

No. 77406-4

SUPREME COURT OF THE STATE OF WASHINGTON

**DOUG SCOTT, LOREN TABASINSKE &
SANDRA TABASINSKE,**

Petitioners,

v.

CINGULAR WIRELESS LLC,

Respondent.

**SUPPLEMENTAL BRIEF OF
RESPONDENT CINGULAR WIRELESS LLC**

Evan M. Tager
(admitted *pro hac vice*)

David M. Gossett
(admitted *pro hac vice*)

MAYER BROWN ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
Telephone: 202.263.3000
Facsimile: 202.263.3300

David J. Burman, WSBA # 10611

Albert Gidari, Jr., WSBA #18521

Sally L. Morgan, WSBA #33140

PERKINS COIE LLP

1201 Third Avenue, 48th Floor

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

David T. Biderman
(admitted *pro hac vice*)

PERKINS COIE LLP

1620 – 26th St., 6th Floor

Santa Monica, CA 90404-4013

Telephone: 310.788.9900

Facsimile: 310.788.3399

Attorneys for Respondent

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As we demonstrated in our brief in the court of appeals, the arbitration provision at issue in this case is fully enforceable. The class-arbitration waiver contained in that arbitration provision is not substantively unconscionable under Washington law. In any event, a rule of state law that this provision is substantively unconscionable would be preempted by federal law. Rather than reiterate our entire argument, in this supplemental brief we instead make several discrete points, primarily in response to arguments made by petitioners in their reply brief in the court of appeals and in their briefs in support of discretionary review.¹

A. Petitioners’ Focus On The Purportedly “One-Sided” Nature Of The Class-Arbitration Waiver Is Misplaced.

As we explained in our brief in the court of appeals, the *overwhelming* majority of courts around the country that have confronted the issue have held that class-arbitration waivers are *not* unconscionable. *See* Cingular CtApp Br. 18 n.3; Cingular Opp. 9 n.6.²

¹ Previous briefs in this case are cited as follows: Briefs in the court of appeals: Scott CtApp Br.; Cingular CtApp Br.; Scott CtApp Reply; briefs in this Court: Scott Mot. Disc. Rev.; Cingular Opp.; Scott Disc. Rev. Reply.

² In their court of appeals reply brief (at 13-14), petitioners assert that “many of [the cases Cingular cites] do not involve state unconscionability law.” Although a few of the cases we cited in the court of appeals did not address unconscionability *per se*—because we were instead discussing cases holding that class-arbitration waivers are “fully enforceable” (Cingular CtApp Br. 18)—the 27 cases we listed in our opposition to discretionary review (at 9 n.6) collectively reject unconscionability challenges to class-arbitration waivers under the laws of 17 states. Since we filed that brief an additional three courts have upheld class-arbitration waivers against unconscionability challenges under the laws of three

Petitioners attempt to neutralize the rulings of the 20 states that have upheld class waivers over unconscionability attacks by asserting that those states, unlike Washington, do not have a rule against “one-sided” contracts. *See, e.g.*, Scott CtApp Reply 2, 14, 15. That effort falls short for several reasons.

1. Petitioners’ argument is based on a misreading of the term “one-sided” as used by this Court in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004), and *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004). Those cases treat “one-sided” as one of a number of terms that describe a contract that is excessively biased in fa-

additional states: *Copeland v. Katz*, 2005 WL 3163296, at *4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster, Inc.*, __ F. Supp. 2d __, 2005 WL 3199440, at *4 (E.D. Okla. Nov. 17, 2005) (Oklahoma law); *Dambrosio v. Comcast Corp.*, 2005 WL 3543794, at *14-*16 (E.D. Pa. Dec. 27, 2005) (Pennsylvania law).

