

**SUPREME COURT OF FLORIDA**

**CASE NO. SC-10-19**

JAMES PENDERGAST,  
Individually and on behalf  
of all others similarly situated,

Lower Tribunal No. 09-10612

Appellant,

v.

SPRINT NEXTEL CORPORATION, *et al.*,

Appellees.

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On Questions Certified from the United States  
Court of Appeals for the Eleventh Circuit

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**BRIEF OF AT&T MOBILITY LLC  
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES**

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Evan M. Tager (*pro hac* pending)  
Archis A. Parasharami (*pro hac* pending)  
Kevin Ranlett (*pro hac* pending)  
MAYER BROWN LLP  
1999 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000

Sylvia H. Walbolt  
Christine Davis Graves  
CARLTON FIELDS, P.A.  
4221 W. Boy Scout Boulevard,  
Suite 1000  
Tampa, FL 33607  
(813) 223-7000

*Attorneys for Amicus Curiae AT&T Mobility LLC*

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## **INTEREST OF THE *AMICUS CURIAE***

AT&T Mobility LLC (“ATTM”) is one of the largest providers of wireless service in the United States. ATTM’s customers (like Sprint’s) enter into standard nationwide service contracts requiring that all disputes be resolved in arbitration on an individual basis. Individual arbitration is a prompt and fair method of dispute resolution that is inexpensive and less adversarial than litigation. In this case, even though Sprint’s arbitration clause neither imposes undue costs on consumers nor limits their own remedies, plaintiff asks the Court to declare the clause unenforceable solely because it precludes him from bringing a class action.

ATTM has a strong interest in this case because it believes that arbitration is a win-win dispute-resolution mechanism for consumer claims. Yet its arbitration clause—which one judge has described as the most consumer-friendly arbitration clause he had ever seen—has been challenged in federal court under Florida law. The federal district court held that ATTM’s arbitration clause is enforceable, and the plaintiffs appealed to the Eleventh Circuit, which appears to be holding the case pending this Court’s decision here. *See Cruz v. Cingular Wireless, LLC*, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), *appeal pending*, No. 08-16080-CC (11th Cir. argued Nov. 17, 2009).

But the impact of this Court’s resolution of the certified questions is sure to go far beyond just Sprint and ATTM. If the Court were to agree with plaintiff that

arbitration clauses must allow for class-wide arbitration in order to be enforceable, it is inevitable that companies will stop including arbitration agreements in their contracts with Florida customers. That in turn would deprive businesses and consumers of the benefits of arbitration, and burden the courts with cases that could have been resolved inexpensively, expeditiously, and fairly in arbitration.

### **SUMMARY OF ARGUMENT**

It is the overwhelming majority rule among states that have considered the question that agreements to arbitrate on an individual basis are fully enforceable, at least when, as here, they do not contain other features—for example, cost-sharing provisions or limitations on remedies—that make it infeasible for customers to obtain redress for their claims. As courts adopting this view have recognized, so long as consumers can effectively vindicate their *own* claims in an arbitral forum, it is neither unconscionable nor violative of public policy for them to trade the speculative right to participate in a class action for lower prices and a more efficient and effective dispute-resolution procedure.

Arbitration benefits consumers and businesses alike because it is cheaper, faster, more accessible, and less adversarial than litigation. But that is so only when arbitration is conducted in its traditional, one-on-one form, not when class-action procedures are superimposed on it. As the U.S. Supreme Court has recently recognized, “class arbitration” is at least as burdensome and time-consuming as

class-action litigation, involves the same massive stakes as class litigation, and yet is subject to the same narrow standards of review as traditional, “bilateral” arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 2010 WL 1655826, at \*13 (U.S. Apr. 27, 2010). Accordingly, any holding by this Court that arbitration clauses are enforceable under Florida law only if they allow for class procedures would lead businesses to abandon arbitration altogether—an outcome that would be harmful to consumers, further burden Florida’s already over-taxed judicial system, and conflict irreconcilably with the strong national policy favoring arbitration that is embodied in the Federal Arbitration Act (“FAA”).

