In direct conflict with the First District’s decision in *Rosen v. SCIL, LLC*, 343 Ill. App. 3d 1075 (1st Dist. 2003), *appeal denied*, 207 Ill. 2d 627 (2004), the Fifth District held that—although the remainder of the arbitration provision is enforceable—the parties’ class-arbitration waiver is unenforceable as a matter of Illinois law. The appellate court’s decision presents four distinct issues, each of which warrants this Court’s review under the criteria specified in Rule 315(a):

*First*, the Fifth District’s holding that the class-arbitration waiver in the parties’ arbitration provision is substantively unconscionable is plainly wrong, and conflicts with decisions of the First District and the vast majority of other courts that have addressed the same issue. In reaching its minority position, the Fifth District ignored the well-established principle that contractual arbitration agreements are favored as a matter of federal and state law. Furthermore, by conditioning the enforcement of a business’s arbitration provision on its willingness to expose itself to class-wide arbitration, the Fifth District created a poison pill that threatens to kill such provisions, for few businesses are likely to agree to a procedure (class arbitration) that affords none of the speed, simplicity, and economy of individual arbitration, multiplies the stakes exponentially, yet remains subject to the narrow “manifest disregard” standard of review that applies to all arbitrations.

*Second*, in concluding that the parties’ class-arbitration waiver is unconscionable, the Fifth District focused on a superseded version of Cingular’s arbitration provision under which Kinkel would have been required to pay up to \$125 of the costs of arbitration and would have been entitled to an award of attorneys’ fees to the extent provided for un-

der Illinois law. The court refused to afford legal significance to Cingular's offer to allow Kinkel—*as well as all other past and present customers*—to take advantage of Cingular's revised arbitration provision under which Cingular pays all costs of arbitration unless the claim is frivolous, plus the claimant's reasonable attorneys' fees if she receives the amount of her claim or more in arbitration. Although the superseded version of the arbitration provision is sustainable in its own right, the Appellate Court's refusal to focus on the even-more-consumer-friendly revised provision conflicts with decisions from courts around the nation. As these other courts have held, in order to effectuate the pro-arbitration policies underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, a party's offer to waive particular features of an arbitration provision in order to make arbitration less expensive and/or less burdensome to the other party should be honored, especially when, as here, the offer is consistent with an across-the-board revision of the arbitration provision, not simply an ad hoc litigation position.

*Third*, the Appellate Court's conclusion that the FAA does not preempt its holding that class-arbitration waivers are unenforceable cries out for this Court's review. In fact, as a number of courts around the country have suggested, any holding that a class-arbitration waiver is unenforceable under state law is preempted by the FAA.

*Fourth*, the Appellate Court's finding of procedural unconscionability ignores settled Illinois law. Because this holding could render not only arbitration provisions but also the vast majority of other contract terms unenforceable, review of this issue, too, is plainly warranted.

## STATEMENT OF FACTS

On or about July 25, 2001, Kinkel entered into a WSA with Cingular, pursuant to which Cingular agreed to provide her with cellular telephone service. *See* R. C38. That WSA includes an arbitration provision that specifies that the parties are required to submit to arbitration “any and all disputes \* \* \* arising out of or relating to” the contract (or to pursue such claims in small claims court). *See* R. C38. The arbitration provision further indicates that it is governed by the FAA. *See id.*

Despite her contractual commitment to arbitrate all disputes, on August 9, 2002, Kinkel filed a complaint in the Circuit Court of Madison County, asserting claims of breach of contract and statutory fraud. *See* R. C3. According to that complaint, the “Contract Termination Fee” contained in Cingular’s WSAs—under which Cingular is authorized to charge a customer \$150 if the customer cancels the contract before fulfilling her “service commitment”—is unlawful. *See id.* at C3-C4. Kinkel submitted an amended complaint on August 25, 2003, which the circuit court gave her leave to file on September 11, 2003. *See* R. C38B. That complaint again raised claims of breach of contract and statutory fraud based on the “Contract Termination Fee.” There is no dispute that both of these claims arise out of and relate to the WSA between Cingular and Kinkel.

