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 OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Counsel for Amicus Curiae

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse
President
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Tel.: (617) 695-3660
benrobbins@nelfonline.org
August 9, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views and the views of its supporters on whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), should preempt a state court's rule of decision that effectively creates a blanket *per se* rule invalidating consumer arbitration agreements that are limited to individual arbitration, when generally applicable state contract law requires careful consideration of all of the terms of the specific arbitration agreement at issue.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that 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 its preparation or submission. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, amicus notes that on June 17 and June 21, 2010, counsel for petitioner and counsel for respondents respectively filed a blanket consent to the filing of amicus curiae briefs, in support of either or neither party.

and small businesses from all parts of New England and the United States.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to New England's business community.[2] This is such a case, and NELF believes that this brief provides an additional perspective to aid the Court in deciding the issue presented within.

SUMMARY OF ARGUMENT

The FAA requires courts to treat arbitration agreements on an equal footing with all other contracts and bars courts from singling out arbitration agreements for suspect status. Contrary to this clear statutory mandate, the Ninth Circuit in this case has

---

[2] *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

enforced a rule of decision created by the California Supreme Court in *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005), that singles out class arbitration waivers in consumer arbitration agreements and effectively invalidates them *per se*. This special rule, applicable only to certain arbitration agreements, is a drastic departure from general California contract law, which requires careful consideration of all of the terms of an agreement--in this case the agreement to arbitrate on an individual basis only--to determine whether it is unconscionable.

While the Ninth Circuit acknowledged that the agreement at issue between the petitioner AT&T Mobility LLC ("ATTM") and the respondents contained many consumer-friendly terms that allowed for the vindication of small, individual claims, the court nevertheless dismissed these otherwise dispositive facts as inconsequential under *Discover Bank*. Instead, the court focused narrowly and exclusively on the fact that the claims at issue were small-value consumer claims as a basis for determining unconscionability. In so doing, the court deviated markedly from general California contract law, and its decision should be reversed under the FAA.

The *Discover Bank* rule applied by the Ninth Circuit also has broader, more damaging

implications. While in this case the Ninth Circuit's invalidation of ATTM's waiver would apparently also invalidate the entire arbitration agreement under the contract's nonseverability clause, the Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), would likely compel the same result with respect to *any* arbitration agreement with an invalidated class waiver, whether or not the agreement contained a nonseverability clause. The implications of *Stolt-Nielsen* in this case are therefore sweeping. If allowed to stand, the Ninth Circuit's decision and the *Discover Bank* rule could have the effect, in California at least, of invalidating, in its entirety, virtually every consumer arbitration agreement containing a class action waiver.

Finally, the Ninth Circuit's decision should be reversed because the *per se* rule of unconscionability that it applies may actually harm consumers. Simply put, the lower court's application of the *Discover Bank* rule may well discourage businesses from continuing to offer low-cost and efficient procedures for resolving disputes as an alternative to traditional litigation.

ARGUMENT

I. The FAA should preempt state law when it singles out consumer arbitration agreements and *per se* invalidates them when they bar class arbitration.

At issue in this case is the validity, under the FAA, of the Ninth's Circuit's application of a state rule of decision that transforms the general contract defense of unconscionability from an inquiry into the particular terms of an agreement into a rigid *per se* rule when applied to consumer arbitration agreements. The necessary starting point in resolving this issue is Congress's intent. Section 2 of the FAA requires courts to enforce arbitration agreements according to their terms, "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). As this Court has recently explained,

> The FAA . . . places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms . . . Like other contracts, however, they may be invalidated by *generally applicable contract defenses*, such as fraud, duress, or unconscionability.

Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (internal citations and quotations omitted) (emphasis added).

It follows from these principles that the FAA preempts any state law that singles out arbitration agreements for suspect status. *See Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The essential inquiry under the Court's precedents is whether the challenged state law, in this case a judicial rule of decision, imposes burdens on arbitration agreements that do not apply to contracts generally. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687; *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

In this light, the Ninth Circuit's decision invalidating ATTM's class action waiver should be reversed because it rests on its application of a special rule invalidating class action waivers in consumer arbitration agreements that the California Supreme Court announced in *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005). In that case, the California Supreme Court held that a class action waiver in a consumer arbitration agreement is unconscionable as a matter of law if it is contained within a "consumer contract of adhesion," if the claim is of a kind that "predictably involve[s] small amounts of damages," and "when it is alleged that the

party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money[.]" *Discover Bank*, 113 P.3d at 1110.[3] The Ninth Circuit in this case applied the *Discover Bank* rule to invalidate ATTM's class action waiver and deny ATTM's motion to compel arbitration. *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 854-55, 859 (9th Cir. 2009).