For these reasons, we urge the Court to embrace the majority rule and hold that agreements to arbitrate disputes on a bilateral basis are fully enforceable under Florida law so long as they do not make it infeasible for customers to obtain redress of their *own* claims—as opposed to the claims of others.<sup>1</sup>

## ARGUMENT

It is the overwhelming majority rule among states that have considered the issue that provisions requiring bilateral arbitration (thereby precluding class actions) are fully enforceable—at least when, as here, they are not joined with

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<sup>1</sup> In this brief, we address the third and fourth certified questions—relating to substantive unconscionability and public policy. We agree with, but do not further expand upon, Sprint’s position as to the first and second certified questions.

other provisions that make it infeasible to obtain redress on an individual basis.<sup>2</sup> For example, although declining to enforce an arbitration clause that failed “to provide a cost-effective mechanism for individual customers to obtain a remedy,” the Illinois Supreme Court has held that “[i]t is not unconscionable or even unethical for a business to attempt to limit its exposure to class arbitration or

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<sup>2</sup> Illustrative cases include: **Alabama:** *Battels v. Sears Nat’l Bank*, 365 F. Supp. 2d 1205 (M.D. Ala. 2005); **Arkansas:** *Davidson v. Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007); **Colorado:** *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249 (Colo. Ct. App. 2001); **Connecticut:** *Pomposi v. GameStop, Inc.*, 2010 WL 147196 (D. Conn. Jan. 11, 2010); **Delaware:** *Edelist v. MBNA Am. Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001); **District of Columbia:** *Szymkowicz v. DirecTV, Inc.*, 2007 WL 1424652 (D.D.C. May 9, 2007); **Georgia:** *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); **Hawaii:** *Brown v. KFC Nat’l Mgmt. Co.*, 921 P.2d 146 (Haw. 1996); **Illinois:** *Crandall v. AT&T Mobility, LLC*, 2008 WL 2796752 (S.D. Ill. July 18, 2008); **Kansas:** *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (Kan. Ct. App. May 27, 2005); **Louisiana:** *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004); **Maryland:** *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005); **Michigan:** *Francis v. AT&T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009); *Adler v. Dell*, 2008 WL 5351042 (E.D. Mich. Dec. 18, 2008); **Mississippi:** *Anglin v. Tower Loan of Miss., Inc.*, 635 F. Supp. 2d 523 (S.D. Miss. 2009); **Missouri:** *Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009); **New York:** *Nayal v. Hip Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566 (S.D.N.Y. 2009); **North Dakota:** *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918 (N.D. 2005); **Ohio:** *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758 (N.D. Ohio 2009); **Oklahoma:** *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305 (E.D. Okla. 2005); **Pennsylvania:** *Cronin v. CitiFinancial Servs., Inc.*, 352 F. App’x 630 (3d Cir. 2009); **South Dakota:** *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005); **Tennessee:** *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001); **Texas:** *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190 (Tex. Ct. App. 2003); **Utah:** *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698 (Tenn. Ct. App. 2006); **Virginia:** *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007).

litigation, but to prefer to resolve the claims of customers or clients individually.” *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 278 (Ill. 2006). After surveying the laws of other states, the court concluded that the “pattern in these cases” is that “a class action waiver will not be found unconscionable” when “the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner.” *Id.* at 274.<sup>3</sup>

Similarly, it has been the unanimous view of federal district courts in Florida that provisions requiring bilateral arbitration are fully enforceable under Florida law so long as they neither impose undue costs on consumers nor limit the individual remedies that consumers can obtain.<sup>4</sup> Accordingly, in asking this Court to declare Sprint’s arbitration provision unenforceable merely because it requires bilateral arbitration, plaintiff is running into a headwind of authority.

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<sup>3</sup> Courts applying *Kinkel* consistently have upheld arbitration clauses that are substantially similar to the Sprint provision here. *See, e.g., Crandall v. AT&T Mobility, LLC*, 2008 WL 2796752 (S.D. Ill. July 18, 2008); *Harris v. DirecTV Group, Inc.*, 2008 WL 342973, at \*5 (N.D. Ill. Feb. 5, 2008); *In re Jamster Mktg. Litig.*, 2008 WL 4858506 (S.D. Cal. Nov. 10, 2008); *Pivoris v. TCF Fin. Corp.*, 2007 WL 4355040 (N.D. Ill. Dec. 7, 2007).