Based on the arbitration provision contained in the WSA, Cingular moved to compel Kinkel to arbitrate the dispute. *See* R. C39. The WSA provides that “all fees and expenses of the arbitration shall be equally borne by [the customer] and CINGULAR,” subject to the limits set by the AAA rules—under which the customer would pay no more than \$125 to arbitrate claims of less than \$10,000, such as Kinkel’s (*see* R. C191). How-

ever, Cingular committed to pay the *full* cost of arbitrating (unless the arbitrator were to find Kinkel's claim to be frivolous under the substantive standards articulated in Fed. R. Civ. P. 11(b) and Ill. Sup. Ct. R. 137). *See* R. C44. Cingular further committed to reimburse Kinkel for her reasonable attorneys' fees and costs if the arbitrator were to award her an amount equal to or greater than her monetary claim. *See id.* Cingular explained that these commitments were consistent with a revision to its arbitration provision, which was sent to all of its then-current customers in July 2003.<sup>2</sup> When asked by the circuit court, Cingular's counsel represented that Cingular would make the features of the revised provision available to *all* current and former customers rather than merely to plaintiff (*see* R. 8), and provided the court with a copy of the new arbitration provision (*see* R. C49-C50).

On November 10, 2003, after briefing and oral argument, the circuit court denied Cingular's motion to compel arbitration, adopting plaintiff's 18-page proposed order in its entirety. *See* R. C184. Cingular thereafter appealed to the Fifth District.

The Appellate Court rejected a number of the grounds given by the circuit court for refusing to enforce the parties' arbitration provision. However, that court, too, found "that the prohibition on class arbitration [contained in the arbitration provision] is uncon-

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<sup>2</sup> In order to make arbitration even more convenient and inexpensive than under prior agreements, Cingular revised its arbitration provision to specify that it will pay "all AAA filing, administration and arbitrator fees," unless the claim or the relief sought is found to be improper, as measured by the standards set forth in Fed. R. Civ. P. 11(b). *See* R. C50. The revised provision further specifies that, if a customer recovers the amount of his demand or more, "Cingular shall reimburse [him] for [his] reasonable attorneys' fees and expenses incurred for the arbitration." *Id.* In addition, the new arbitration provision provides that the arbitration shall take place "in the county \* \* \* of [the customer's] billing address" (*id.*), making arbitration equally, if not more, convenient for customers than invocation of the judicial system. Finally, the arbitration provision does not include a requirement that proceedings be kept confidential and does not limit the remedies that an arbitrator may award. *See* R. C49-C50.

scionable and therefore unenforceable.” A7. According to the Fifth District, the arbitration provision in general, and the class-arbitration waiver in particular, were procedurally unconscionable because they had not been adequately brought to Kinkel’s attention. *See* A9-A10. The court found the class-arbitration waiver to be substantively unconscionable on the ground that it effectively precludes consumers from seeking relief for small claims, rejecting Cingular’s contention that the availability of statutory attorneys’ fees and the option of pursuing claims in small claims court make it fully feasible to obtain redress for such claims. *See* A10-A12. In so ruling, the Fifth District refused to give effect to Cingular’s offer to make the features of its revised arbitration provision available to Kinkel and accordingly refused to consider Cingular’s argument that, when arbitration is cost-free and prevailing plaintiffs are automatically entitled to an award of reasonable attorneys’ fees, it is not unconscionable to require that claims be arbitrated on an individual basis. The court also rejected Cingular’s argument that any state-law requirement conditioning enforcement of an arbitration provision on the availability of class-wide arbitration is preempted by the FAA.

