No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,
v.
VINCENT AND LIZA CONCEPCION,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioner before this Court in favor of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations collectively employing approximately twenty million people. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices.

EEAC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based litigation.

A three-judge panel of the Ninth Circuit below, applying California state law, refused to enforce a consumer arbitration agreement containing a class action waiver provision, concluding that bans on class-wide arbitration are both substantively and

procedurally unconscionable. Although the agreement containing the challenged class action waiver provision arose in the consumer context, the Court's ruling also potentially could influence the use of mandatory arbitration agreements generally, and class action waivers specifically, in the employment arbitration context.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Serv. Corp.,* 525 U.S. 70 (1999); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza v. Pyett*, __ U.S. __, 129 S. Ct. 1456 (2009); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010); and *Rent-A-Center, West, Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772 (2010). EEAC thus is quite familiar with the issues presented in this case and is well-situated to brief the Court on the significant importance of the issues beyond the immediate concerns of the parties to the case.

SUMMARY OF ARGUMENT

This Court repeatedly has emphasized that a principal aim of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, is to construe private arbitration agreements in accordance with the parties' desires and expectations. "The FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57 (1995). To the

contrary, courts are to "rigorously enforce agreements to arbitrate . . . in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("as with any other contract, the parties' intentions control").

Thus, where the parties to an arbitration agreement have expressly waived the availability of certain procedures, such as class-wide arbitration, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citation omitted). The Ninth Circuit in the decision below impermissibly refused to do so.

Even more troubling, and despite the Ninth Circuit's claims to the contrary, the decision below endorses a California state policy that holds private agreements to arbitrate to a higher standard of enforceability than is generally applicable to other private contracts, in direct contravention of the FAA. This Court has held that such a state law, whether statutorily or judicially created, is incompatible with, and therefore is preempted by, the FAA. *See Southland Corp. v. Keating,* 465 U.S. 1 (1984); *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681 (1996).

The California public policy expressed in the decision below, which in effect establishes an across-the-board ban on class arbitration waivers, also undermines most, if not all, of the practical benefits that inure to employers and employees alike by agreeing

to arbitrate workplace disputes. Not only does it impose the very cost burdens and procedural complexities that both employers and employees, by agreeing to arbitrate, sought to avoid, but it also undermines uniform application of multistate employers' ADR procedures. The prospect of having to litigate, from state to state, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, which benefits not only them but also their employees. It also significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

ARGUMENT

I. THE DECISION BELOW SHOULD BE REVERSED BECAUSE IT IMPERMISSIBLY CONFLICTS WITH, AND THEREFORE IS PREEMPTED BY, THE FAA

A. The Strong Federal Policy Supporting Arbitration Requires That Agreements To Arbitrate Be Enforced In Accordance With Their Terms

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "declares as a matter of federal law 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.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). This language "is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As this Court recently observed in *Stolt-Nielsen S. A. v. AnimalFeeds Inter-*

national Corp., "[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." 130 S. Ct. 1758, 1773 (2010). The FAA thus "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, at 24-25 (footnote omitted).

Indeed, "'[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 625-26 (1985) (citation omitted). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted).

This Court repeatedly has reaffirmed the federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Randolph,* 531 U.S.

79 (2000). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer,* 500 U.S. at 26 (quoting *Moses H. Cone*, 460 U.S. at 24).

Section 4 of the FAA provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Upon determining that the agreement to arbitrate is valid and addresses the disputed claim, the FAA requires, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

In *Gilmer*, this Court held that an arbitration agreement that an individual signed as a condition of employment, in which he pledged to submit to arbitration any dispute that might arise out of his employment or the termination thereof, was enforceable under the FAA, so as to require him to arbitrate his claim that his employer engaged in age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* In so doing, the Court made clear that as a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (citations omitted).