<sup>4</sup> In addition to the present case and *Cruz*, see *Brueggemann v. NCOA Select, Inc.*, 2009 WL 1873651 (S.D. Fla. June 30, 2009); *La Torre v. BSF Retail & Commercial Operations, LLC*, 2008 WL 5156301 (S.D. Fla. Dec. 8, 2008); *Sanders v. Comcast Cable Holdings, LLC*, 2008 WL 150479 (M.D. Fla. Jan. 14, 2008); *Rivera v. AT&T Corp.*, 420 F. Supp. 2d 1312 (S.D. Fla. 2006); and *Hughes v. Alltel Corp.*, 2004 U.S. Dist. LEXIS 20705 (N.D. Fla. Mar. 31, 2004).

Plaintiff's extremist position also butts up against the FAA. Section 2 of the FAA provides that a state may not refuse to enforce an arbitration agreement "save upon such grounds as exist in law or equity for the revocation of any contract." 9 U.S.C. § 2. In other words, arbitration clauses may be invalidated only by "generally applicable contract defenses" (*Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996))—not ones that apply only to arbitration provisions or even ones that apply to dispute-resolution provisions more broadly. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.").

This means that whatever standards the Court applies in evaluating Sprint's arbitration clause must apply equally to every term of every contract. Accordingly, the effect of embracing plaintiff's position that an arbitration clause may be unconscionable or violate public policy merely because it requires disputes to be resolved on an individual basis would be to unsettle millions of other contracts. The Court therefore should reaffirm that Florida law permits courts to invalidate contracts only in exceptionally rare circumstances. And even if the Court were to conclude that such circumstances are present here, it should limit its holding to the facts of this case so as to avoid casting doubt on the enforceability of arbitration provisions that, like ATTM's, are even more consumer-friendly than Sprint's.

**I. BECAUSE AGREEMENTS TO ARBITRATE ON AN INDIVIDUAL BASIS BENEFIT CONSUMERS, GENERALLY APPLICABLE PRINCIPLES OF FLORIDA LAW AND THE FAA PRECLUDE COURTS FROM DECLARING THEM UNCONSCIONABLE.**

**A. Provisions Requiring Bilateral Arbitration Are Not Substantively Unconscionable When, As Here, They Are Free Of Other Terms That Would Make It Infeasible To Vindicate Claims On An Individual Basis.**

Since its very inception, the unconscionability doctrine has been limited to those contractual terms that are “so unfair as to shock the conscience of the court.”

E. ALLEN FARNSWORTH, *CONTRACTS* § 4.27 (4th ed. 2004) (internal quotation marks omitted); *see also* JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 246 (1835). As Justice Story explained, the doctrine applies to bargains that “no man in his senses and not under delusion would make on the one hand, and [that] no honest and fair man would accept on the other.” *Id.* § 244.

To this day, Florida courts adhere to this strict “shocks the conscience” standard, refusing to refashion the unconscionability doctrine into a tool for judges to pronounce in hindsight upon the fairness of prices or other contract terms that arguably ended up disfavoring one party. *See, e.g., Belcher v. Kier*, 558 So. 2d 1039, 1042 (Fla. 2d DCA 1990); *Garrett v. Janiewski*, 480 So. 2d 1324, 1326 (Fla. 4th DCA 1985); *Steinhardt v. Rudolph*, 422 So. 2d 884, 889 (Fla. 3d DCA 1982).<sup>5</sup>

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<sup>5</sup> *See also, e.g., Fotomat Corp. v. Chanda*, 464 So. 2d 626, 629 (Fla. 5th DCA 1985) (although relief is appropriate “where it is perfectly plain to the court that  
(cont’d)

This rule is even more important in today's economy. Because businesses depend on standardized contracts to make transactions predictable, "the entire law of contracts, as well as the commercial value of contractual agreements, would be substantially undermined if parties could back out of their contractual undertakings on th[e] basis" of a mere purported "bad bargain." *Steinhardt*, 422 So. 2d at 890. Accordingly, to avoid unsettling millions of contracts, the Court should reaffirm that courts may substitute their judgment for that of the parties only when the parties' agreement is so grossly unfair as to qualify as conscience-shocking.