## **ARGUMENT**

### **I. This Court Should Grant Review To Determine Whether Class-Arbitration Waivers Are Unconscionable.**

This Court should grant review and reverse the Fifth District’s decision that the class-arbitration waiver in the parties’ WSA is substantively unconscionable. Not only is the question of the enforceability of class-arbitration waivers one of great importance; it is also an issue that divides the Appellate Court.

**A. Review is warranted because the Fifth District’s decision is inconsistent with decisions from the First District and from courts around the nation.**

According to the lower court, “the prohibition of class arbitration [is] substantively unconscionable” because it “is a one-sided limitation on \* \* \* customers’ ability to seek relief for claims where damages are quite low.” A10-A11. This holding directly conflicts with two decisions of the First District—*Rosen*, 343 Ill. App. 3d 1075, and *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109 (2003), *appeal denied*, 205 Ill. 2d 582 (2003). In each of those cases, plaintiffs brought unconscionability challenges to waivers of class arbitration; in each case, the court rejected those challenges. Thus, in *Hutcherson*, the First District explained that, “[a]lthough we recognize the importance of class actions as a tool for protecting consumers, we cannot ignore the strong policy that favors enforcement of arbitration provisions.” 342 Ill. App. 3d at 124.<sup>3</sup> And in *Rosen*, the court again rejected the argument that an arbitration provision was “unconscionable because it prohibit[ed] class actions” (343 Ill. App. 3d at 1082), explaining that class-action waivers are not unconscionable under Illinois law and that any policy arguments against them “should be addressed by the legislature.” *Id.*

The Fifth District attempted to distinguish *Rosen* and *Hutcherson* on the ground that “the arbitration clause at issue in each [of those cases] provided that the defendant creditor would advance any arbitration fees required to be paid by the plaintiff consumer (in *Rosen*, the clause only provided that the creditor would advance the amount of any

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<sup>3</sup> Although the *Hutcherson* court was applying Arizona law (*see* 342 Ill. App. 3d at 115-16), it based its decision on generally applicable principles of law because no Arizona court had addressed the question of a class-arbitration waiver. *See id.* at 121. Furthermore, in *Rosen* the First District relied on *Hutcherson* to analyze Illinois law. *See* 343 Ill. App. 3d at 1082.

arbitration fees in excess of what it would cost the consumer to bring the action in court instead of in arbitration)” and that “the consumer would only be required to repay these expenditures if an arbitrator determined that the consumer was required to do so.” *See* A14. This distinction is unfounded. In fact—as Cingular pointed out in its Fifth District briefs and again in its Petition for Rehearing—putting aside Cingular’s offer to pay the full costs of arbitration, it is undisputed that the cost to Kinkel of arbitrating would be limited to \$125 under the AAA Consumer Arbitration rules (*see* R. C191), an amount that is equivalent to the cost of filing in court (*see* Cingular Br. 31) and is *identical* to the filing fee at issue in *Rosen* (*see* 343 Ill. App. 3d at 1085). Accordingly, *Rosen* is indistinguishable from this case.

*Rosen* and *Hutcherson* are firmly in the mainstream. Indeed, the overwhelming majority of courts around the country confronted with the issue have disagreed with the analysis of the Fifth District and declared that class-arbitration waivers are not unconscionable. *See, e.g., Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (Georgia law); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 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); *In re Currency Conversion Fee 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); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004) (Alabama law); *Caley v.*

*Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367, 1377 (N.D. Ga. 2004) (Georgia law); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-77 (M.D. Ala. 2003) (Alabama law); *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1260-64 (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 \*15 (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); *Parrish v. Cingular Wireless, LLC*, 28 Cal. Rptr. 3d 802, 811-12 (Cal. Ct. App. 2005) (California law), *petition for review pending* (Cal. 2005); *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); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (table), 2005 WL 1277948, at \*7 (Kan. Ct. App. 2005) (Kansas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 742-43 (Md. 2005) (Maryland law); *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886 (N.J. App. Div. 2001) (New Jersey 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); *cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (rejecting argument that disputes under the Age Discrimination in Employment

Act (“ADEA”) should not be subject to arbitration because, among other things, arbitration procedures “do not provide for \* \* \* class actions,” and explaining that, “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred”) (quotation marks and citation omitted; alteration in original).