B. The Availability Of Class Arbitration Procedures Generally Can Be Waived By The Parties To A Valid Arbitration Agreement

Parties to arbitration agreements often agree to streamlined procedural mechanisms that do not allow for claims to be brought on a class-wide basis. As this Court observed in *Gilmer,* "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. at 1469 ("The decision to resolve . . . claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace . . . discrimination; it waives only the right to seek relief from a court in the first instance").

The ability to bring a class action is one of the procedural rights that can be waived in a valid arbitration agreement. As the Seventh Circuit has observed:

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

Champ v. Siegel Trading Co., 55 F.3d 269, 276 (7th Cir. 1995) (citations omitted); *see also Stolt-Nielsen*, 130 S. Ct. at 1775 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," noting that "the relative benefits of class-action arbitration are much less assured . . .").

C. The Decision Below, Which Imposes Significantly More Stringent Standards Regarding The Enforceability Of Mandatory Agreements To Arbitrate Than Are Required For Other Types Of Contracts, Directly Contravenes The Plain Language Of The FAA

This Court's longstanding precedent makes clear that no state may hold private agreements to arbitrate to a higher standard of enforceability than is generally applicable to other private contracts without running afoul of the FAA. *See Southland Corp. v. Keating,* 465 U.S. 1 (1984); *Perry v. Thomas,* 482 U.S. 483 (1987); *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681 (1996). Whether statutorily or judicially created, a state law that imposes greater burdens on the enforceability of mandatory agreements to arbitrate than apply to other types of contracts is incompatible with, and therefore is preempted by, the FAA.

In *Southland Corp. v. Keating*, for instance, this Court held that a state law requiring resolution by judicial forum of all applicable claims—and thus precluding the enforcement of valid mandatory arbitration agreements—impermissibly conflicts with, and is preempted by, Section 2 of the FAA, which provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It observed:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be a part of a written . . . contract "evidencing a transaction involving commerce" and such clauses may be

> revoked upon "grounds as exist at law or in equity for the revocation of any contract."

465 U.S. at 10-11 (footnote omitted).

The Court in *Southland* thus concluded, "[i]n enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10. It reaffirmed that principle in *Perry v. Thomas,* observing that:

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law.

482 U.S. at 492 n.9 (citations omitted).

Subsequently, in *Doctor's Associates, Inc. v. Casarotto*, this Court ruled that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." 517 U.S. at 687. There, the Court considered the validity of a Montana state law that imposed a special notice requirement for all contracts subject to arbitration. Because this special notice requirement applied only to agreements to arbitrate, and not "'any contract,'"

the Court concluded that the requirement "is thus inconsonant with, and is therefore preempted by, the federal law." *Id.* at 688.

In determining that the class action waiver contained in Respondents' consumer contracts was unconscionable and therefore unenforceable under California law, the court below relied on the Ninth Circuit's decision in *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), in which it first "decided the invalidity of an arbitration agreement banning class actions" under California law. Pet. App. 2a. In *Shroyer*, the Ninth Circuit interpreted the California Supreme Court's 2005 ruling in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), "as creating a three-part test to determine whether a class action waiver in a consumer contract is unconscionable": whether (1) the agreement is a contract of adhesion; (2) the dispute between the contracting parties is likely to involve "small amounts of damages"; and (3) the plaintiff has *alleged* (not proven) that the party "with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money." Pet. App. 7a.

The court below ultimately concluded that each prong of the *Discover Bank* unconscionability test was satisfied, although it did point out "that 'there are most certainly circumstances in which a class action waiver is unconscionable under California law despite the fact that all three parts of the *Discover Bank* test are not satisfied.'" Pet. App. 7a. It further determined, erroneously, that *Discover Bank's* unconscionability test is not expressly preempted by the FAA, because the test is one of general applica-

bility to all contracts, and the "FAA 'does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause.'" Pet. App. 12a.