Under that standard, provisions requiring bilateral arbitration cannot be deemed unconscionable when, as here, they contain no other features that make it infeasible for customers to vindicate their claims on an individual basis. As the U.S. Supreme Court recently explained, "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs [and] greater efficiency and speed." *Stolt-Nielsen*, 2010 WL 1655826, at \*13.

Consumers benefit from bilateral arbitration because it is the most

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one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce," "Florida has long recognized that the courts are not concerned with the wisdom or folly of contracts"); UCC § 2-302 cmt. 1 ("The principle is one of prevention of oppression and surprise and not of disturbance of allocation of risks because of superior bargaining power.").

inexpensive way to resolve their claims, the vast majority of which are individualized and thus could not be brought as class actions.<sup>6</sup> Indeed, were businesses to stop providing for bilateral arbitration, consumers with small, individualized claims would be left “without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.” *Allied-Bruce*, 513 U.S. at 281.

In addition, because arbitrators are less likely to impose the kinds of evidentiary or procedural burdens that frequently cause consumers to lose in court, consumers prevail more often in arbitration than in litigation. For example, a recent study of claims that consumers filed with the AAA found that customers win relief 53.3% of the time.<sup>7</sup> By contrast, in court, virtually all consumer actions that are not settled or voluntarily withdrawn are dismissed, with only a tiny fraction ever reaching trial, much less a verdict for the plaintiff.<sup>8</sup> Unsurprisingly,

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<sup>6</sup> The American Arbitration Association (“AAA”) caps fees for small consumer claims at \$125. Moreover, many businesses, like ATTM, contractually agree to pay the full cost of arbitration, making it free to consumers.

<sup>7</sup> Searle Civil Justice Inst., *Consumer Arbitration Before the American Arbitration Association* 68 (Mar. 2009), available at [http://www.searlearbitration.org/p/full\\_report.pdf](http://www.searlearbitration.org/p/full_report.pdf); see also Am. Arbitration Ass’n, *Analysis of the American Arbitration Association’s Consumer Arbitration Caseload*, available at <http://www.adr.org/si.asp?id=5027> (AAA arbitrators ruled for the consumer in 48% of cases brought by consumers between January and August 2007).

<sup>8</sup> See Admin. Office of U.S. Courts, *2006 Judicial Facts and Figures* tbl. 4.10, available at <http://www.uscourts.gov/uscourts/statistics/JudicialFactsAndFigures/>  
(cont’d)

participants in arbitration—even the losers—have stated that they prefer arbitration to litigation because it is faster (74%), simpler (63%), and cheaper (51%) than a lawsuit; most (66%) say that they would choose arbitration over litigation again.<sup>9</sup>

Moreover, it is not just the subset of consumers with disputes who benefit from arbitration. The many consumers who never have a dispute of any kind also benefit because arbitration “lower[s] [businesses’] dispute-resolution costs,” and “whatever lowers costs to businesses tends over time to lower prices to consumers.” Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-55 (2006).<sup>10</sup>

For all of these reasons, trading the speculative right to participate in a class action for the well-established benefits of bilateral arbitration is generally not conscience-shocking. Contrary to plaintiff’s contention, class actions are not the only way to make pursuit of low-value claims worthwhile; the same goal can be

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(... cont’d)

2006/Table410.pdf (only 1.3% of federal civil cases reach trial).

<sup>9</sup> See Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 5 (2005), at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf>.

<sup>10</sup> Cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (explaining that customers who accept contracts with forum-selection clauses “benefit in the form of reduced fares representing the savings that the [company] enjoys by limiting the fora in which it may be sued”).

accomplished through other remedies, such as attorneys' fees and statutory or punitive damages. If arbitration is free (or less than court filing fees) and the arbitrator can award the same remedies to individual consumers that a court could award, then individual consumers can fully vindicate their claims in the arbitral forum, where they are more likely to prevail than in court.

