

No. 09-893

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**In the Supreme Court of the United States**

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AT&T MOBILITY LLC,

*Petitioner,*

v.

VINCENT AND LIZA CONCEPCION,

*Respondents.*

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

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**REPLY BRIEF FOR PETITIONER**

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## REPLY BRIEF FOR PETITIONER<sup>1</sup>

Respondents contend that our interpretation of the FAA would “insulate” from challenge under state law an arbitration clause’s “egregiously one-sided or exculpatory” procedural rules (Resp. Br. (“RB”) 28) and mandate enforcement of every agreement that requires bilateral arbitration and precludes class actions (*id.* at 31).

To the contrary, under our interpretation, courts could invalidate arbitration agreements that select procedures that are so egregiously unfair as to run afoul of generally applicable state-law unconscionability doctrine. And courts also could invalidate agreements requiring bilateral arbitration upon finding that a customer is unable to vindicate her rights on an individual basis.

That is *not* what happened here, however. Rather, the California courts manufactured a new legal principle—wholly inconsistent with the unconscionability analysis applied outside the arbitration context—to invalidate an arbitration clause under which respondents undeniably *can* vindicate their claims on an individual basis. The FAA prohibits that result.

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<sup>1</sup> The Rule 29.6 Statement in the opening brief remains accurate.

**A. The *Discover Bank* Rule Is Not A Ground For The Revocation Of Any Contract.**

- 1. The *Discover Bank* rule is not saved from preemption merely because it also applies to other dispute-resolution agreements.**

Respondents assert that Section 2 does no more than “establish[] a rule of nondiscrimination toward arbitration” and that this standard is satisfied here because the *Discover Bank* rule applies to “arbitration and nonarbitration agreements alike.” RB9-10.

To be sure, this Court has held that state-law rules that single out arbitration contracts for discriminatory treatment do not qualify as “grounds \*\*\* for the revocation of any contract” and therefore fall outside Section 2’s savings clause. See Pet. Br. (“PB”) 27-28. But the Court has never said the converse—*i.e.*, that the savings clause immunizes every state-law rule that is not facially discriminatory.

That is unsurprising, because the word “discrimination” does not appear in Section 2. Instead, that provision specifies that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract” (emphasis added).

The use of the modifier “any” indicates that Congress never intended to allow States to invalidate arbitration provisions on the basis of rules that apply only to a narrow subset of non-arbitration agreements. This Court repeatedly has recognized that “the word ‘any’ has an expansive meaning.” *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting cases); see also *United States v. James*, 478 U.S. 597, 604-605 (1986). Congress’s use of “the



expansive word ‘any’ and the absence of restrictive language [leaves] ‘no basis in the text for limiting’ the phrase ‘any [contract]’” to mean a few non-arbitration contracts. *Ali*, 552 U.S. at 214 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

The Court accordingly has said repeatedly that Section 2 saves only grounds that “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 added); see also *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (Montana statute “directly conflicts with” Section 2 because it “conditions the enforceability of arbitration agreements on compliance with a special notice requirement *not applicable to contracts generally*”) (emphasis added).

Indeed, that understanding is necessary to avoid rendering the statute a nullity. As respondents concede (RB14), the FAA was enacted to overturn the “ouster” doctrine. That doctrine applied both to arbitration provisions and other forum-selection clauses. See PB29-30. If Section 2 did no more than preclude facial discrimination against arbitration provisions, it would have failed to accomplish Congress’s most basic purpose.<sup>2</sup>

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<sup>2</sup> Recognizing this, respondents say that the ouster doctrine would be preempted by Section 2 because it would have a “discriminatory effect” on arbitration. RB33. But that standard would equally invalidate California’s near-categorical ban on provisions that require individual dispute resolution. Superimposing class-action procedures on arbitration changes the very character of arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775-1776 (2010). By contrast, because class actions already are a feature of the litigation landscape, a facially neutral prohibition against agreements to re-

Similarly, it is inconceivable that the Montana statute invalidated in *Casarotto* would have been saved if only it had said: “Any contractual provision setting forth the means for resolving disputes shall be typed in underlined capital letters on the first page of the contract.”

Unable to defend their interpretation of the savings clause, respondents claim that our reading of the clause is “incoherent” and would allow companies to escape application of statutes like the U.C.C. that codify “unconscionability and other general defenses” in the context of “specific categories of contracts.” RB24-25. Not so. A rule is no less generally applicable merely because it *also* has been codified in a particular context.

But as *Perry* makes clear, to come within the savings clause, the rule must have arisen to govern contracts generally, not arbitration specifically—either directly or indirectly by regulating a gerrymandered subset of contracts, such as those involving dispute resolution. Were it otherwise, States would be able to superimpose on arbitration any procedure used in courts—jury trials, plenary discovery, application of the rules of civil procedure and evidence, etc.—by labeling it a “neutral” requirement for all dispute-resolution agreements. See PB29-30.

Respondents recognize that an interpretation of the FAA permitting States to do that would not be credible, but their construction of Section 2 provides no basis for preempting such requirements: Rather, all of these rules would be permissible because they treat litigation and arbitration evenhandedly.

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solve disputes on an individual basis would have no similar impact on agreements that contemplate litigation.

