No. 09-893

In the Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER[1]

Respondents do not take issue with most of the points made in the Petition and the four supporting amicus briefs. Specifically:

- They do not dispute that, as a result of the decision below and others like it, tens (if not hundreds) of millions of arbitration provisions governed by the FAA are unenforceable under California law. See Pet. 17-19; CTIA Br. 12-13; DRI Br. 18-19 n.4.
- They do not dispute that both courts below found that respondents would be "essentially guarantee[d]" to obtain make-whole relief (if not more) were they to invoke ATTM's arbitration process and invalidated ATTM's arbitration provision *solely* because it precludes respondents from seeking to vindicate the unasserted claims of *other* customers. See Pet. App. 9a-11a & n.9, 37a-46a.
- They do not dispute that, because "no arbitration provision * * * is more pro-consumer than ATTM's, * * * there is little, if anything, left for businesses to do in the way of creating additional 'incentives' to arbitrate" (DRI Br. 23) and that companies therefore are apt to conclude "that they will never be able to design an arbitration agreement that satisfies courts in some economically important jurisdictions" (Chamber of Commerce Br. 14 n.6).

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[1] The Rule 29.6 Statement in the Petition remains accurate.

- They do not dispute that the vast majority of courts outside of California and the Ninth Circuit have rejected state-law attacks on provisions requiring traditional, bilateral arbitration when, as here, the provisions neither limit remedies nor impose undue costs on the plaintiff. Indeed, they point out that Pennsylvania has joined the list (see Opp. 8-9), leaving one fewer jurisdiction in which the preemption issue presented here could conceivably arise and making it all the more clear that there is no point to waiting for a deeper split to develop.
- They do not dispute that class-wide arbitration is such an unpalatable hybrid that few, if any, businesses would knowingly agree to it. See Pet. 32-34; DRI Br. 9-18; CTIA Br. 17-18. That point, of course, has now been expressly endorsed by this Court. See *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, No. 08-1198, slip op. 21-23 (Apr. 27, 2010).
- And they do not dispute our showing (Pet. 31-32)—and that of the amici—that California has thoroughly distorted its law of unconscionability in order to invalidate contracts requiring the arbitration of disputes on an individual basis. See DRI Br. 4-9; Chamber of Commerce Br. 16-23; PLF Br. 10-19.

These unrefuted points establish both the importance of the issue presented by the Petition and the irreconcilability of the decision below with the FAA and the decisions of this Court. The arguments respondents do make fail to justify allowing this issue to continue to go unresolved.

A. *Stolt-Nielsen* Confirms That The Decision Below Is Irreconcilable With The FAA And This Court's Precedents.

The issue in *Stolt-Nielsen* was whether an arbitration provision that is "silent" on the subject may be construed to permit class-wide arbitration. The Court began its analysis by observing that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." Slip op. 17 (internal quotation marks omitted). Reiterating what it has said "on numerous occasions," the Court explained that "the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Id.* at 18 (internal quotation marks omitted). In other words, under the FAA "parties are generally free to structure their arbitration agreements as they see fit," including by "agree[ing] on rules under which any arbitration will proceed." *Id.* at 19 (internal quotation marks omitted).

The Court reasoned from these established principles that parties also "may specify *with whom* they choose to arbitrate their disputes." *Ibid.* It follows, the Court concluded, "that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 20. In short, the arbitration panel's contrary conclusion was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Ibid.*

Finally, the Court explained that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed [that] the par-

ties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 21. Indeed, the Court declared, the "changes brought about by the shift from bilateral arbitration to class-action arbitration"—including the loss of cost savings and efficiency associated with bilateral arbitration and the magnified stakes of class-wide arbitration—are "fundamental." *Id.* at 21-23. Accordingly, it concluded, "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 23.

Stolt-Nielsen strongly supports our contention that the FAA preempts California from refusing to enforce provisions that require traditional, bilateral arbitration when, as here, it is fully realistic for plaintiffs to vindicate their claims on an individual basis. After all, if the FAA precludes arbitrators from conducting class-wide arbitration when the parties' agreement is silent on the subject, it follows inexorably that the FAA also precludes States from requiring parties to submit to class-wide proceedings as the price of obtaining admission to the arbitral forum.

Moreover, in reaffirming that "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms'" (*id.* at 18), *Stolt-Nielsen* supports our argument that the FAA preempts States from dictating the procedures that apply in arbitration at least when, as here, such procedures are not necessary to ensure that the parties can vindicate their claims. See Pet. 26-30.

Finally, in acknowledging "the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration" (slip op. 22), *Stolt-Nielsen* reinforces our point 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 purposes of the FAA. See Pet. 32-34.

In short, *Stolt-Nielsen* confirms that the decision below is out of step with this Court's precedents. That is reason enough for this Court to grant certiorari.