The goal of giving consumers adequate incentives to pursue small claims may also be achieved by contract. For example, under ATTM's arbitration clause, customers may arbitrate all claims under \$75,000 for free and recover the same individual remedies that a court could award. But in addition, if the arbitrator awards the customer more than ATTM's last settlement offer, ATTM must pay the customer a \$10,000 minimum recovery plus double attorneys' fees. See <http://www.att.com/disputeresolution>. Because of these procedures, courts have found that *every* customer "has incentive to bring his or her claim, regardless of whether classified as 'high' or 'small' dollar." *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679, 685 (N.D. W. Va. 2010).<sup>11</sup> Verizon Wireless, another major wireless carrier, has included similar incentives in its arbitration provision.

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<sup>11</sup> Other courts have described ATTM's arbitration agreement as "perhaps the most fair and consumer-friendly provisions this Court has ever seen" (*Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, at \*3 (C.D. Cal. June 18, 2009)); as "unusually customer-centered" (*Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 900 n.6 (S.D. W. Va. 2009)); and as "fair" to consumers seeking to enforce their statutory rights (*Francis v. AT&T Mobility LLC*, 2009 WL 416063, at \*5 (E.D. Mich. Feb. 18, 2009)).

See [http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER\\_AGREEMENT&jspName=footer/customerAgreement.jsp](http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp).

In sum, given the many benefits of individual arbitration, it cannot be conscience-shocking to require individual arbitration when, as here, the costs of arbitrating are low or non-existent and there are no limitations on the remedies that a customer may obtain. To conclude otherwise would water down the meaning of “conscience-shocking” in a way that would threaten to undermine the sanctity of all contractual provisions because, as noted above, the FAA mandates that judicial restrictions on arbitration agreements be equally applicable to all contracts.

**B. In Determining Whether A Requirement That Disputes Be Resolved Through Bilateral Arbitration Is Unconscionable, The Court Must Take Into Account The FAA’s Preemptive Reach.**

In answering the third certified question, this Court should also take into account the preemptive force of the FAA, which establishes “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

As the U.S. Supreme Court recently explained, “[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance.” *Stolt-Nielsen*, 2010 WL 1655826, at \*11 (citations omitted). Reiterating what it has said “on numerous occasions,” the

Court confirmed that “the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.” *Id.* (internal quotation marks omitted). In other words, under the FAA “the parties are generally free to structure their arbitration as they see fit,” including by “agree[ing] on rules under which any arbitration will proceed.” *Id.* at \*12 (internal quotation marks omitted). Part of that freedom, the Court explained, is that parties may also “specify *with whom* they choose to arbitrate their disputes.” *Id.* That choice, which includes choosing bilateral as opposed to class-wide arbitration, is protected by the FAA’s mandate that arbitration agreements be enforced as written.

This is not to say that the FAA leaves no room for the invocation of state-law defenses, such as unconscionability. But it does mean that, in articulating and applying those defenses in the context of agreements to arbitrate, courts must be sensitive to the FAA’s overarching goal of ensuring enforcement of arbitration agreements according to their terms.

That should be especially true when the term in question requires the parties to engage in traditional, bilateral arbitration. As the Supreme Court recognized in *Stolt-Nielsen*, the “fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration” (2010 WL 1655826, at \*13) would frustrate the very purposes that arbitration is designed to achieve. Not only does “class-action arbitration” afford none of the “efficiency” and cost savings of bilateral

arbitration, but it also combines the massively increased stakes—which “are comparable to those of class-action litigation”—with a “scope of judicial review [that] is much more limited” than what would be available in court. *Id.* Indeed, these changes are so great that, if faced with the choice between exposing themselves to the risk of a class-wide arbitration or giving up on arbitration entirely, businesses will unfailingly choose the latter course—an outcome that is inimical to the goals of the FAA.