We also note that in their November 8, 2005, “Statement of Additional Authorities” petitioners assert that *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005), supports their argument that Cingular’s arbitration provision is substantively unconscionable. In fact, the case does just the opposite. The *Whitney* court specifically distinguished the Fifth Circuit’s decision in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004)—upholding an earlier version of Cingular’s arbitration provision—on the ground that “the record established that the plaintiff’s rights could be vindicated through arbitration under the contractual provisions and factual circumstances involved *in that case*.” 173 S.W.3d at 313 & n.10 (citing *Iberia*, 379 F.3d at 174-75) (emphasis added); *see also* *Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281, slip op. at 4-5 (Mo. Cir. Ct. Nov. 28, 2005) (attached) (distinguishing *Whitney* and holding that the class waiver in Cingular’s revised arbitration provision is not unconscionable). *Whitney* disapproved Alltel’s arbitration provision because it not only had a class waiver, but also imposed “prohibitively expensive” costs of arbitration on the customer and deprived the arbitrator of the “power or authority” to award attorneys’ fees and incidental, consequential, punitive, or exemplary damages. *Id.* at 314, 313, 304; *see also* *Blitz*, slip op. at 4.

vor of one party to that contract and therefore is substantively unconscionable; other synonyms include “[s]hocking to the conscience’, ‘monstrously harsh’, and ‘exceedingly calloused.’” *Zuver*, 153 Wn.2d at 303.³ In the arbitration context, these various articulations of the standard for substantive unconscionability are met only when the arbitration provision at issue would significantly interfere with the weaker party’s ability to obtain redress for his or her claims, and they are not met when the arbitration provision would not have that effect. *See* Cingular CtApp Br. 21-22.

Here, as Judge Shaffer found, Cingular’s arbitration provision is particularly “*consumer friendly*” (RP 7 (emphasis added)), and directly addresses any potential concern that Cingular customers might not be able to obtain redress for small claims. Cingular has eliminated any financial deterrent to the pursuit of small claims in arbitration by agreeing to bear the *full* costs of arbitration *and* to reimburse customers for their reasonable attorneys’ fees in the event that they recover the amount of their demands or more. *See* Cingular CtApp Br. 24-26; RP 16.⁴ In addition, under Cingu-

³ In fact, in *Zuver* this Court disclaimed that Washington’s unconscionability standard requires any sort of slavish mirroring of obligations. *See Zuver*, 153 Wn.2d at 319 n.16 (“[W]e are not concerned here with whether the parties have mirror obligations under the agreement, but rather whether the effect of the provision is so one-sided as to render it patently overly harsh in this case.”) (internal quotation marks omitted).

⁴ Of course, arbitrators also remain free to award attorneys’ fees under the arbitration provision even if a consumer is awarded less than his or her full demand when state law authorizes such an award. *See Blitz*, slip. op. at 2 (holding that

lar’s arbitration provision customers may pursue appropriate claims in small claims court. *See* Cingular CtApp Br. 28-30; RP 10. Given the exceptionally consumer-friendly nature of Cingular’s arbitration provision, petitioners are simply wrong to argue that this provision is so “one-sided” as to meet the stringent standard for substantive unconscionability. This is so even accepting petitioners’ argument (*e.g.*, Scott Mot. Disc. Rev. 7) that one aspect of the arbitration clause—the class waiver—benefits only Cingular. But in fact, petitioners’ premise is wrong.⁵

2. Petitioners’ are in any event wrong in claiming that the states that have rejected unconscionability challenges to class waivers do not share with Washington a rule against “one-sided” contracts. Just like Washing-

Cingular’s arbitration provision “does not restrict the award of attorneys’ fees if such fees are available under applicable federal or state law”).