Respondents suggest that such state-law rules would be preempted because “the statute cannot be read to destroy itself by allowing States to require procedures that are fundamentally incompatible with arbitration.” RB11; see also RB32-33. To avoid losing this case, however, respondents must explain why mandating full discovery procedures is “fundamentally incompatible with arbitration” but mandating the “fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration” (*Stolt-Nielsen*, 130 S. Ct. at 1776) is not.<sup>3</sup>

Respondents’ sole support for their purported distinction is this Court’s observation that parties may agree to class-wide arbitration if they so choose. RB35. Yet the same could be said of the procedures that respondents admit States may not superimpose on arbitration. Parties undoubtedly *could* agree to have an arbitral jury or to arbitrate under the federal rules of evidence and civil procedure. See Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 573 PLI/Real 663, 670 (2009) (arbitration conducted under federal rules); <http://www.i-courthouse.com> (internet arbitration by jury).<sup>4</sup>

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<sup>3</sup> Respondents and their amici constantly say that ATTM “embedded” a class waiver in its arbitration clause, as if bilateral arbitration were an alien element. In fact, as *Stolt-Nielsen* recognizes, it is class procedures that are alien to arbitration.

<sup>4</sup> Respondents say that “because ‘[a]rbitration carries no right to trial by jury,’ a rule forbidding jury-trial waivers would make arbitration agreements unenforceable in violation of Section 2.” RB33 (quoting *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956)) (citation omitted). Of course, *Stolt-Nielsen* establishes that arbitration “carries no right” to class-wide proceedings either.

Respondents' argument therefore provides no reasoned basis for distinguishing among various procedural requirements. Either respondents' construction of the statute must be rejected because it would not preclude States from mandating the use of litigation procedures in arbitration, or respondents' concession that the FAA preempts States from requiring procedures that are "fundamentally incompatible" means that the *Discover Bank* rule is preempted as well.

**2. The *Discover Bank* rule is not saved from preemption merely by labeling it an application of California unconscionability and exculpatory-clause principles.**

Respondents also argue that the *Discover Bank* rule is simply an evenhanded application of California's general contract-law defenses. We agree that "the FAA does not preclude States from applying general contract defenses, such as unconscionability" (RB34). But that is not what happened here.

Under *Discover Bank*, provisions requiring bilateral arbitration are unenforceable whenever the plaintiff *alleges* that the defendant cheated large numbers of consumers out of small amounts of money—even when, as here, consumers are fully able to vindicate their claims on an individual basis. This rule—whose application is unrelated to the fairness of the arbitration provision—was created especially for provisions requiring bilateral arbitration and deviates markedly from generally applicable unconscionability and exculpatory-clause principles.

Respondents argue that it is irrelevant whether the *Discover Bank* rule "represent[s] a departure from" generally applicable California contract-law

principles because that constitutes “a question of state law, which this Court does not sit to review.” RB35-36 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989)).<sup>5</sup> In respondents’ view, so long as a decision invokes the “unconscionability” label, that is the end of the matter even if it rests on legal principles that are entirely different from those applied to determine unconscionability outside the arbitration context.

Respondents are simply wrong that this Court is powerless to look beyond the label that state courts affix to the rationale they give for invalidating arbitration provisions. As respondents’ own amici acknowledge, the question whether a state-law ground for invalidating an arbitration provision falls within Section 2’s savings clause “arises under federal law.” Federal Jurisdiction Professors Br. 6. Indeed, as they further acknowledge, this Court’s FAA precedents “suggest[] that a ‘generally applicable’ rule of state contract law does not exist simply because a state court *says* that it does.” *Id.* at 7 (citing *Perry*, 482 U.S. at 492 n.9).

Amici also correctly point out that this situation is analogous to the independent-and-adequate-state-grounds doctrine. *Id.* at 8. In that context, this Court “has analyzed, in dozens of cases, whether state procedural rules purportedly precluding federal review have been ‘firmly established and regularly

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<sup>5</sup> *Volt* held that issues of *contract interpretation* are matters of state law that this Court does not review. That holding lends no support to respondents’ submission that this Court is powerless to determine whether a rule employed to invalidate an arbitration provision is one of general applicability.

followed.” *Ibid.* (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

Amici contend that the analogy to the independent-and-adequate-state-grounds context dictates that the party arguing preemption must show that “the rule of state contract law at issue is *not* in fact ‘generally applicable.’” *Id.* at 10. Although the Court need not answer the burden question to decide this case, Section 2 places the burden on respondents, not us. Because the statute specifies that arbitration provisions must be enforced according to their terms *unless* they are revocable under a generally applicable state-law principle, it follows that the party seeking to avoid enforcement has the burden of proving that the state-law principle is, indeed, generally applicable. In any event, we *have* established that the *Discover Bank* rule deviates markedly from generally applicable contract-law principles.

*a. Unconscionability.*

We demonstrated in our opening brief that the *Discover Bank* rule deviates from generally applicable unconscionability principles in multiple ways.<sup>6</sup>

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<sup>6</sup> Respondents repeatedly represent that 19 other States have interpreted their unconscionability law the same way that California has. That is false. The overwhelming majority of those States have held that provisions requiring bilateral arbitration are unenforceable only when they would preclude customers from vindicating their claims. See App., *infra*, 1a-6a. Indeed, courts in five of those States—Alabama, Florida, Illinois, Michigan, and West Virginia—have *enforced* ATTM’s current arbitration provision or a predecessor version. See *ibid.* And that provision indubitably would be upheld in Delaware, Georgia, Ohio, and Pennsylvania, where courts have upheld arbitration clauses that were materially less consumer-friendly than

Respondents’ effort to demonstrate that *Discover Bank* is a straightforward application of California unconscionability principles does not withstand scrutiny.<sup>7</sup>

- (1) *Respondents mischaracterize California’s generally applicable unconscionability principles.*

Although respondents dispute our showing (PB32-34) that California limits the concept of substantive unconscionability to contract terms that shock the conscience (RB38-39), they cite no Califor-

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ATTM’s. See *ibid.* The enforceability of ATTM’s arbitration provision is an open question in most of the remaining States.