The way to accommodate Florida unconscionability doctrine with the FAA’s objectives of enforcing arbitration agreements as written and allowing parties to structure their arbitrations as they see fit is simply to adhere to the longstanding definition of unconscionability, under which a contract must be enforced unless, taken as a whole, it is so profoundly unfair as to shock the conscience. More specifically, the FAA may permit courts to declare an agreement to engage in bilateral arbitration to be unconscionable when other features of the agreement—such as a cost-sharing provision or a limitation on individual remedies—make it infeasible for customers to vindicate their claims on an individual basis. But a blanket rule invalidating arbitration clauses solely because they require arbitration in its traditional, bilateral form would be irreconcilable with, and hence preempted

by, the FAA.<sup>12</sup> See *Walther v. Sovereign Bank*, 872 A.2d 735, 750-51 (Md. 2005) (the “cases in which courts have adhered to an unquestionably minority view” that provisions requiring bilateral arbitration are unconscionable “give short shrift” to “the strong policy, made clear in both federal and Maryland law, that favors the enforcement of arbitration provisions”).

## **II. DECLARING PROVISIONS THAT REQUIRE BILATERAL ARBITRATION TO VIOLATE PUBLIC POLICY WOULD HARM CONSUMERS AND BE PREEMPTED BY THE FAA.**

Plaintiff argues that provisions requiring bilateral arbitration violate Florida public policy because they preclude individuals from serving as private attorneys general. This argument misses the mark in two key respects. First, the right of private litigants to vindicate the claims of *third parties* is not, and never has been, a fundamental public policy in Florida. Second, any state public policy forbidding the enforcement of provisions to arbitrate on an individual basis would be preempted by the FAA.

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<sup>12</sup> This would be so even if the rule were applicable to all dispute-resolution agreements, not just arbitration provisions. In *Preston v. Ferrer*, 552 U.S. 346 (2008), the U.S. Supreme Court held that the FAA preempted a California law that hampered the quick resolution of certain disputes in arbitration by imposing an administrative exhaustion requirement. Because that exhaustion requirement applied to both judicial and arbitral proceedings, yet was still preempted, *Preston* “demonstrate[s] that [the FAA] cannot be read to stand for [the] proposition that state laws avoid FAA preemption so long as they do not ‘single out’ arbitration agreements for special treatment.” *Carter v. SSC Odin Operating Co.*, 2010 WL 1493626, at \*8 (Ill. Apr. 15, 2010) (holding that state-law rule mandating right to trial by jury was preempted though rule applied to both arbitration and litigation).

**A. Adoption Of A Newly Minted Public Policy Favoring The Use Of Class Actions Would Not Benefit Consumers.**

It is well established that the courts of this state must be “guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy,” because doing so would conflict with “the fundamental public policy of the right to freedom of contract.” *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101-02 (Fla. 1944). Indeed, Florida has long embraced “[t]he right to make contracts of any kind, so long as no fraud or deception is practiced and the contracts are legal in all respects.” *State ex rel. Fulton v. Ives*, 167 So. 394, 398 (Fla. 1936) (en banc). In those rare cases in which the Legislature wishes to declare certain rights nonwaivable, it knows how to say so expressly.<sup>13</sup>

The Legislature has not chosen to forbid consumers from bargaining away the ability to bring a class action. Nor would it be sound public policy for this Court to do so. Until very recently, class actions for money damages did not even exist. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997) (explaining that it was only in 1966 that the Federal Rules of Civil Procedure were amended to authorize “class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded”).

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<sup>13</sup> *See, e.g.*, Fla. Stat. §§ 520.12-13 (nonwaivable right to attorneys’ fees); *id.* § 516.31(6) (waiver of limitation of consumer’s liability for certain deficiencies after the collateral for a loan is repossessed “shall be void and unenforceable as contrary to public policy”).

Such a recent innovation can hardly be deemed so fundamental as to make a contractual waiver of it violative of public policy.

Moreover, class actions are not so uniformly beneficial as to justify the untouchable status to which plaintiff asks this Court to exalt them. While there undeniably are cases in which class actions serve a valuable function, the vast majority of consumer disputes concern inherently individualized issues for which class treatment will not be available. *Cf. InPhyNet Contracting Servs., Inc. v. Soria*, 2010 WL 1562747, at \*5 (Fla. 4th DCA Apr. 21, 2010) (“Where both liability and damages depend on individual factual determinations, resolution of these claims can only be decided on an individual basis.”). Indeed, classes are certified only about 20% of the time.<sup>14</sup> And in the few class actions that are certified, the percentage of consumers who participate in the ensuing settlements is astonishingly small—often on the order of one percent, or less.<sup>15</sup>

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<sup>14</sup> See, e.g., Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 635-36, 638 (2006).