⁵ As we discussed in our brief in the court of appeals (at 16), class-arbitration waivers benefit consumers because they result in a lower price for the goods or services being offered. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594, 111 S. Ct. 1522, 113 L.Ed.2d 622 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers); *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) (“arbitration 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”) (citation and internal quotation marks omitted). This is especially true because many companies may choose to eliminate arbitration provisions altogether rather than be subjected to the burdens and risk of class-wide arbitration. *See* page 14, *infra*. Furthermore, petitioners’ attack on the class-arbitration waiver in this case on the ground that businesses generally do not bring class actions against their customers (*see* Scott CtApp Br. 8-9) is in essence an attack on arbitration itself. Although in the last few years a small number of arbitrations have proceeded on a class-wide basis, historically arbitration has been understood to be an individual proceeding. Thus, an attack on the lack of class proceedings in arbitration is basically an attack on one of the defining features of arbitration.

ton, *every one of these 20 states* also refuses to enforce contracts that are overly “one-sided.”⁶ Nonetheless, courts applying the laws of each of

⁶ See *Layne v. Garner*, 612 So. 2d 404, 408 (Ala. 1992) (factor relevant to unconscionability determination is “whether there were oppressive, *one-sided*, or patently unfair terms in the contract”); *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, 1055 (Ariz. Ct. App. 2005) (“[f]actors showing substantive unconscionability include contract terms so *one-sided* as to oppress or unfairly surprise an innocent party”) (citations and internal quotation marks omitted); *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986) (Colorado law) (“basic test” of unconscionability under Colorado law is whether “the clauses involved are so *one-sided* as to be unconscionable”) (citations and internal quotation marks omitted); *Burge v. Fid. Bond & Mortgage Co.*, 648 A.2d 414, 420 (Del. 1994) (contract is unconscionable “when its terms are so *one-sided* as to be oppressive.”) (citations and internal quotation marks omitted); *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 771 (Ga. 1996) (“the basic test for determining unconscionability is whether * * * the clauses involved are so *one-sided* as to be unconscionable”) (citations and internal quotation marks omitted); *Lewis v. Lewis*, 748 P.2d 1362, 1369 (Haw. 1988) (unconscionable contract is one that is “*unacceptably one-sided*”); *Zobrist v. Verizon Wireless*, 822 N.E.2d 531, 540 (Ill. App. Ct. 2004) (“Substantive unconscionability * * * relates to situations where a clause or term in a contract is allegedly *one-sided* or overly harsh.”) (citations and internal quotation marks omitted); *Hartford v. Tanner*, 910 P.2d 872, 878 (Kan. Ct. App. 1996) (“Where a contract is so *one-sided* that no fair-minded person would view it as just or tolerable, it is deemed unconscionable.”); La. Rev. Stat. 9:3516(36) (“A contract or clause is unconscionable when * * * it is so onerous, oppressive or *one-sided* that a reasonable man would not have freely given his consent to the contract or clause thereof in question”); *Walter v. Sovereign Bank*, 872 A.2d 735, 748 (Md. 2005) (“The mere fact that the arbitration agreement does except from its purview, however, a foreclosure proceeding, does not destroy *mutuality* and make the arbitration agreement so *one-sided* as to make it unconscionable.”); *Gianni Sport Ltd. v. Gantos, Inc.*, 391 N.W.2d 760, 761 (Mich. Ct. App. 1986) (“basic test [for unconscionability is] whether * * * the [contractual] clauses involved are so *one-sided* as to be unconscionable”); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162–63 (Nev. 2004) (“substantive unconscionability focuses on the *one-sidedness* of the contract terms”) (citations and internal quotation marks omitted); *MacFarlane v. Rich*, 567 A.2d 585, 591 (N.H. 1989) (“an [antenuptial] agreement once fair and reasonable may become so *one-sided* by the time of dissolution [of the marriage] that its application to a spouse would be unconscionable”); *Muhammad v. County Bank of Rehoboth Beach*, 877 A.2d 340, 348–49 (N.J. Super. Ct. App. Div. 2005), *rev. granted*, No. 58,430 (N.J.) (“Substantive unconscionability suggests the exchange of obliga-