<sup>7</sup> Respondents deny that *Discover Bank* effectuates an across-the-board rule, citing a smattering of cases enforcing provisions that required bilateral arbitration. RB20 & n.14. Whether *Discover Bank* effectuates a categorical rule is beside the point, because the courts below construed it to require invalidation of ATTM’s arbitration clause notwithstanding that “[t]he provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim” (Pet. App. 11a n.9). In any event, the California Supreme Court has held that private claims for class-wide “public” injunctions are *categorically* non-arbitrable. See *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal.4th 303 (2003); *Broughton v. Cigna Healthplans*, 21 Cal.4th 1066 (1999). Two additional appellate decisions have held that the California Legal Remedies Act *categorically* precludes parties from agreeing to resolve claims under that Act on a bilateral basis. *Fisher v. DCH Temecula Imports LLC*, 187 Cal.App.4th 601 (2010); *America Online, Inc. v. Super. Ct.*, 90 Cal.App.4th 1 (2001). And another holds that provisions requiring bilateral arbitration may be invalidated as a matter of public policy whenever a court determines that a class action would be “a preferable means of vindicating” *any* non-waivable statutory claim. *Arguelles-Romero v. Super. Ct.*, 184 Cal.App.4th 825, 845 (2010). These holdings underscore that California courts will invalidate any consumer-arbitration provision that requires bilateral arbitration.

nia case to the contrary. One group of amici cite *A&M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473 (1982). See Contracts Professors Br. 15. But even if *A&M* were indeed “the leading California appellate case” as amici assert, the standard it articulates is not meaningfully different from the shocks-the-conscience standard. As the *A&M* court explained it, “a contractual term is substantively suspect if it real-locates the risks of the bargain in an *objectively unreasonable* or unexpected manner.” 135 Cal.App.3d at 487 (emphasis added). Because the district court found that “a *reasonable* customer may well prefer” bilateral arbitration under ATTM’s provision to participating in a class action (Pet. App. 42a (emphasis added)), it is manifest that the *Discover Bank* rule deviates even from the allegedly more relaxed *A&M* standard.

Respondents are no more successful in refuting our showing that the *Discover Bank* rule deviates from generally applicable unconscionability principles by focusing on the alleged effects on non-parties of respondents’ agreement to arbitrate bilaterally. RB44-47. Not one case that they or their amici cite holds that an agreement that is fair to the parties before the court may nonetheless be deemed unconscionable because of its impact on non-parties. Indeed, virtually all of the authorities cited by respondents involve the separate “exculpatory clause” rationale, which we address below.

Respondents also fail to refute our demonstration that generally applicable principles of unconscionability law turn on whether the challenged term is conscience shocking (or “objectively unreasonable”) *at the time of contracting*. In contending that *Discov-*



*er Bank's ex post* focus is “a *limitation*, not an expansion, of the test” (RB47), they miss our point entirely. Under the generally applicable *ex ante* approach, ATTM’s arbitration provision would not be deemed unconscionable because courts would consider the range of possible outcomes as of the time of contracting: (i) the customer never has a dispute and thus incontrovertibly benefits from the cost savings associated with substituting ATTM’s process for judicial class actions; (ii) the customer has only inherently individualized disputes that could never be brought as class actions and hence would be unlikely to be redressed through the judicial process (see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)); and (iii) the customer does have at least one dispute that is appropriate for class-wide resolution, in which event she is likely to recover only pennies on the dollar in the event she bothers to file a claim at all—in contrast to the “prompt[]” and “full” compensation that she would likely receive under ATTM’s provision (see Pet. App. 41a-42a). It would not be “objectively unreasonable” for a customer confronted with this range of outcomes *ex ante* to agree to ATTM’s arbitration provision.

Under the *Discover Bank* approach, in contrast, this same provision that “a reasonable person may well prefer” (Pet. App. 42a) *ex ante* is deemed invalid by viewing it through the much narrower *ex post* lens of an already-filed class action that carefully alleges the three elements of the *Discover Bank* test. The contract at issue in *American Software, Inc. v. Ali*, 46 Cal.App.4th 1386 (1996), which resulted in non-payment of commissions amounting to 40% of the plaintiff’s annual salary, could never have survived

under this idiosyncratic, *ex post* approach. See also DRI Br. 9-14.

- (2) *Respondents' eleventh-hour argument that ATTM's arbitration provision is "unfair" to them is misguided.*

Unable to demonstrate that generally applicable California unconscionability law focuses on the impacts of a contract on non-parties, respondents change course and argue that ATTM's arbitration provision in fact is "not fair" to them. RB39. Of course, both courts below effectively found otherwise. The district court found that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars" (Pet. App. 42a) and that "the Concepcions arguably would be better off to individually pursue their claim in arbitration" because "their net recovery may be larger and more quickly paid through ATTM's informal claims and arbitration process" (*id.* at 47a n.10). And the Ninth Circuit found that ATTM's provision "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim" and that "the problem with it under California law \*\*\* is that not every aggrieved customer will file a claim." *Id.* at 11a n.9.