The *Discover Bank* rule applied by the Ninth Circuit in this case offends the FAA for many reasons. First, the rule does not apply to "any contract," as required by § 2 of the FAA, but instead applies only to consumer contracts containing class action waivers, which occur almost exclusively in mandatory arbitration provisions.[4] For this reason alone, the FAA

---

[3] California broadly defines a contract of adhesion as any unilateral, "take-it-or-leave-it" contract, in which "the party of superior bargaining strength[] relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Discover Bank v. Super. Ct.*, 113 P.3d at 1108 (internal quotations and citations omitted). *See also Szetela v. Discover Bank*, 118 Cal.Rptr.2d 862, 867 (Cal. Ct. App. 2002) ("When the weaker party is presented the [contract] and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present.") Accordingly, every consumer form contract in California would automatically satisfy the first prong of the *Discover Bank* rule.

[4] While the *Discover Bank* test could theoretically apply to a contractual waiver of the right to bring a class action

should invalidate the *Discover Bank* rule and require reversal of the decision below.

But, the *Discover Bank* rule offends the FAA even further because it operates to invalidate class action waivers in consumer arbitration agreements on a *per se* basis, thereby treating them differently from any other contract term that has been attacked as unconscionable.[5] *Discover Bank* creates an

---

litigation, the FAA should still preempt the rule because it would not apply to contracts generally, as required by § 2 of the FAA ("save upon such grounds as exist . . . for the revocation of *any* contract") (emphasis added). *See also Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 724-25 (4th Cir. 1990) (FAA preempts state franchise law voiding contract term denying dealers access to "procedures, forums or remedies" under state law, even though statute silent on arbitration and could apply to non-arbitration contract provisions such as forum selection clauses). In any event, class action waivers occur almost exclusively in arbitration agreements and rarely arise in the litigation context. *See Bonanno v. Quizno's Franchise Co., LLC*, 2009 WL 1068744, at *12 (D. Colo. Apr. 20, 2009) (in dispute arising under franchise agreement with class litigation waiver, noting only one other case involving class action waiver outside arbitration context).

[5] Furthermore, as is discussed below, this Court's recent holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), indicates that a decision invalidating the class waiver also invalidates the entire arbitration provision, at least with respect to class claims.

irrebuttable presumption that a class action waiver in a consumer form contract functions as an unlawful exculpatory clause (and is therefore unconscionable) if the plaintiff merely shows that the claims are predictably small, and if she merely *alleges* that the business defendant has engaged in a scheme to wrongfully deprive large numbers of consumers of individually small sums of money. *See Laster v. AT & T Mobility*, 584 F.3d at 856; *Discover Bank*, 113 P.3d at 1110. In short, the *Discover Bank* standard, which drives the Ninth Circuit's decision, creates a *per se* rule that class arbitration waivers in most consumer form agreements in California are unconscionable. But this is precisely what the FAA does not permit.

To the contrary, the FAA's mandate is that only "generally applicable contract defenses" can operate to invalidate an arbitration agreement. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. at 2776. But clearly this *per se* rule against consumer class action waivers departs markedly from general California law of unconscionability. Unlike the rigid *Discover Bank* rule, the generally applicable unconscionability standard involves a "sliding scale" approach, under which courts weigh varying degrees of procedural and substantive factors to determine a particular contract's overall fairness at the time of its formation. *See Armendariz v. Found. Health*

Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); Cal. Civ. Code § 1670.5(A) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable *at the time it was made*[,] the court may refuse to enforce the contract.") (emphasis added). In short, the Ninth Circuit's application of the *Discover Bank* rule violates the FAA because it creates a special, *per se* rule of unconscionability that targets class action waiver provisions in consumer arbitration agreements, thus deviating markedly from the general California law of unconscionability, which considers all of the terms of a particular agreement in determining its overall fairness at the time of contract formation.

For these reasons, it is clear that the FAA should have precluded the Ninth Circuit's application of the *Discover Bank* rule and should now require reversal of the lower court's decision. As the Ninth Circuit expressly acknowledged, AT & T's agreement allows for the vindication of individual claims: "The [agreement] does essentially guarantee that the company will make any aggrieved customer whole who files a claim[.]" *Laster*, 584 F.3d at 856 n.9. The court also acknowledged the agreement's many generous terms designed to facilitate the speedy and inexpensive resolution

of claims. *Id.*, 584 F.3d at 855-56.[6]

But, rather than complying with the general California law of unconscionability, which would have required consideration of the overall fairness of the agreement's terms, the Ninth Circuit instead dismissed them as inconsequential under *Discover Bank*. The court instead focused narrowly and exclusively on the fact that the claims at issue were small-value consumer claims as a basis for determining unconscionability. *Id.* at 856 & nn. 8-9. In so doing, the court departed drastically from the general California law of