these 20 states have held class-arbitration waivers not to be unconscionable. These states have adhered to the long-standing and well-founded principles governing the doctrine of substantive unconscionability, which ensure that courts do not lightly invalidate a contract, freely entered into between two parties. At most two states—California and West Virginia—have, under the guise of applying the test for substantive unconscionability, ignored these principles and held that class-arbitration waivers are *per se* unconscionable in consumer contracts when claims are small even if those contracts preserve the consumers’ ability to obtain redress.⁷

tions so **one-sided** as to shock the court’s conscience.”) (citations and internal quotation marks omitted); *Maier v. Maier*, 633 N.Y.S.2d 165 (App. Div. 1995) (agreement may not be set aside as unconscionable unless it is so “**one-sided** as to shock the conscience”); *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918, 922 (N.D. 2005) (“substantive unconscionability * * * focuses upon the harshness or **one-sidedness** of the contractual provision in question”) (citations and internal quotation marks omitted); *Barnes v. Helfenbein*, 548 P.2d 1014, 1020 (Okla. 1976) (“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.”); *Borden, Inc. v. Advent Ink Co.*, 701 A.2d 255, 264 (Pa. Super. 1997) (“In determining whether a clause is unconscionable, the court should consider whether * * * the clause is so **one-sided** that it is unconscionable under the circumstances.”) (citations and internal quotation marks omitted); *Rozeboom v. Northwestern Bell Tel. Co.*, 358 N.W.2d 241, 244 (S.D. 1984) (“contract provisions which are **one-sided** * * * should be declared unconscionable”) (citations and internal quotation marks omitted); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001) (“the basic test for unconscionability is whether * * * the clause involved is so **one-sided** that it is unconscionable”). [All emphases added.]

⁷ Petitioners have never engaged our argument that the specific terms of Cingular’s arbitration provision insulate it from unconscionability challenges, choosing instead to attack class-arbitration waivers generally. But given the lengths to which Cingular has gone to make its arbitration provision “consumer friendly” (RP 7), there can be no doubt that, assuming that **any** class-arbitration waiver is enforceable in the consumer context, the class-arbitration waiver in Cingular’s

3. Finally, it is worth noting that throughout this litigation petitioners have attempted to turn this case into a debate over what dispute-resolution procedures are best for Washington consumers. But this is not the right forum for that policy debate. As the superior court explained, these kinds of policy debates are for the legislature, not the courts, to resolve; the duty of the courts is to “apply the law as written.” RP 4; *see also Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003) (explaining that class-arbitration waivers are not unconscionable under Illinois law and that any policy arguments against them “should be addressed by the legislature”).

B. Plaintiffs Are Wrong In Asserting That Consumers Have Not Sought Redress Against Cingular Under The Arbitration Provision.

Petitioners repeatedly assert that “not one Cingular customer in the past six years ha[s] ever actually filed a claim against Cingular to arbitration” (Scott Disc. Rev. Reply 7 (citing CP 1435 ¶ 8); *see also, e.g.,* Scott CtApp Br. 21-22), a purported fact that they use to support their claim that “Cingular’s arbitration clause is working exactly as designed: to insulate the corporation from claims by its customers” (Scott Disc. Rev. Reply 7). But neither the premise nor the conclusion of this argument has merit.

For starters—as we discussed in our brief in the court of appeals (at

arbitration provision is.

28)—Cingular customers may bring claims in small claims court as well as in arbitration, and “[t]here are hundreds of small claims cases filed against Cingular throughout the country, including * * * in the State of Washington.” CP 1725 (Decl. of Michael Cross ¶ 2).

In addition, Cingular’s arbitration provision requires customers to give Cingular notice of their claims at least 30 days in advance of filing an arbitration demand. *See* CP 355. Many claims are resolved after Cingular receives such notice without the need for customers to commence an arbitration. CP 1725 (Decl. of Michael Cross ¶¶ 3-4).