<sup>15</sup> See, e.g., Cheryl Miller, *Ford Explorer Settlement Called a Flop*, THE RECORDER, July 13, 2009, at 1 (only 75 out of “1 million” class members—or 0.0075 percent—participated in class settlement); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445-46 (2005) (redemption rate of class action coupons ranges from one to three percent); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 649-50 (7th Cir. 2006) (a “paltry three percent” of class members had filed claims under the settlement); *Palamara v. Kings Family Rests.*, 2008 WL 1818453, at \*2 (cont’d)

On the other hand, consumers benefit from exchanging the right to bring class actions for the lower prices that bilateral arbitration permits and for faster, cheaper, and less adversarial dispute-resolution procedures than are available in court. *See supra* pp. 8-10. Moreover, some arbitration clauses—like ATTM’s—provide consumers with **greater** rights in arbitration than they would have in court, such as the potential for a minimum award of \$10,000 plus double attorneys’ fees.

Because contracts requiring bilateral arbitration generally benefit consumers, a rule that conditions the enforcement of arbitration clauses on the availability of class-wide arbitration would have severe negative consequences. As noted above (at 13-14), businesses would sooner abandon arbitration entirely than subject themselves to class arbitration—with its exponentially increased stakes, yet sharply limited grounds for judicial review. Yet without arbitration, the many small consumer disputes that are too individualized to be brought as class actions would be too expensive to pursue.

Finally, class actions are not essential to ensure that consumers receive

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(W.D. Pa. Apr. 22, 2008) (“approximately 165 class members” out of 291,000 “had obtained a voucher” under the settlement—a take rate of under 0.06%); *Yeagley v. Wells Fargo & Co.*, 2008 WL 171083, at \*2 (N.D. Cal. Jan. 19, 2008) (“less than one percent of the class chose to participate in the settlement”), *rev’d on other grounds*, 2010 WL 601460 (9th Cir. Feb. 22, 2010); *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at \*5 (N.C. Super. Ct. May 7, 2007) (“only 337 valid claims were filed out of a possible class of 1,500,000”—a take rate of just over 0.02%), *rev’d*, 664 S.E.2d 569 (N.C. Ct. App. 2008).

robust protection. Contrary to plaintiff's assertion, if there truly is widespread corporate misconduct, the attorney general or other regulators will address it.

In sum, although class actions may at times be useful, they are in no way so fundamental as to be categorically unwaivable.

**B. A State Public Policy Prohibiting Agreements To Arbitrate On An Individual Basis Would Be Preempted By The FAA.**

A second reason to answer the fourth certified question in the negative is that the FAA would preempt any public policy precluding enforcement of provisions that require bilateral arbitration and thereby bar class actions.

The FAA was specifically enacted to prevent states from refusing to enforce arbitration agreements on grounds of state public policy. Before the FAA, the “hostility of American courts to the enforcement of arbitration agreements” led courts to declare these agreements contrary to public policy. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). In 1925, Congress enacted the FAA “to reverse the longstanding judicial hostility to arbitration agreements.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). To declare that arbitration in its traditional, bilateral form violates state public policy would resuscitate the very impediments to arbitration that the FAA was intended to abolish.

“Congress itself” has the power to fashion a public-policy exception to enforcement of an arbitration agreement. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). But the fact that “the

unavailability of class action relief would violate the intent of a *State* legislature is not a relevant consideration when determining whether arbitration is required under the FAA.” *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 364 (Tenn. Ct. App. 2001). Under the Supremacy Clause of the U.S. Constitution, a state’s view of public policy must yield to the federal policy favoring arbitration.