---

[6] As ATTM has pointed out, on page 1 of Brief for Petitioner, one veteran federal judge has noted that ATTM's agreement "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski v. AT & T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D.Cal. June 18, 2009) (rejecting unconscionability challenge to same agreement and compelling arbitration). Specifically, the arbitration provision requires ATTM to pay all arbitration fees for non-frivolous claims, authorizes the arbitrator to award punitive damages and injunctions, and requires a minimum award of $7,500 and double attorney's fees if the arbitral award exceeds ATTM's last written settlement offer. *Laster v. AT & T Mobility, LLC*, 584 F.3d at 853, 856 n.10. The agreement also provides for arbitration in the customer's home county, allows the customer to choose between in-person, phone, and desk arbitration, and disclaims any right ATTM may have had to pursue attorney's fees from a customer. *Id.*, at 856 n.10.

unconscionability and treated an arbitration clause differently from "any contract," in violation of § 2 of the FAA.

Finally, it should be noted that, while in this case the Ninth Circuit's invalidation of ATTM's waiver would apparently also invalidate the entire arbitration agreement, pursuant to the contract's nonseverability clause,[7] the Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), would likely compel the same result with respect to *any* arbitration agreement with an invalidated class waiver, whether or not the agreement contained a nonseverability clause. In *Stolt-Nielsen*, the Court, applying the bedrock principle that arbitration is entirely a matter of the parties' consent, held that the FAA precludes compelling a party to submit to class arbitration "unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S. Ct. at 1764 (emphasis in original). A class action waiver evinces the drafting party's clear intent that it has not agreed to and in fact has opposed class arbitration.[8] Therefore, under *Stolt-Nielsen*, a

---

[7] The nonseverability clause in ATTM's agreement is reproduced on page 61A of the appendix to ATTM's Petition for a Writ of Certiorari, at ¶ 6.

[8] There should be no question that a business's clear intent not to consent to class arbitration, as expressed in

party that has included a class action waiver in its arbitration agreement cannot be compelled to submit to class arbitration.

However, when a court, as in this case, invalidates a class action waiver, it has concluded that individual parties to an agreement must be allowed to aggregate their claims. Since *Stolt-Nielsen* bars a court from ordering class arbitration where the parties have not agreed to it, individuals wishing to aggregate their claims must be allowed to do so in court. Thus, the upshot of invalidating the waiver must be invalidation of the entire arbitration agreement, at least with respect to parties wishing to aggregate their claims.

The implications of *Stolt-Nielsen* in this

---

a class action waiver, should survive a determination that the waiver is unconscionable. This is so because determining a party's contractual intent is separate and distinct from determining whether that intent is enforceable. *See Rent-A-Center, W., Inc. v. Jackson*, 2010 WL 2471058, at *4 n.1 (June 21, 2010) (discussing difference between contractual intent and validity for purposes of parties' delegation of "gateway" issues to arbitrator). *See also Fensterstock v. Educ. Fin. Partners*, 2010 WL 2729759, at *14 (2d Cir. July 12, 2010) ("Our conclusion that a given agreement is invalid and unenforceable does not mean that the parties in fact reached the opposite agreement."). In any event, *Stolt-Nielsen* clearly establishes that even contractual silence on the issue of class arbitration is insufficient to establish a party's consent to class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1776-77.

case are therefore sweeping. Since the *Discover Bank* rule and the Ninth Circuit's decision amount to a *per se* prohibition on class action waivers in consumer arbitration agreements, a decision by this Court upholding the Ninth Circuit's application of that rule could have the effect, in California at least, of allowing all California consumers who seek class certification to avoid arbitration agreements altogether and bring class actions in court. Congress simply could not have intended any such wholesale undermining of arbitration agreements under the FAA. Quite to the contrary, "the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal quotations and citations omitted). Accordingly, the Ninth Circuit's decision, and the California Supreme Court's *Discover Bank* rule upon which the Ninth Circuit's decision is based, should be reversed as in violation of the FAA.

II. If allowed to stand, the Ninth Circuit's decision could harm consumers by discouraging businesses from offering generous arbitration provisions designed to ensure the inexpensive and convenient resolution of individual claims.