Furthermore, petitioners misstate the record. The affidavit on which they rely says only that the American Arbitration Association’s records indicate that, as of August 18, 2004, no *resident of the state of Washington* had commenced an arbitration against Cingular. *See* CP 1435 (Declaration of Gerald Strathmann ¶ 8). In fact, numerous Cingular customers nationwide have commenced arbitrations against the company during the time period relevant to this case.⁸

Finally, because Cingular’s arbitration provision eliminates the disincentives for customers to seek redress for small claims, petitioners’ assertion that the provision can be used to “insulate the corporation from claims

⁸ For example, a report on the AAA’s web site lists 30 arbitrations of various kinds filed against Cingular between January 1, 2003 and December 31, 2005. *See* <http://www.adr.org/CCPQ405.pdf> (pages 212-216).

by its customers” (Scott Disc. Rev. Reply 7) is meritless. By committing to make arbitration cost-free for its customers, Cingular bears all costs of arbitration and faces the strong possibility of paying a customer’s attorneys’ fees if it resists a meritorious claim rather than resolves it. The amount Cingular would have to pay in arbitration fees alone (**\$1700**) could in many instances vastly exceed the amount of the customer’s claim, eliminating any incentive Cingular might have to continue a practice that leads more than a handful of customers to file arbitrations.⁹

In short, what Cingular’s customers have given up in exchange for lower priced wireless service—the ability to participate in class actions—has not by any stretch of the imagination placed them at Cingular’s mercy. By making individual arbitration so cheap and efficient for customers, Cingular’s arbitration provision removes any economic barrier in the way of vindicating small claims. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280, 115 S. Ct. 834, 842-43, 130 L.Ed.2d 753 (1995) (“arbitration’s advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litiga-

⁹ 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, § C-8, at <http://www.adr.org/sp.asp?id=22014>.

tion”).¹⁰

C. The Declarations On Which Petitioners Rely Are Self-Interested And Unpersuasive.

In addition to the Strathmann Declaration discussed above, petitioners repeatedly quote from the Declarations of Peter Maier and Sally Gustafson. But far from being “empirical” evidence (Scott CtApp Reply 7), these declarations are improper opinion testimony, rife with legal conclusions, lack foundation, and, most importantly, are irrelevant to the issues before this Court.¹¹ For example, Maier may think that “[t]he individual claims of the Cingular class members are too small and too complex factually and legally to be litigated by a private attorney representing an individual consumer or even by an individual consumer in small claims court” (CP 1582 ¶ 10), but—as we just discussed—in fact hundreds of Cingular customers *have* brought claims in arbitration and in small claims court. In addition, Maier’s assertion that “in his experience” attorneys’ fees are “discretionary” and might not be awarded for small claims (*id* ¶ 12) ignores that *Cingular’s* arbitration provision makes such an award

¹⁰ In any event, the assumption that companies can insulate themselves through the use of a class-waiver in an arbitration provision even when they make arbitration free and provide for an award of attorneys’ fees to prevailing plaintiffs reflects nothing more than hostility to arbitration, which historically has been undertaken on an individualized basis.

¹¹ Cingular objected to these declarations in the superior court (*see* CP 1729), but, having granted our motion, the court never ruled on those objections.

mandatory. Similarly, Gustafson’s declaration—which is really an attack on the lack of adequate funds for the Consumer Protection Division of the Attorney General’s office rather than a basis for construing Washington contract law to render class-arbitration waivers unenforceable (*see* CP 1570 ¶ 9)—ignores entirely the “consumer friendly” features of Cingular’s arbitration provision. Thus, the superior court appropriately afforded these declarations no weight.

D. The Federal Arbitration Act Would Preempt Any Rule That The Parties’ Class-Arbitration Prohibition Is Substantively Unconscionable Under Washington Law.