In fact, at least two other appellate courts have rejected unconscionability challenges to *precisely* the same arbitration provision that is at issue in this case. In *Iberia*, the United States Court of Appeals for the Fifth Circuit held that Cingular’s pre-2003 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 Practices Act] plaintiff’s substantive rights.” *See* 379 F.3d at 174-75 & n.19. And less than two months ago, the California Court of Appeal also rejected an unconscionability challenge to that same provision, based in part on Cingular’s explanation that it would allow the plaintiffs in that case to avail themselves of the additional consumer-friendly provisions in the July 2003 provision. *See Parrish*, 28 Cal. Rptr. 3d at 811-12 (“[T]he costs of arbitration are paid by Cingular. Unlike the credit card customers in *Szetela [v. Discover Bank]*, 97 Cal. App. 4th 1094 (2002), Cingular’s subscribers are not deterred from seeking redress for small amounts. Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.”).

To be sure, some courts (mostly in California) have sided with the Fifth District

and held that class-arbitration waivers were unconscionable. *See, e.g., Szetela*, 97 Cal. App. 4th 1094; *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Discover Bank v. Superior Court*, \_\_\_ Cal. Rptr. 3d \_\_\_, 2005 WL 1500866 (Cal. June 27, 2005); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 264 (W.Va. 2002).<sup>4</sup> Although all of those cases involve arbitration provisions that are not as consumer-friendly as Cingular’s provision, the existence of cases that arguably accord with the Fifth District’s holding serves only to deepen the division in the courts and confirm the importance of this Court resolving the question for the entire State.

**B. Review is warranted because of the importance of this question.**

Although the mere existence of a split as deep as the one here would warrant this Court’s intervention, the importance of this issue re-enforces the need for immediate review.

As the *Iberia* court recently explained, “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.” 379 F.3d at 174 (quoting *Gilmer*, 500 U.S. at 31). Grafting time-consuming and expensive class-action procedures onto an arbitral proceeding would essentially eliminate the distinction between arbitration and litigation. Moreover, while the stakes would be increased exponentially over an individual arbitration, any class-wide arbitral award would be reviewable only for fraud,

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<sup>4</sup> The U.S. District Court for the Northern District of West Virginia recently refused to follow *Berger* on the ground that its analysis is preempted by the FAA. *See Schultz v. AT&T Wireless Servs., Inc.*, No. 5:04CV47, Mem. Op. & Order at 11-12 (May 27, 2005) (attached; A37-A38).

bias, or “manifest disregard” of the law. *See Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 181 Ill.2d 373, 393 (1998). In such circumstances, few businesses would be willing to “roll the dice” by including an arbitration provision in their consumer contracts. Thus, the consequence of refusing to enforce class-arbitration waivers would not be fairer or more efficient arbitration—but rather *more litigation* and *less arbitration*.

Given the “national policy favoring arbitration” (*Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)), a decision like this one, which will lead inexorably to parties choosing *not* to arbitrate, must be inherently suspect. As a result, even were there not a clear split of authority on the enforceability of class-arbitration waivers, the issue would warrant this Court’s review.