B. The Issue Presented Is Of Exceptional Importance.

We showed in the Petition that the question presented here is important because California law, as construed by the Ninth Circuit, has the effect of invalidating tens, if not hundreds, of millions of provisions that require traditional, bilateral arbitration. Respondents do not deny that the rule endorsed by the Ninth Circuit will have this broad impact.[2] Nor

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[2] Respondents do deny that the Ninth Circuit's approach amounts to an across-the-board condemnation of provisions requiring bilateral arbitration. Opp. 16-17. But all except one of the federal district court cases they cite pre-date the Ninth Circuit's decision. And that decision—*Smith* v. *Americredit Financial Services, Inc.*, 2009 WL 4895280 (S.D. Cal. Dec. 11, 2009)—was promptly appealed. Meanwhile, the lone state-court case they cite—*Citibank (South Dakota), N.A.* v. *Walker*, 2008 WL 4175125 (Cal. Ct. App. Sept. 11, 2008)—is non-precedential, pre-dates the Ninth Circuit's decision, and, in any event, turned on waiver and the plaintiff's failure to "allege any viable class action claims" (*id.* at *4).

do they deny that the Ninth Circuit has drastically expanded the reach of California law by applying it to all claims involving either a California-based business or a California customer without regard to the law chosen in the parties' contract.

Respondents nonetheless contend that the issue presented is "unimportant," because, they say, all federal courts of appeals and state supreme courts to reach the issue have held that the FAA does not preempt state unconscionability law. As we discuss in the next section, they are mistaken about that, but even if they were right about the case law, that does not mean either that the issue is "unimportant" or that review is unwarranted.

An issue may be important even in the absence of a conflict among the lower courts. See, *e.g.*, *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 698 (2010) (Court granted certiorari "[b]ecause of the importance of the issue"); *Saenz* v. *Roe*, 526 U.S. 489, 498 (1999) (Court granted certiorari despite unanimity of courts of appeals on the issue "because of the importance of the case"); *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 519 (1998) (same); *Missouri* v. *Jenkins*, 515 U.S. 70, 83 (1995) (same).

Indeed, this Court has granted review in other arbitration cases in which there either was no split or the issue was of materially less significance than the one presented here. See *Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Stolt-Nielsen*, *supra*; *Rent-A-Center West, Inc.* v. *Jackson*, No. 09-497 (argued Apr. 26, 2010).

C. Respondents' Assertion That There Is No Disarray In The Lower Courts Is Mistaken.

In response to our contention that the lower courts are in disarray regarding the issue presented here, respondents assert that (i) every federal court of appeals, state supreme court, and intermediate state appellate court to reach the issue has held that the FAA does not preempt States from refusing to enforce provisions that require traditional, bilateral arbitration; (ii) no case holds otherwise; and (iii) our showing that such provisions are fully enforceable under the laws of most States is beside the point. They are mistaken in each respect.

To begin with, by mischaracterizing our preemption argument, respondents overstate the number of courts that have rejected it. Our position is that the FAA preempts a State's preference for class actions when, as here, the parties have agreed not to permit class arbitration *and* the plaintiff is fully able to vindicate his or her claims in a bilateral arbitration.[3] It

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[3] Accordingly, respondents are simply wrong in asserting that the fact that both courts below found that customers are able to vindicate their claims on an individual basis under ATTM's 2006 arbitration provision "has no bearing on whether the FAA preempts a finding that a class ban is unconscionable under state contract law" (Opp. 12). Their misunderstanding of our preemption argument also underlies their mischaracterization of ATTM's amicus brief in *T-Mobile USA, Inc.* v. *Laster*, 128 S. Ct. 2500 (2008). See Opp. 3. For the same reason, respondents' invocation of the denial of certiorari in *Laster* and several other pre-*Stolt-Nielsen* cases (Opp. 1) misses the point. None of those cases involved a "third generation" arbitration clause (see DRI Br. 21-22) like ATTM's that ensures that plaintiffs can resolve their disputes on an individual basis.

is *not* our position that the FAA categorically preempts state unconscionability law or categorically precludes States from refusing to enforce provisions requiring bilateral arbitration when other features of those provisions make it unrealistic to vindicate claims on an individual basis. The overwhelming majority of the cases cited by respondents do no more than reject these broadest of preemption arguments (and several do not mention preemption at all). Only a few arguably hold that the FAA *never* preempts States from applying unconscionability doctrine to invalidate a provision requiring bilateral arbitration.[4]

On the other side of the ledger, respondents dismiss as "purely speculative" the Third Circuit's statement in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), that the FAA would preempt Pennsylvania cases striking down provisions requiring bilateral arbitration. Opp. 8. But as respondents admit, the Third Circuit has now twice held that such provisions are not unconscionable under Pennsylvania law, so *Gay* is likely to be the Third Circuit's last word on whether the FAA would preempt a contrary interpretation of Pennsylvania law.

And it is only by giving it a hypertechnical reading that respondents can claim that *Pyburn* v. *Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001), does not conflict with the decision below.[5] In

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[4] See *Homa* v. *Am. Express Co.*, 558 F.3d 225 (3d Cir. 2009); *Feeney* v. *Dell Inc.*, 908 N.E.2d 753 (Mass. 2009); *Fiser* v. *Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008).