These findings below framed the issue on which this Court granted review, which takes as given that the Concepcions are fully able to vindicate their claims under ATTM's arbitration provision. Even if this Court were to consider respondents' "fairness" argument, the standard is not one of simple,

subjective fairness. Under generally applicable unconscionability principles, a contractual term must be conscience-shocking or, at minimum, “objectively unreasonable” before a California court will deem it unenforceable. See pages 9-10, *supra*; PB3-4, 32-33.

In any event, respondents’ claims of unfairness rest on a misunderstanding of the way in which ATTM’s arbitration provision functions. As the district court found, the provision creates powerful incentives for ATTM to resolve customers’ complaints without the need to initiate an arbitration. Because ATTM has undertaken to pay the full \$1,700 cost of arbitration and because it has an independent interest in satisfying its customers, its customer-service department generally will resolve customers’ complaints at the very outset. Indeed, ATTM provides customers with over \$1.3 billion in bill credits every year. Pet. App. 44a. If a customer is not satisfied with the resolution offered by the customer-service department, she need only fill out a simple, one-page Notice of Dispute. As the district court found, ATTM has a strong incentive to offer the customer many times the value of the claim (plus a reasonable amount of attorneys’ fees if the customer is represented by counsel) in order to avoid the risk of having to fund an arbitration and the possibility of having to pay the premiums. *Id.* at 37a-39a.

For this reason, respondents and their amici are mistaken in assuming that, to be made whole, customers would need to expend any significant amount of time or money investigating their claims and developing legal theories that would survive dispositive motions if the claims were brought in court. It makes economic sense for ATTM to resolve virtual-

ly all disputes without determining whether the customer has a legally cognizable claim. For example, amici Marygrace Coneff *et al.* contend that the complexity of their small-dollar claims would deter lawyers from representing them. Coneff Br. 17. But complex expert testimony is unnecessary in order to obtain a resolution of their claims under ATTM’s arbitration provision. If a simple phone call to customer service complaining about call quality would not have gotten them an acceptable resolution, the filing of a Notice of Dispute surely would have.<sup>8</sup>

In short, as the district court found, even if no customer ever receives the premiums, ATTM’s arbitration provision “serve[s] a noble purpose” by creating a process that is “quick, easy to use, and prompts full or, as described by [respondents], even excess payment to the customer *without* the need to arbitrate or litigate.” Pet. App. 39a. And if the customer is dissatisfied with ATTM’s offer, she may proceed to fully subsidized arbitration with its prospect for a substantial windfall. Such a customer ordinarily would be able to arbitrate her claims simply by explaining them to the arbitrator and, if necessary, presenting modest documentary evidence, such as her bills. See *Francis v. AT&T Mobility LLC*, 2009

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<sup>8</sup> The Coneff brief is replete with distortions of the record in that case—including aspersions on the integrity of the late Richard Nagareda. To note but one distortion, the brief supplies a misleading partial quotation of an answer by counsel for ATTM to a question about the premiums. Coneff Br. 14. The complete quote, with the omitted part italicized is: “If you’re asking me how often are the premiums paid out, I don’t think it happens, *because AT&T is so motivated to resolve the disputes at the outset of the arbitration process.*” Tr. at 9, *Coneff v. AT&T Corp.*, *supra* (May 19, 2009).

WL 416063, at \*7-\*9 (E.D. Mich. Feb. 18, 2009). If that is “unfair,” it is impossible to imagine any contract between a business and a consumer being safe from invalidation.

Respondents also contend that the requirement to arbitrate bilaterally was “unfair” because “they were forced to give up \*\*\* the compensatory, deterrent, and cost-spreading effects of class actions brought on their behalf by others.” RB41. Here again, it is not conscience-shocking or “objectively unreasonable” to give up these supposed benefits in exchange for quick, easy, and effective resolution of one’s own disputes. In any event, as just discussed, respondents would not forgo any compensatory benefits by pursuing relief under ATTM’s arbitration provision rather than participating in a class action brought by others, and there is no need for cost-spreading because neither discovery nor expert testimony is generally necessary for ATTM customers to obtain relief. Finally, it makes no sense to say that respondents’ agreement is unfair to them because of the (alleged) reduction in deterrence resulting from other customers’ entry into similar agreements. Indeed, respondents cannot identify a single case outside the arbitration context in which a contract has been declared unconscionable because of the effects on the party of agreements entered into by non-parties.

*b. California’s exculpatory-clause statute.*

- (1) *The California courts have never applied the exculpatory-clause statute to a contract that does not exculpate one party from liability to its counterparty.*

Respondents and their amici take issue with our submission (PB40-41 & n.12) that the manipulability of “public policy” counsels caution in determining whether the savings clause encompasses public-policy grounds. As noted in our opening brief, the Court need not resolve that question here because the *Discover Bank* rule rests on an interpretation of the exculpatory-clause statute that does not apply to other kinds of contracts. Specifically, while the courts below deemed ATTM’s arbitration provision to be an unenforceable “exculpatory clause” because *non-parties* might not choose to pursue claims (Pet. App. 11a n.9, 43a-45a), California courts have not deemed any other kind of contract to be impermissibly exculpatory solely because of its effects on non-parties.