As we explained in our brief in the court of appeals (at 35-45), the FAA would preempt any rule of Washington law under which the class-arbitration waiver in Cingular’s arbitration prohibition would be deemed substantively unconscionable for the following reasons:

1. Washington has no generally applicable prohibition against contractual waivers of class actions, and thus cannot ban such waivers in the context of arbitration agreements. *See* Cingular CtApp Br. 36-38. Although petitioners suggest that they seek a neutral rule of Washington law that applies equally to all class-action waivers in consumer contracts, whether or not arbitration is the required forum (*see* Scott CtApp Reply 13, 23), such a rule in practical effect is hostile to arbitration and is preempted under Section 2 of the FAA because virtually all consumer arbitra-

tion agreements either expressly or implicitly prohibit class-wide arbitration, whereas very few other contracts prohibit judicial class actions. A rule “generally” precluding class-action waivers would nullify tens of millions of arbitration provisions, but almost no other contracts.

2. Any rule of Washington law that precluded class-arbitration waivers would also conflict with the purposes of the FAA, and thus would be preempted under basic principles of conflict preemption. *See* Cingular CtApp Br. 38-42. In response, petitioners assert that this conflict-preemption argument “is entirely without authority.” Scott CtApp Reply 23. But in fact, a number of courts have accepted the argument.

For example, the Tennessee Court of Appeals has expressly 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, 365 (Tenn. Ct. App. 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 v. AT&T*

Wireless Servs., Inc., 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005).

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, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S. Ct. 1647, 1655, 114 L.Ed.2d 26 (1991)); *see also id.* at 175 (observing that “the plaintiffs’ attack on the confidentiality provision is, in part, an attack on the character of arbitration itself”).

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 v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (quoting *Gilmer*, 500 U.S. at 31). To say that a prohibition of class-wide arbi-

tration 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.

That these courts have accepted our conflict-preemption argument makes sense because a rule that class-arbitration waivers are unenforceable would toll the death knell for consumer arbitration provisions; such a rule would have the effect of eliminating all benefits of arbitration, while exponentially multiplying the risks. Especially because any class-wide arbitral award would be reviewable only for bias, fraud, and "manifest disregard" of the law (*see* 9 U.S.C. § 10; *Wilko v. Swan*, 346 U.S. 427, 436-437, 75 S. Ct. 182, 187-88, 98 L.Ed. 168 (1953)), few if any businesses would continue to include arbitration provisions in their contracts with consumers. This outcome could not be more inimical to the FAA's purpose of encouraging the use of arbitration. Hence, any rule that requires consumer arbitration provisions to allow for class-wide arbitration would conflict with and be preempted by the FAA.

E. The Non-Severability Provision In The Arbitration Provision Is Entirely Reasonable Because Class-Wide Arbitration Would Defeat The Purposes Of Arbitration.

Petitioners have argued that the fact that the class-arbitration waiver is non-severable suggests "that [Cingular's] interest lies not in arbitration,

but in banning class actions.” Scott CtApp Reply 10 & n.3. This simply is not so. As we have explained (*see* Cingular CtApp Br. 40-44), grafting the class-action mechanism onto arbitration would undermine the benefits for which arbitration exists in the first place. Furthermore, as discussed above (at 14), no sensible company would voluntarily agree to class-wide arbitration given the limited scope of review that exists for arbitral decisions. Cingular’s interest is in having a low-cost, efficient, and effective means of dispute resolution; the arbitration provision is designed to provide just that. But the fact that Cingular would never agree to class-wide arbitration—and thus includes a non-severability clause in its arbitration provision—in no way suggests that the company is anti-arbitration generally, or that its arbitration provision does not provide its customers with effective means of resolving disputes with the company.