**II. This Court Should Grant Review To Determine Whether The FAA Requires Courts To Accept Offers To Waive Aspects Of Arbitration Provisions In Order To Make Arbitration Less Expensive And/Or Burdensome.**

In refusing to enforce the class-arbitration waiver, the Fifth District made a separate error that also warrants this Court’s correction: It refused to focus on Cingular’s revised arbitration provision, under which Cingular bears all the costs of arbitration (assuming that the claimant’s claims are not frivolous) and reimburses the claimant for her reasonable attorneys’ fees if the arbitrator awards her the amount of her claim or more. *See* A14-A15 (“We need not determine whether we would” enforce the class-arbitration waiver contained in the revised arbitration provision because, although “Cingular has offered to apply the new provision to the plaintiff, \* \* \* [i]t is not clear that this offer applies to those the plaintiff seeks to represent, [and thus] giving Cingular the benefit of a piecemeal reworking of the contract that was in effect when the plaintiff cancelled her

service would not meet the interests of justice.”).

As a factual matter, the Appellate Court’s holding is entirely baseless. As Cingular explained to that court, it was *entirely* “clear” that the offer to allow Kinkel to rely upon the new provision “applies to those the plaintiff seeks to represent” as well; Cingular so explained in oral argument in the circuit court (*see* R. 8), in its opening brief to the Fifth District (*see* Cingular Br. 12), in oral argument in the Appellate Court, and in its petition for rehearing to the Appellate Court.

In identical circumstances, the California Court of Appeal recently held an unconscionability challenge to the pre-2003 version of Cingular’s arbitration provision to be moot, explaining: “This is not a case in which a defendant offered to change a defective provision in order to nullify an unconscionability claim,” but instead is one in which the company “made the modification \* \* \* to benefit all existing customers, and \* \* \* announced its plan to apply the \* \* \* modification to past customers as well,” thereby estopping itself “from taking a contrary position in any later proceeding.” *Parrish*, 28 Cal. Rptr. 3d at 814 n.15.

But even had Cingular’s offer to allow Kinkel to rely on the consumer-friendly features in the revised arbitration provision been specific only to her, in refusing to accept that offer the Fifth District placed itself in conflict with decisions from around the nation (including Illinois federal courts) holding that, in order to effectuate the strong federal policy favoring arbitration, offers to pay the costs of arbitration should be credited when considering whether an arbitration provision is enforceable. *See, e.g., Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (“the fact that [the defendant] agreed to

pay *all* costs associated with arbitration forecloses the possibility that the [plaintiffs] could endure any prohibitive costs in the arbitration process”) (emphasis in original); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002) (“Conseco’s offer to pay the costs of arbitration and to hold the arbitration in the Larges’ home state of Rhode Island mooted the issue of arbitration costs.”); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002) (“Scott should also be given the opportunity to meet its burden to prove that arbitration will not be prohibitively expensive, or as has been suggested in other cases, offer to pay all of the arbitrator’s fees.”); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001) (stating that the court would reconsider its conclusion that costs of arbitration rendered arbitration provision unconscionable if defendants agreed to pay those costs). In fact, the Fifth District *itself* had previously recognized that an offer to pay all costs of arbitration “serves to moot” the argument that arbitration would be excessively costly. *Zobrist v. Verizon Wireless*, 354 Ill. App. 3d 1139, \_\_\_, 822 N.E.2d 531, 539 (5th Dist. 2004).

Because the Fifth District’s ignored this case law and refused to consider Cingular’s revised arbitration provision, this Court’s review is clearly warranted.

### **III. The Lower Court’s Holding That The FAA Does Not Preempt State-Law Rules Conditioning Enforcement Of Arbitration Provisions On The Availability Of Class-Wide Arbitration Warrants This Court’s Review.**

Over twenty years ago, the United States Supreme Court noted that it was an open question whether “State law imposition [of] class action procedures [on arbitration] was preempted by federal law.” *Southland*, 465 U.S. at 8. That issue is squarely presented here. Indeed, Cingular raised two distinct federal preemption arguments in the lower

courts. First, Cingular contended that Section 2 of the FAA preempts state courts from employing heightened unconscionability standards to strike down class-arbitration waivers. Second, Cingular argued that, independent of Section 2, general principles of conflict preemption preclude states from conditioning enforcement of arbitration provisions on the availability of class-wide relief because of the inherent incompatibility of complex class-action procedures and the simplicity and informality that are the hallmarks of arbitration.