Respondents contend that the exculpatory-clause doctrine long has been concerned with the effects of contracts on the public at large. RB44-47. But neither they nor any of their amici can cite a single case invalidating a contract as exculpatory even though the contract placed no restrictions on the ability of the party before the court to obtain complete relief. *Every* case they cite involved a clause that waived a party’s own claims against its counter-party for the latter’s negligence, disclaimed warranties, or eliminated remedies.

Some of those cases say that the contracts in question affected the public interest—because that is

a prerequisite for invalidating an exculpatory clause. See, e.g., *Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92 (1963); *Hiroshima v. Bank of Italy*, 78 Cal.App. 362 (1926). But that is a far cry from invalidating a contract that does not actually exculpate one party from liability to its counterparty.

If the exculpatory-clause statute did extend to “anything that would indirectly reduce a defendant’s aggregate liability,” as respondents seem to contend, it would encompass many routine characteristics of arbitration and litigation. For example, the law does not require individuals with claims common to many people to file them as class actions. And if they do choose to go it alone and settle their claims, the law permits them to do so on a confidential basis. Yet under respondents’ theory, that would undermine the goal of notifying similarly situated persons, and thereby potentially reduce the defendants’ aggregate liability. Similarly, respondents’ concept of exculpation would require that all arbitral awards be published and given collateral-estoppel effect in future disputes involving the same defendant.

For all of these reasons, *Discover Bank* cannot be justified as an even-handed application of California’s statute governing exculpatory clauses.

(2) *ATTM’s arbitration provision does not exculpate it from liability to non-parties.*

For the reasons just stated, it is legally irrelevant whether ATTM’s arbitration provision in some sense “exculpates” it from liability to non-parties. In any event, respondents and their amici are mistaken that it does. Their contention rests almost exclusively on statistics showing that few customers actually file arbitrations against ATTM. But as the district

court found, ATTM generally will resolve the claims of its customers “*without* the need to arbitrate or litigate.” Pet. App. 39a. True, as the Ninth Circuit concluded, “not every aggrieved customer will file a claim” (*id.* at 11a n.9), but that is equally (if not more) true of class actions—especially ones like this, in which most customers are unlikely to think that ATTM did anything wrong; the claims are inherently individualized, making class certification questionable at best; and the likelihood of a settlement for more than a few pennies on the dollar is low.

Similarly mistaken is the assertion by some amici that, if class actions are unavailable, attorneys would have no incentive to represent customers in arbitrations. To begin with, as the district court found, ATTM has a policy of including reasonable attorneys’ fees in settlement offers to customers who are represented by counsel in filing Notices of Dispute or Demands for Arbitration. Pet. App. 38a n.7.<sup>9</sup> Moreover, nothing would stop an enterprising lawyer from creating a Notice of Dispute mill—advertising for clients and then using the incentives ATTM has created to obtain settlements well in excess of the value of each client’s claim. One group

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<sup>9</sup> One amicus cites to declarations of attorneys who asserted that they would be unwilling to represent consumers in bilateral arbitration. Coneff Br. 11-13. In both that case and others, however, ATTM has introduced declarations from lawyers who *would* be willing to represent consumers in bilateral arbitration under ATTM’s provision. See Docket Nos. 54-60, *Coneff v. AT&T Corp.*, No. 2:06-cv-944-RSM (W.D. Wash.); Docket Nos. 32-35, *Cruz v. Cingular Wireless, LLC*, No. 2:07-cv-714-JES-DNF (M.D. Fla.); Docket Nos. 23-24, *Powell v. AT&T Mobility, LLC*, No. CV-09-CO-1800-LSC (N.D. Ala.); see also Docket No. 57 Exs. 1, 4, *Hancock v. AT&T, Inc.*, No. 5:10-cv-822-W (W.D. Okla.) (AT&T’s functionally identical provision).



of amici inadvertently makes this very point. They note that after issuing a press release announcing a lawsuit against ATTM, they were contacted by 4,700 customers with similar complaints. Coneff Br. 10. They easily could have filled out Notices of Dispute for each of these 4,700 customers and either obtained acceptable settlements or had the opportunity to pursue the premiums in serial arbitrations. That would have been more than enough financial incentive for most lawyers.

The contention of some amici that class actions are indispensable to ensure that customers learn of potential claims is mistaken for several reasons. First, because ATTM's arbitration provision does not require confidentiality, lawyers and consumer advocates may disseminate information about alleged wrongdoing "in the manner of their choosing." *Cruz v. Cingular Wireless LLC*, 2008 WL 4279690, at \*4 (M.D. Fla. Sept. 15, 2008), *appeal pending*, No. 08-16080-CC (11th Cir.). For that reason, and because of the prevalence of blogs, internet forums, and other media, widespread problems are highly unlikely to go undiscovered. Second, because customers who feel aggrieved by a service or charge do not have to identify a cause of action against ATTM in order to obtain redress under ATTM's arbitration provision, the assumption that customers need "notice" that they supposedly have been defrauded is mistaken. Third, the assumption that class actions actually serve a meaningful notice function is tenuous at best. See, e.g., Eisenberg & Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("class members display by their behavior that they do not value the right to receive notice"). Certainly, there is no evidence in the record of this

case that any more than a small fraction of putative class members even read class notices.