The Ninth Circuit's decision not only offends the FAA but it may also harm consumers by discouraging businesses from offering the type of consumer-friendly terms contained in the agreement in this case, thereby depriving consumers of an inexpensive and convenient procedure for the resolution of small claims. As ATTM has explained in its brief, "[it] has revised its arbitration provision over time in order to make bilateral [i.e., individual] arbitration a realistic and effective dispute-resolution mechanism for consumers." Brief for Petitioner, at 5. The evolution of ATTM's arbitration agreements illustrates how a business that seeks to limit arbitration to individual claims has provided, as a *quid pro quo* for this limitation, a number of generous terms to encourage and ensure the prompt and informal resolution of disputes. Consumers clearly benefit from the fruits of this contractual arrangement—a streamlined and virtually free procedure for the resolution of individual claims that dispenses with the formalities, costs, and delays typical of the

judicial forum. An agreement such as ATTM's embodies the virtues of arbitration long recognized by this Court, namely an alternative forum "[for] obtaining a prompt and inexpensive resolution of [parties'] disputes . . . ." *Nolde Bros., Inc. v. Local No. 358, Bakery and Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 254 (1977).

Indeed, given ATTM's likely goal of ensuring the practical and inexpensive resolution of individual claims, it is not surprising that ATTM's arbitration agreement provides terms that are above and beyond what is minimally required under California unconscionability law. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000) (specifying "certain minimum requirements" to avoid unconscionability as including "neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration"). For example, as discussed in n.6 above, ATTM's agreement provides that the company will assume all arbitration costs and fees for non-frivolous claims. *Laster v. AT & T Mobility LLC*, 584 F.3d at 856 n.10. This term is not necessarily required under California law. Indeed, one California court has upheld an arbitration agreement imposing "the entire cost of the arbitration, including legal fees" on the losing

party. *Lagatree v. Luce, Forward, Hamilton & Scripps*, 88 Cal.Rptr.2d 664, 667, 683-87 (Cal. Ct. App. 1999) (rejecting employee's challenge to validity of employer's fee-allocation provision in arbitration agreement). Nor does California law require ATTM to include its $7,500 premium payment provision for failure to make a reasonable pre-arbitration settlement offer. *Laster*, 584 F.3d at 855-56. This provision creates a powerful and consumer-friendly incentive for ATTM to resolve claims promptly and informally, even before arbitration has begun.

It is also notable that, prior to the *Discover Bank* decision, California courts had upheld AT &T's consumer-friendly agreements with class waivers precisely because they ensured the vindication of individual claims:

> [T]he cost to the customer [in arbitration] is limited to $25 on claims under $1,000; AT & T will pay all other administrative costs and fees. . . . AT & T's subscribers are not deterred from seeking redress for small amounts . . . Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.

Bucy v. AT & T Wireless Servs., Inc., 2005 WL

1168371, at *6 (Cal. Ct. App. May 18, 2005) (enforcing consumer arbitration agreement with class action waiver). Significantly, the California Supreme Court issued its *Discover Bank* decision shortly after the California Appeals Court decided *Bucy v. AT & T*, quoted above. After remand by the California Supreme Court in light of *Discover Bank*, the California Appeals Court in *Bucy* reversed itself and held that the class waiver at issue was unconscionable. *Bucy v. AT & T Wireless Servs., Inc.*, 2005 WL 2404424, at *1 (Cal. Ct. App. Sep. 30, 2005).

If allowed to stand, however, the Ninth Circuit's decision would defeat this carefully crafted *quid pro quo* between consumers and businesses by effectively requiring businesses that wish to provide arbitration as a means of dispute resolution to agree to class arbitration in consumer arbitration agreements, at least in California. After all, the Ninth Circuit in this case, having viewed ATTM's agreement through the pinched and severe lens of *Discover Bank*, expressly disregarded the extent to which the numerous consumer-friendly terms in the agreement could minimize or outweigh the impact of the class waiver. Because these beneficial terms were likely intended to obviate the need for class arbitration by enhancing the procedures and remedies associated with individual claims, a *per se* ban on class waivers would, at the least, destroy the incentive for

businesses to provide such enhanced consumer-friendly terms in arbitration agreements. If in fact businesses do remove such terms from their consumer agreements, it is consumers, and not businesses, that will suffer. Consumers could lose many informal and convenient procedures for the resolution of their individual claims, a unique process that is neither required by law nor available in litigation.

In sum, a decision affirming the Ninth Circuit's application of *Discover Bank* may well sacrifice the interests of consumers and the virtues of arbitration for the sake of an abstract, *a priori* policy assumption that consumers must be allowed to aggregate their claims at all costs. Such a deleterious result would be inimical to the FAA's purpose of fostering arbitration as a practical and convenient tool for the resolution of disputes.

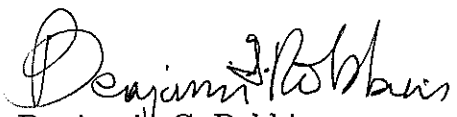
CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the Ninth Circuit's decision.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By their attorneys,



Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse,
President
New England Legal
Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

August 9, 2010