The Appellate Court rejected each of these arguments. *See* A11, A15. But not only do they implicate important questions of federal law; in each instance, the Fifth District’s analysis conflicts with that of other courts around the nation. Thus, these issues, too, warrant this Court’s consideration.

**A. *Express preemption.*** Under Section 2 of the FAA, 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.*” *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis in original). As the U.S. Court of Appeals for the Fifth Circuit has 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 Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 759 (Wash. 2004) (“courts may not refuse to enforce arbitration agreements under state laws which apply only to such agreements, or by relying on the *uniqueness* of an agreement to

arbitrate”) (quotation marks, alterations, and citations omitted; emphasis in original); *Obliv, Inc. v. Winiacki*, 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.”).

Yet in concluding that Cingular’s arbitration provision is unconscionable merely because it prohibits class arbitration, the Fifth District plainly altered Illinois’s generally applicable unconscionability standard, under which a contractual term may be deemed unenforceable only if “it is so one-sided that only one under delusion would make it and only one unfair and dishonest would accept it.” *In re Estate of Croake*, 218 Ill. App. 3d 124, 126 (1st Dist. 1991). There are many reasons why a rational consumer would agree to individual arbitration, not the least of which is a belief that doing so would help moderate the cost of the goods or services being offered. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers). Accordingly, it is only by watering down the applicable unconscionability standard—in violation of Section 2 of the FAA and in conflict with *Iberia* and *Obliv*—that the Fifth District could declare the class-arbitration waiver in Cingular’s WSA to be unconscionable.

**B. Conflict preemption.** Although the Fifth District rejected Cingular’s conflict-preemption argument (*see* A11), the California Court of Appeal recently expressly accepted it, noting that recognition of “a nonwaivable right to class arbitration would undermine the purpose of arbitration.” *Parrish*, 28 Cal. Rptr. 3d at 813. As that court explained, “[t]he fact that the procedural device of class treatment is not available in arbitration is ‘part and parcel of arbitration’s ability to offer simplicity, informality, and expedi-

tion, characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.” *Id.* (quoting *Iberia*, 379 F.3d at 174) (internal quotation marks and citation omitted); *see also* *Schultz*, Mem. Op. and Order at 11-12 (A37-A38).

Each of these splits of authority, which raise important questions of federal law and affect the relationship between state and federal law, warrant this Court’s attention.

**IV. The Appellate Court’s Holding That The Parties’ Arbitration Provision Is Procedurally Unconscionable Conflicts With Case Law From Illinois And Elsewhere And Is Inconsistent With Section 2 Of The FAA.**

The Appellate Court’s procedural-unconscionability analysis, which conflicts with decisions from the First District and is inconsistent with foundational principles of federal arbitration law, also warrants this Court’s review.<sup>5</sup>

According to the Fifth District, the class-action waiver in the arbitration provision is procedurally unconscionable because it “was offered to the plaintiff on a take-it-or-leave-it basis hidden in a maze of fine print where it was unlikely to be noticed, much less read.” A9. Although the Fifth District acknowledged that “the fact that a contract [term] is offered in a form contract on a take-it-or-leave-it basis does not automatically render a contract term procedurally unconscionable” (A8 (citing *Zobrist*, 822 N.E.2d at 541)), it distinguished Cingular’s arbitration provision because that provision “appears in the middle of a long paragraph at the bottom of the term-and-conditions page on the back of the service agreement” in “tiny single-spaced text.” A8-A9.