The contention that ATTM's arbitration provision cannot adequately replicate the deterrent effect of class actions is wrong on multiple levels as well. First, by exposing itself to the risk of serial Notices of Dispute seeking more than the face amount of customers' economic injuries, ATTM *has* created a powerful deterrent against systemic wrongdoing.

Second, for the reasons stated in the Chamber of Commerce's amicus brief (at 7-11), the assumption that class actions have a significant deterrent effect is dubious. See also PB46 n.14.

Third, the principal mechanism of deterrence (aside from the desire to retain customers) is government enforcement. To take one recent example, notwithstanding respondents' suggestion that the FCC is an apathetic regulator of the wireless industry, its investigation into alleged inaccurate data charges by Verizon Wireless resulted in an agreement by Verizon to refunds in excess of \$50 million. See *FCC: Verizon, Can You Pay Me Now?*, PCWORLD, Oct. 28, 2010, [http://www.pcworld.com/article/209126/fcc\\_verizon\\_can\\_you\\_pay\\_me\\_now.html](http://www.pcworld.com/article/209126/fcc_verizon_can_you_pay_me_now.html). The States too are fully capable of investigating and punishing true misconduct—as opposed to the kind of lawyer-driven claims that characterize many class actions, including the current one. See South Carolina/Utah Br. 5-6.

For all of these reasons, the *Discover Bank* rule cannot be saved from preemption as an even-handed application of California's statutory prohibition against exculpatory clauses.

**B. The *Discover Bank* Rule Stands As An Obstacle To The Accomplishment Of The Full Purposes And Objectives Of Congress In Enacting The FAA.**

We explained in our opening brief that the *Discover Bank* rule is preempted for the additional reason that it stands as an obstacle to the accomplishment of two key purposes of the FAA: (i) to ensure that parties have the flexibility to select their own dispute-resolution procedures; and (ii) to remove impediments to arbitration. Respondents concede that these were indeed core purposes of the FAA (see RB49), but contend that they are not sufficiently embodied in the text of the FAA to preempt state law. They are mistaken as to each.

The objective of enabling parties to select the procedures that will govern their arbitration is directly conveyed and carried out by Sections 2, 3, and 4, each of which make arbitration agreements enforceable according to their terms. It thus is not surprising that this Court repeatedly has based its FAA decisions on this principle. See PB24-26. Congress's goal of removing impediments to arbitration is equally evident from the text and structure of the statute. Indeed, that was the *raison d'être* for Section 2. In short, if these two purposes cannot serve as bases for conflict preemption, it is hard to see which purposes could.

Respondents' arguments that California law does not stand as an obstacle to accomplishment of these objectives do not withstand scrutiny.

1. Respondents misapprehend our first conflict-preemption argument. It is not our position that the FAA preempts state-law defenses to procedures that

are so “unfair” to the plaintiff as to warrant the inference that she never truly assented. See RB50-51. In that circumstance, there would be no contractual choice to protect.

Similarly, our position would not prevent States from declaring that arbitration agreements must ensure that parties can vindicate their claims. What they may not do is dictate the procedures used to provide that assurance. Because ATTM’s arbitration provision both encourages consumers to pursue their claims (Pet. App. 39a-40a, 42a) and “essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim” (*id.* at 11a n.9), however, it is manifest that California has sought to exalt the class-action procedure, not simply ensure that ATTM’s customers are able to vindicate their claims. See also *Fisher, supra*; *Arguelles-Romero, supra*.

Respondents offer no intelligible means of distinguishing California’s naked policy preference for the class-action procedure from its preference for administrative exhaustion of claims under the California Talent Agents Act. See *Preston v. Ferrer*, 552 U.S. 346 (2008). Just as the exhaustion requirement frustrated the FAA’s objective of enabling parties to arbitration agreements to contract for “streamlined proceedings and expeditious results” (*id.* at 357-358), so too does California’s categorical preference for class-wide dispute resolution.

Elsewhere in their brief, respondents concede that state-law rules requiring procedures that are “incompatible with arbitration” would be preempted because they “directly conflict” with the statute. RB32. If, as they concede, the doctrine of conflict preemption precludes States from insisting that

parties agree to have written arbitral awards, fact-finding by juries, and plenary discovery and motion practice, however, it equally precludes States from insisting that parties' agreements allow for class-wide proceedings. See pages 4-6, *supra*. All of these requirements would frustrate the FAA's purpose of enabling parties to structure their dispute-resolution procedures to achieve streamlined proceedings and expeditious results, at reduced expense.

2. With respect to our second conflict-preemption argument, respondents accuse us of exaggerating the likelihood that companies will abandon arbitration if the price of admission is acquiescence in class-wide proceedings. They point to two cases in which companies made a one-time, post hoc representation that, if the requirement of bilateral arbitration were invalidated, they would nonetheless prefer arbitration to staying in court. RB53. But those idiosyncratic decisions, made after litigation had commenced and a judge had been assigned, in no way mean that these or any other company would be willing to enter into pre-dispute arbitration provisions that authorize class-wide arbitration. Indeed, neither respondents nor any of their amici can identify even one company that does so.

Respondents assert that, even if no company would authorize class-wide arbitration, all companies would be free to adopt a bifurcated approach under which "the vast range of claims by consumers and employees" that are individualized in nature could continue to be arbitrated, while disputes pleaded as class actions could be brought in court. RB54-55. They claim that "[t]he securities industry has followed precisely that approach for the past 18 years." RB55. But "that approach" is a matter of

regulatory command, not contractual choice. See FINRA Rules 12200 (requiring firms to arbitrate individual claims upon customer's request), 12204(d) (forbidding arbitration of claims pleaded as a class actions).