Any characterization of the *Discover Bank* rule as one applicable to contracts in general is grossly inaccurate at best and, at worst, is plainly false. In fact, the *Discover Bank* rule is *not* one of *general* applicability, but rather is directed *specifically* at arbitration agreements. A recent analysis of cases decided by the California Court of Appeals involving unconscionability challenges bears this out. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (Fall 2006).

According to the results of the study, arbitration agreements challenged as unconscionable under California state law were invalidated by the courts 47% of the time, whereas only 11% of "ordinary" contracts were deemed unenforceable on that ground. Broome at 48. Thus, "[c]ontract terms, other than arbitration clauses, are rarely held to be unconscionable." *Id.* at 54. The study author therefore concludes that:

> [T]he standard for establishing unconscionability is more easily satisfied when the contractual term being challenged is an arbitration agreement. An empirical review reveals that unconscionability challenges succeed with far greater frequency when the disputed term is an arbitration provision. Through both empirical and substantive analysis, therefore, the cloak of the "generally applicable" contract defense of unconscionability is removed, and these unique

> standards and requirements are revealed for what they really are: manifestations of the California courts' ingrained bias against arbitration as an alternative to the judicial forum.

Id. at 66 (footnote omitted). The author goes on logically to conclude that the California courts' "current approach is preempted by the FAA." *Id.*

In holding the arbitration agreement in the instant case to a higher standard than applies to other types of contracts, the court below blatantly disregarded this Court's prior rulings prohibiting states from regulating such agreements beyond the bounds of the FAA. Accordingly, the decision below should be reversed.

II. A STATE BAN ON CLASS ACTION WAIVERS DEFEATS MOST, IF NOT ALL, OF THE ADVANTAGES AND MUTUAL BENEFITS OF ARBITRATION, ESPECIALLY IN THE EMPLOYMENT CONTEXT

A. Imposing Class Arbitration Even Where The Underlying Agreement Contains An Express Class Action Waiver Provision Fundamentally Would Alter The Expectations Of Both Employers And Employees By Imposing The Very Costs And Burdens Sought To Be Avoided By Forgoing Court Litigation

As this Court has observed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi,* 473 U.S. at 626-27. The outmoded hostility to arbitration agreements generally, and

those containing class action waivers specifically, is particularly misplaced in the employment context, where arbitration offers significant advantages to both employers and employees. Indeed, there are "real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* As one commentator has observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims,* 5 Cardozo J. Conflict Resol. 2 (2003). The significant financial benefits that employees derive from arbitration are likely to disappear altogether if they are forced to

submit to complex, class-based arbitration procedures, despite having agreed to waive such procedures.

Allowing an arbitration to proceed as a class action despite unambiguous contractual language to the contrary also would undermine the efficiencies of arbitrating workplace disputes. Unlike the typical arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend. Indeed, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775. As this Court pointed out last Term in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties . . . thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation.

Id.

Furthermore, the significantly higher costs and exposure posed by class actions creates enormous pressure to settle rather than run even a small risk of catastrophic loss. This increases greatly the potential for what some courts have called "judicial blackmail":

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added); *see also Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citing cases referring to the pressure on defendants to settle class actions as "judicial blackmail"). These issues are even more acute in the context of arbitration, which by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Permitting class arbitration where the parties have agreed not to do so thus would defeat one of the most mutually advantageous purposes of arbitration—lower-cost resolution of disputes.

B. State Policies That Place Greater Restrictions On Agreements To Arbitrate Than Exist For Other Contracts Undermine Employers' Efforts To Develop And Enforce Uniform ADR Procedures

The court below, along with most California state courts and some other federal courts applying California law, continue to subject mandatory arbitration agreements generally—and those containing class action waiver provisions specifically—to higher enforceability standards than are imposed upon other types of contracts. Multistate employers thus are faced with the real possibility that their alternative dispute resolution programs will not be enforced uniformly for all of their employees. Indeed, employers are all but assured that arbitration agreements containing class action waivers, while valid in most other states, will be deemed unenforceable in California.

The prospect of having to litigate, from state to state, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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