That rationale reflects nothing less than anti-arbitration bias. In fact, the only case

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<sup>5</sup> As the lower court acknowledged, “[i]n order to be unconscionable, a contract provision must be *both* procedurally *and* substantively unconscionable.” A7 (emphasis added). Thus, to the extent the Appellate Court erred in its analysis of either procedural or substantive unconscionability, it erred in refusing to enforce the arbitration provision as written.

upon which the lower court relied to support its holding—the First District’s decision in *Frank’s Maintenance & Engineering, Inc. v. C. A. Roberts Co.*, 86 Ill. App. 3d 980 (1st Dist. 1980)—demonstrates that there was nothing procedurally unconscionable about the clause at issue here.

In *Frank’s*, the First District found a clause printed on the back of an acknowledgment to be procedurally unconscionable because “the limiting clause was not conspicuous and was not known to the plaintiff at the time the contract was made.” 86 Ill. App. 3d at 991 (footnote omitted). But as the *Frank’s* court stressed, crucial to its holding was the fact that “*the clause directing the plaintiff’s attention to conditions on the reverse side of the acknowledgment was stamped over, indicating that legend was irrelevant.*” *Id.* at 991-92 (emphasis added). Here, by contrast, not only was the clause directing plaintiff to the reverse side not stamped over, but plaintiff specifically initialed that clause, thereby acknowledging the binding effect of the contractual provisions on the back of the form. Moreover, the arbitration provision was not carefully concealed on the back of the form. Instead, the very first paragraph alerted the reader to the existence of an arbitration provision lower down on the page. As the court in *Frank’s* explained, a clause is “part of the bargain [if it was] brought to the purchaser’s attention [or was] conspicuous.” *Id.* at 990. The arbitration clause here satisfies both of those requirements. Thus, the Fifth District’s decision is irreconcilable with the First District’s decision in *Frank’s*.

The Fifth District’s finding of procedural unconscionability also runs afoul of Section 2 of the FAA. The U.S. Supreme Court has expressly held that under Section 2

states may not apply conspicuousness requirements to arbitration provisions that do not apply to other contractual provisions. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-88 (1996). On the basis of that holding, the U.S. Court of Appeals for the Fifth Circuit recently rejected a claim that *the precise contract involved here* was procedurally unconscionable, explaining: “The companies’ arbitration clauses are not printed in type that is smaller than that generally used in the rest of the contract. *The FAA prohibits states from passing statutes that require arbitration clauses to be displayed with special prominence, and courts cannot use unconscionability doctrines to achieve the same result.*” *Iberia*, 379 F.3d at 172 (emphasis added; citations and footnote omitted). The Fifth Circuit further noted, in contrast to the Fifth District’s conclusion, that Cingular’s contract in fact went beyond what was necessary to immunize it from challenge on conspicuity grounds because “the first paragraph of the Cingular contract specifically adverts to the arbitration clause, the only provision given such prominent billing.” *Id.* at 172 n.14.

Thus, the Fifth District’s holding creates a square split not only with the First District as to the standard for procedural unconscionability under Illinois law but also with a federal court of appeals on an issue of federal law. Furthermore, that decision is in fatal tension with the Supreme Court’s decision in *Casarotto*—certainly adequate reasons for this Court to grant review.

But the Fifth District’s procedural-unconscionability analysis is not only legally baseless; it also threatens to undermine the predictability that is a foundational element of contract law. As the Appellate Court noted, the arbitration provision was one of a num-

ber of clauses printed in identical type face on the back of the parties' WSA. *See* A8-A9. Thus, either the Fifth District impermissibly subjected the arbitration provision to an idiosyncratic procedural-unconscionability analysis that does not apply to other contract terms or it created a new, untenable rule that *every* term in standard form contracts must be more prominent than surrounding terms. This latter rule would destroy contract law as we know it, given that 99 percent of all contracts in this country are form contracts (*see* John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000)). Thus, the implications of the Fifth District's decision are dramatic.

For all of these reasons, review of the Fifth District's procedural-unconscionability holding is essential.

### CONCLUSION

Defendant-Petitioner Cingular Wireless LLC respectfully requests that the Court grant its Petition for Leave to Appeal.

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Respectfully submitted,

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