It is unsurprising that respondents have no examples of companies volunteering for the same arrangement. The AAA requires businesses to pay all but \$125 of the \$1,700 cost of consumer arbitrations. Businesses would have little incentive to subsidize bilateral arbitration—much less provide the affirmative inducements that are the hallmark of ATTM's arbitration provision—if, at the end of the day, they still must litigate in court every claim pleaded as a class action. Instead, companies will give up on arbitration entirely, burdening the courts with additional cases and leaving customers “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). Nothing could be more inimical to the objectives of the FAA.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## **APPENDIX**



**APPENDIX A**

States in Respondents' Appendix That  
Invalidate Agreements Requiring Bilateral  
Arbitration Only If They Exculpate The  
Defendant From Liability To The Plaintiff

| State   | Decisions   |
|---------|---|
| Alabama | <p><i>Leonard v. Terminix Int'l Co.</i>, 854 So.2d 529, 538 (Ala. 2002); <i>Powell v. AT&amp;T Mobility, LLC</i>, __ F.Supp.2d __, 2010 WL 3943859, at *4-*5 (N.D. Ala. Sept. 30, 2010); <i>Battels v. Sears Nat'l Bank</i>, 365 F.Supp.2d 1205, 1217 (M.D. Ala. 2005); <i>Lawrence v. Household Bank (SB), N.A.</i>, 343 F.Supp.2d 1101, 1112 (M.D. Ala. 2004); <i>Taylor v. First N. Am. Nat'l Bank</i>, 325 F.Supp.2d 1304, 1319-1322 (M.D. Ala. 2004); <i>Billups v. Bankfirst</i>, 294 F.Supp.2d 1265, 1276-1277 (M.D. Ala. 2003); <i>Gipson v. Cross Country Bank</i>, 294 F.Supp.2d 1251, 1263-1264 (M.D. Ala. 2003); <i>Taylor v. Citibank USA, N.A.</i>, 292 F.Supp.2d 1333, 1345 (M.D. Ala. 2003); <i>Pitchford v. AmSouth Bank</i>, 285 F.Supp.2d 1286, 1296 (M.D. Ala. 2003).</p> |

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| Delaware | <i>Edelist v. MBNA Am. Bank</i> , 790 A.2d 1249, 1261 (Del. Super. Ct. 2001); <i>Pick v. Discover Fin. Servs., Inc.</i> , 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001).  |
| Florida  | <i>S.D.S. Autos, Inc. v. Chrzanowski</i> , 976 So.2d 600, 608 (Fla. Dist. Ct. App. 2007); <i>Fonte v. AT&amp;T Wireless Servs., Inc.</i> , 903 So.2d 1019, 1027 (Fla. Dist. Ct. App.), <i>rev. denied</i> , 918 So.2d 292 (Fla. 2005); <i>Cruz v. Cingular Wireless LLC</i> , 2008 WL 4279690, at *3-#4 (M.D. Fla. Sept. 15, 2008), <i>appeal pending</i> , No. 08-16080-CC (11th Cir.); <i>La Torre v. BSF Retail &amp; Commercial Operations, LLC</i> , 2008 WL 5156301, at *5 (S.D. Fla. Dec. 8, 2008); <i>Rivera v. AT&amp;T Corp.</i> , 420 F.Supp.2d 1312, 1321-1322 (S.D. Fla. 2006); <i>Hughes v. Alltel Corp.</i> , 2004 U.S. Dist. LEXIS 20705, at *13-*15 (N.D. Fla. Mar. 31, 2004). |

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| Georgia  | <p><i>Caley v. Gulfstream Aerospace Corp.</i>, 428 F.3d 1359, 1378 (11th Cir. 2005); <i>Jenkins v. First Am. Cash Advance of Ga., LLC</i>, 400 F.3d 868, 878 (11th Cir. 2005); <i>Coffey v. Kellogg Brown &amp; Root</i>, 2009 WL 2515649, *13 (N.D. Ga. Aug. 13, 2009); <i>Honig v. Comcast of Ga. I, LLC</i>, 537 F.Supp.2d 1277, 1287-1289 (N.D. Ga. 2008); <i>Lomax v. Woodmen of the World Life Ins. Soc’y</i>, 228 F.Supp.2d 1360, 1365 (N.D. Ga. 2002).</p>   |
| Illinois | <p><i>Kinkel v. Cingular Wireless LLC</i>, 857 N.E.2d 250, 275 (Ill. 2006); <i>Crandall v. AT&amp;T Mobility LLC</i>, 2008 WL 2796752, at *4-*5 (S.D. Ill. July 18, 2008); <i>Rosen v. SCIL, LLC</i>, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003), <i>leave to appeal denied</i>, 807 N.E.2d 982 (Ill. 2004); <i>Brown v. Luxottica Retail N. Am. Inc.</i>, 2010 WL 3893820, at *2-*5 (N.D. Ill. Sept. 29, 2010); <i>Estep v. World Fin. Corp.</i>, 2010 WL 3239456, at *5 (C.D. Ill. Aug. 16, 2010); <i>Jackson v. Payday Loan Store of Ill., Inc.</i>, 2010 WL 1031590, at *5 (N.D. Ill. Mar. 17, 2010); <i>Harris v. The DirecTV Group, Inc.</i>, 2008 WL 342973, at *5 (N.D. Ill. Feb. 5, 2008); <i>Pivoris v. TCF Fin. Corp.</i>, 2007 WL 4355040, at *6 (N.D. Ill. Dec. 7, 2007).</p> |