F. *Stein* and *Heaphy* Support Our Argument That The Class-Arbitration Waiver Is Enforceable.

In our brief in the court of appeals (at 15-16), we stressed that *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 48-49, 17 P.3d 1266 (2001), and *Heaphy v. State Farm Mutual Automobile Insurance Co.*, 117 Wn. App. 438, 447, 72 P.3d 220 (2003)—both of which enforced arbitration provisions that contained class-arbitration waivers—supported our argument that Cingular’s class-arbitration prohibition is enforceable. Of course, this

Court is not bound by decisions of the court of appeals. Nonetheless, petitioners' argument that these decisions are irrelevant (Scott CtApp Reply 11-13) is baseless. In those cases, two different divisions of this state's Court of Appeals both held that the unavailability of class actions generally does not make an arbitration agreement unenforceable under Washington law. That is a powerful indication that extant unconscionability doctrine is not expansive enough to support the wholesale invalidation of class-arbitration waivers. Furthermore, plaintiffs are simply wrong in suggesting that *Heaphy* is "inapposite" because, unlike in that case, "there is no question [here] that Plaintiffs' claims are precisely the kind of claims for which a class action is appropriate" (*id.* at 13 n.5). Rather, petitioners' claims, too, are highly individualized and would not be appropriate for a class action even were this Court to find the class-arbitration waiver to be unenforceable. Among other things, whether a customer was erroneously charged is an individual issue that cannot be determined on a class-wide basis. And the fact that many customers will have received credits for any erroneous charges further complicates this individualized inquiry to the point of making class-wide adjudication unmanageable.

G. The Issues Raised In This Case Differ Considerably From Those Raised In *Dix*.

This case is scheduled to be argued on the same day as *Dix v. ICT*

Group, Inc., No. 77101-4, which raises the question whether a forum-selection clause—mandating that all claims brought against AOL and its agent, ICT, be brought in Virginia—is enforceable under Washington law, even though (at least at the time those contracts were entered into) plaintiffs in Virginia generally could not prosecute cases as class actions. Although petitioners in this case assert that the question presented in *Dix* is similar to the question presented here (*see, e.g.*, Scott Mot. Disc. Rev. 18), in fact the two cases are entirely distinguishable.¹²

1. The legal standards at issue are entirely different.

Under Washington law, courts generally enforce forum-selection clauses unless doing so would be “unfair and unreasonable.” *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 934, 106 P.3d 841 (2005), *rev. granted*, No. 77101-4 (Wash.); *see also, e.g., Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617, 937 P.2d 1158 (1997) (“unreasonable and unjust”). This standard is far lower than the standard for finding a contract to be substantively unconscionable—that it be “[s]hocking to the conscience’, ‘monstrously harsh’, and ‘exceedingly calloused’” (*Zuver*, 153 Wn.2d at 303). Thus, even if a forum-selection clause that has the ef-

¹² This is not to say that Cingular believes that the forum-selection clause in *Dix* is unenforceable; quite the contrary. Our point is just that, *even* if this Court determines the forum-selection clause in *Dix* to be unenforceable, the class-arbitration waiver at issue in this case is enforceable under well-established principles of Washington law and the FAA.

fect of precluding class actions might be “unfair and unreasonable” and hence unenforceable, it does not follow that an arbitration clause that has the effect of precluding class actions would be “shocking to the conscience” and hence unenforceable.

2. *The FAA governs the Cingular arbitration clause.*

Washington’s standard for the enforceability of a forum-selection clause is entirely a creation of state law, and therefore the courts of this state remain free to determine when to enforce such clauses. By contrast, this Court must give effect to the “strong public policy favoring arbitration of disputes” that *Congress* mandated by enacting the FAA (and that similarly exists under Washington law). *See, e.g., Adler*, 153 Wn.2d at 341 & n.4; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S. Ct. 334, 335, 87 L.Ed.2d 444 (1985) (recognizing the “emphatic federal policy in favor of arbitral dispute resolution”). Only Congress can alter that strong public policy favoring arbitrability. *See* page 7, *supra*; *Rosen*, 799 N.E.2d at 494. No such statutory preference exists favoring the enforceability of forum-selection clauses.¹³