Moreover, because contract law traditionally focuses only on the specific parties before the court, rather than third-party effects, a rule that is premised on the needs of other customers rather than the plaintiff would not be among the “generally applicable contract defenses” (*Casarotto*, 517 U.S. at 687) permitted by the FAA. Indeed, granting third parties a veto over private agreements would be such a radical reworking of the most fundamental principles of contract law that it surely does not fall within the limited exceptions that the FAA envisioned.<sup>16</sup>

## CONCLUSION

The Court should hold that agreements to arbitrate on an individual basis are fully enforceable under Florida law when, as here, the cost to the consumer of arbitrating is low and there are no limitations on individual remedies.

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<sup>16</sup> Stated another way, public policy concerns about third parties differ in kind from the types of generally applicable defenses (such as fraud, duress, and unconscionability) that the U.S. Supreme Court identified in *Casarotto*.

Respectfully submitted,

Evan M. Tager (*pro hac* pending)  
Archis A. Parasharami (*pro hac* pending)  
Kevin Ranlett (*pro hac* pending)  
MAYER BROWN LLP  
1999 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000

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Sylvia H. Walbolt  
Joseph H. Lang  
Christine Davis Graves  
CARLTON FIELDS, P.A.  
4221 W. Boy Scout Boulevard,  
Suite 1000  
Tampa, FL 33607  
(813) 223-7000

*Attorneys for Amicus Curiae AT&T Mobility LLC*

Dated: May 18, 2010

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail on the

18th day of May, 2010, to:

Douglas F. Eaton  
William G. Wolk  
HOMERBONNER  
The Four Seasons Tower  
1441 Brickell Avenue  
Suite 1200  
Miami, FL 33131  
deaton@homerbonnerlaw.com  
wwolk@homerbonnerlaw.com  
(305) 350-5100  
*Counsel for Appellant*

Thomas R. Julin  
HUNTON & WILLIAMS LLP  
1111 Brickell Avenue, Suite 2500  
Miami, FL 33131  
(305) 810-2516  
tjulin@hunton.com  
*Counsel for Appellees*

Julie Nepvue  
AARP FOUNDATION LITIGATION  
601 E Street, N.W.  
Washington, D.C. 20049  
(202) 434-2060  
jnepveu@aarp.org  
*Counsel for Amicus Curiae AARP*

David E. Mills  
Daniel D. Prichard  
DOW LOHNES PLLC  
1200 New Hampshire Ave., NW  
Suite 800  
Washington, D.C. 20036  
(202) 776-2000  
dmills@dowlohnes.com  
dprichard@dowlohnes.com  
*Counsel for Appellees*

Bard D. Rockenbach  
BURLINGTON & ROCKENBACH, P.A.  
Courthouse Commons, Suite 430  
444 W. Railroad Ave.  
West Palm Beach, FL 33401  
bdr@FLAppellateLaw.com  
*Counsel for Amicus Curiae Florida  
Justice Association*

James A. Kowalski Jr.  
LAW OFFICES OF JAMES A. KOWALSKI,  
JR., PL  
12627 San Jose Blvd., Suite 203  
Jacksonville, FL 32223  
kowalksi.law@mac.com  
(904) 268-1146  
*Counsel for Amicus Curiae AARP*

Lynn Drysdale  
JACKSONVILLE AREA LEGAL AID, INC.  
126 West Adams Street  
Jacksonville, FL 32202  
Lynn.drysdale@jaxlegalaid.org  
*Counsel for Amicus Curiae Jacksonville  
Area Legal Aid, Inc.*

Brian W. Warwick  
Janet R. Varnell  
VARNELL & WARWICK, P.A.  
20 La Grande Boulevard  
The Villages, FL 32159  
bwwarwick@aol.com  
*Counsel for Amicus Curiae National  
Association of Consumer Advocates*

Andrew G. McBride  
WILEY REIN LLP  
1776 K Street NW  
Washington, D.C. 20006  
amcbride@wileyrein.com  
*Counsel for Amicus Curiae CTIA—The  
Wireless Association*

---

Christine Davis Graves  
*Attorney for AT&T Mobility LLC*

CARLTON FIELDS, P.A.  
4221 W. Boy Scout Boulevard,  
Suite 1000  
Tampa, FL 33607  
(813) 223-7000

Dated: May 18, 2010

## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief has been prepared using 14-point Times New Roman font.

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Christine Davis Graves