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| Michigan   | <p><i>Moffat v. Cingular Ameritech Mobile Commc'ns, Inc.</i>, 2010 WL 451033, at *2 (E.D. Mich. Feb. 5, 2010); <i>Francis v. AT&amp;T Mobility LLC</i>, 2009 WL 416063, at *6-*8 (E.D. Mich. Feb. 18, 2009); <i>Adler v. Dell, Inc.</i>, 2008 WL 5351042, at *6, *10-*12 (E.D. Mich. Dec. 18, 2008); <i>Copeland v. Katz</i>, 2005 WL 3163296, at *4 (E.D. Mich. Nov. 28, 2005).</p>  |
| Missouri   | <p><i>Brewer v. Missouri Title Loans, Inc.</i>, __ S.W.3d __, 2010 WL 3430411, at *4 (Mo. Aug. 31, 2010); <i>Cicle v. Chase Bank USA</i>, 583 F.3d 549, 554-555 (8th Cir. 2009); <i>Pleasants v. Am. Express Co.</i>, 541 F.3d 853, 858-859 (8th Cir. 2008); <i>Kates v. Chad Franklin Nat'l Auto Sales N., LLC</i>, 2008 WL 5145942, at *5 (W.D. Mo. Dec. 1, 2008); <i>Gutierrez v. State Line Nissan, Inc.</i>, 2008 WL 3155896, at *3 (W.D. Mo. Aug. 4, 2008); <i>Bass v. Carmax Auto Superstores, Inc.</i>, 2008 WL 2705506, at *3 (W.D. Mo. July 9, 2008).</p> |
| New Jersey | <p><i>Muhammad v. County Bank of Rehoboth Beach</i>, 912 A.2d 88, 99 (N.J. 2006); <i>Davis v. Dell, Inc.</i>, 2007 WL 4623030, at *4 (D.N.J. Dec. 28, 2007); <i>Jones v. Chubb Inst.</i>, 2007 WL 2892683, at *4 (D.N.J. Sept. 28, 2007).</p>   |

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| New Mexico     | <i>Fiser v. Dell Computer Corp.</i> , 188 P.3d 1215, 1221 (N.M. 2008).   |
| North Carolina | <i>Tillman v. Commercial Credit Loans, Inc.</i> , 655 S.E.2d 362, 371 (N.C. 2008).   |
| Ohio           | <i>Alexander v. Wells Fargo Fin. Ohio 1, Inc.</i> , 2009 WL 2963770, at *3 (Ohio Ct. App. Sept. 17, 2009); <i>Hawkins v. O'Brien</i> , 2009 WL 50616, at *6 (Ohio Ct. App. Jan. 9, 2009); <i>Credit Acceptance Corp. v. Davisson</i> , 644 F.Supp.2d 948, 959 (N.D. Ohio 2009); <i>Stachurski v. DirecTV, Inc.</i> , 642 F.Supp.2d 758, 772 (N.D. Ohio 2009); <i>Price v. Taylor</i> , 575 F.Supp.2d 845, 854 (N.D. Ohio 2008); <i>Howard v. Wells Fargo Minn., NA</i> , 2007 WL 2778664, at *4-*5 (N.D. Ohio Sept. 21, 2007). |
| Oregon         | <i>Vasquez-Lopez v. Beneficial Oregon, Inc.</i> , 152 P.3d 940, 952 (Or. Ct. App. 2007).   |
| Pennsylvania   | <i>Kaneff v. Del. Title Loans, Inc.</i> , 587 F.3d 616, 624-625 (3d Cir. 2009); <i>Cronin v. CitiFinancial Servs., Inc.</i> , 352 F. App'x 630, 635-636 (3d Cir. 2009); <i>Clerk v. First Bank of Del.</i> , 2010 WL 1253578, at *15 (E.D. Pa. Mar. 23, 2010).   |
| Washington     | <i>Scott v. Cingular Wireless</i> , 161 P.3d 1000, 1008 (Wash. 2007).  |

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| West Virginia | <p><i>State ex rel. AT&amp;T Mobility, LLC v. Shorts</i>, No. 35537 (W. Va. Oct. 28, 2010); <i>Adkins v. Labor Ready, Inc.</i>, 303 F.3d 496, 503 (4th Cir. 2002); <i>Wince v. Easterbrooke Cellular Corp.</i>, 681 F.Supp.2d 679, 685 (N.D. W. Va. 2010); <i>Strawn v. AT&amp;T Mobility LLC</i>, 593 F.Supp.2d 894, 898-900 (S.D. W. Va. 2009); <i>Miller v. Equi-first Corp.</i>, 2006 WL 2571634, at *16 (S.D. W.Va. Sept. 5, 2006); <i>Schultz v. AT&amp;T Wireless Servs., Inc.</i>, 376 F.Supp.2d 685, 690-691 (N.D. W. Va. 2005).</p> |
| Wisconsin     | <p><i>Coady v. Cross Country Bank, Inc.</i>, 729 N.W.2d 732, 745 (Wis. Ct. App. 2007).</p>  |