¹³ In their reply brief in the court of appeals, petitioners quote the *Dix* court for the proposition that the Consumer Protection Act “does not exist merely for the purpose of benefiting an individual plaintiff,” but instead is designed “to offer broad protection to the citizens of Washington.” Scott CtApp Reply 6 (quoting *Dix*, 125 Wn. App. at 937). This truism in no way suggests that a class-arbitration waiver is unenforceable whenever a plaintiff has brought a claim under the CPA. Rather, as discussed above (at 8-9), companies will be forced to

Furthermore, even were this Court to determine that Washington law would bar the enforcement of any contract that directly or indirectly precludes class actions, the Court would nonetheless have to address our argument that, as applied to this specific class-arbitration waiver, such a rule is preempted by the FAA. *See* Cingular CtApp Br. 35-45; pages 11-14, *supra*. No equivalent federal preemption argument exists in *Dix*.

3. *The facts are different.*

Nothing about the forum-selection clause at issue in *Dix* informed AOL's customers that they were waiving the ability to proceed via class action. Rather, that clause merely stated that any claim must be brought in the courts of Virginia. Few consumers, if any, would know that class actions generally are not authorized in Virginia state courts, and thus that they were implicitly waiving the ability to seek relief on a class-wide basis by agreeing to the forum-selection clause. By contrast, the arbitration provisions at issue in this case could not have been clearer that the parties were agreeing to resolve all disputes via individual arbitration (or in small claims court).¹⁴ Petitioners in this case nonetheless voluntarily agreed to

change any unfair practice even if consumers are limited to bringing individual arbitrations against the company. Furthermore, this Court long ago held that the FAA would preempt the CPA to the extent the CPA otherwise would be interpreted to limit the arbitrability of disputes. *See Garmo v. Dean Witter*, 101 Wn.2d 585, 681 P.2d 253 (1984).

¹⁴ This is true of both the initial arbitration provisions that petitioners agreed to and the revised arbitration provision that Cingular sent petitioners in July 2003.

arbitrate on those terms.

In addition, the *Dix* plaintiffs argue that, given the small amount of damages they suffered—in most instances less than \$100—their only practical means for relief is a class action. *See* Dix CtApp Br. 30; Dix CtApp Reply Br. 14. This argument is similar to the one that petitioners have raised in this case (*see, e.g.*, Scott CtApp Br. 19-21), but as we have discussed—both above and in our prior briefing—Cingular’s arbitration provision fully addresses this concern: it (a) specifies that Cingular will bear all costs of arbitration unless a claim is frivolous, and will reimburse the claimant for her reasonable attorneys’ fees if she recovers the amount of her claim or more (or, if the applicable law so provides, even if she recovers a lesser amount); and (b) authorizes Cingular’s customers to proceed in small claims court. Thus, just as the class-arbitration waiver in Cingular’s arbitration provision is enforceable *even if* a class-arbitration waiver in a less consumer-friendly arbitration provision might not be (*see* note 7, *supra*), so too is it enforceable even if the forum-selection clause at issue in *Dix* is not.

CONCLUSION

The superior court’s decision should be affirmed.

See Cingular CtApp Br. 4-5.

RESPECTFULLY SUBMITTED,

Evan M. Tager
(admitted *pro hac vice*)
David M. Gossett
(admitted *pro hac vice*)
MAYER BROWN ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
Telephone: 202.263.3000
Facsimile: 202.263.3300

David T. Biderman
(admitted *pro hac vice*)
PERKINS COIE LLP
1620 – 26th Street
Sixth Floor, South Tower
Santa Monica, CA 90404-4013
Telephone: 310.788.9900
Facsimile: 310.788.3399

David J. Burman, WSBA # 10611
Albert Gidari, Jr., WSBA #18521
Sally L. Morgan, WSBA #33140
PERKINS COIE LLP
1201 Third Avenue, 48th Floor
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

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