[5] As we pointed out in the Petition (at 21) and respondents do not dispute, *Pyburn* is the functional equivalent of a decision of the Tennessee Supreme Court.

Pyburn, the Tennessee Court of Appeals held that any state-law preference for allowing claims under the Tennessee Consumer Protection Act to be brought as class actions must give way to the FAA's policy favoring enforcement of arbitration provisions as written. *Id.* at 365. The fact that Tennessee's preference for class actions may have been embodied in positive law rather than the common law of contracts made no difference to the holding, as a federal district court in Tennessee recently concluded. See *Ambrose* v. *Comcast Corp.*, 2010 WL 1270712, at *4 (E.D. Tenn. Mar. 31, 2010) (rejecting unconscionability challenge to provision requiring bilateral arbitration and citing *Pyburn*).

Respondents also overlook *Wince* v. *Easterbrooke Cellular Corp.*, 2010 WL 392975 (N.D. W. Va. Feb. 2, 2010). In that case, the district court held that, in light of the incentives it creates to pursue arbitration on an individual basis, ATTM's arbitration provision "cannot be deemed unfair" and hence unconscionable under West Virginia law. *Id.* at *4. The court went on to hold that "a broad reading" of West Virginia law "that sweepingly invalidates arbitration provisions containing class waivers, no matter the remaining incentives to arbitrate, would stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress in enacting the FAA and would be preempted under the doctrine of conflict preemption." *Id.* at *5 (internal quotation marks and alterations omitted). Although obviously not a decision of a federal court of appeals, *Wince* disproves respondents' assertion that the courts have uniformly rejected our preemption argument.

Finally, respondents miss the point of our showing that provisions that require bilateral arbitration

are fully enforceable under the law of most States when, as here, the provisions create adequate incentives to pursue arbitration on an individual basis. While the cases so holding may not technically be in conflict with the Ninth Circuit on the preemption issue, their *result* is absolutely irreconcilable with that of the Ninth Circuit. As a practical matter, the Ninth Circuit's decision means that the very same provision is enforceable in most States but unenforceable in California and possibly other States within that Circuit. This is the kind of Balkanization that Congress plainly intended to overcome when it enacted the FAA.

Moreover, the fact that ATTM's provision or ones less consumer-friendly than that provision have been upheld under the laws of most States means that there is a greatly diminished universe in which the preemption issue can arise.[6] In the Petition, we argued that the issue might arise in, at most, seven States. But as respondents point out, the Third Circuit has upheld less consumer-friendly arbitration clauses than ATTM's under Pennsylvania law and appears to have held that New Jersey law is not preempted, reducing to five the number of States in

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[6] Respondents say that it is just as likely that courts would reach preemption before turning to state-law issues (Opp. 11), but it is a rule of long standing that federal courts will first seek to decide issues on state-law grounds in order to avoid reaching constitutional issues unnecessarily. See, *e.g.*, *Siler* v. *Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909). Indeed, a federal court recently refused to consider preemption precisely because it had concluded that ATTM's arbitration provision was fully enforceable under state law. See *Moffatt* v. *Cingular Ameritech Mobile Commc'ns Inc.*, 2010 WL 451033, at *3 (E.D. Mich. Feb. 5, 2010).

which the preemption issue might still conceivably arise. That is not enough to make it worthwhile to await a deeper split.

D. This Case Is An Ideal Vehicle For Deciding The Issue.

Respondents do not deny that ATTM's arbitration clause is more consumer-friendly than any other such provision in existence. Nor do they take issue with the Chamber of Commerce's observation that "[b]ecause of the extremely pro-consumer terms of the AT&T Mobility arbitration agreement * * *, this case presents an ideal starting point for the Court in this area; it can rule on the preemptive effect of the FAA without the need to test the limits of how far state law may go in invalidating contracts less favorable to the party claiming 'unconscionability.'" Chamber of Commerce Br. 3-4.

Respondents instead contend that this case is a poor vehicle because there supposedly is a "lingering and unresolved state-law question whether the new agreement even applies to this case." Opp. 13. That contention is a fluorescent red herring. The district court expressly held that, under California law, ATTM validly modified its arbitration provision and that the 2006 version was the applicable one, rejecting each of the arguments that respondents resurrect here. See Pet. App. 28a-30a. The Ninth Circuit then implicitly accepted the district court's reasoning by proceeding directly to determine whether the 2006 provision is unconscionable under California law. Acknowledging that this case presents "a new wrinkle," namely the $7,500 premium payment provided for under the 2006 provision (*id.* at 2a), the Ninth Circuit went on to explain why the requirement of bilateral arbitration was unenforceable notwithstand-

ing this new wrinkle (*id.* at 9a-11a). As a consequence, its holdings as to both state-law unconscionability and FAA preemption govern all future cases in the Ninth Circuit involving ATTM's 2006 provision and its functionally identical 2009 successor. In these circumstances, there is no lingering issue of state law to be decided. As the case comes to this Court, that issue is definitively resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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