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 THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent individual plaintiffs in civil actions. AAJ is committed to the ideal of access to justice for the redress of grievances. It is concerned that the theory of preemption advanced by Petitioners and its *amici* would unjustifiably curtail state authority over contract law of general application, to the detriment of consumers.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has *never* held that a facially neutral state law that is non-discriminatory in purpose and effect may somehow nonetheless be impliedly preempted by the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA").[2] And for good reason. Congress enacted the FAA with the limited purpose of

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[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

[2] "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). It may, however, preempt state laws "to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

remedying the common law's intentional disparate treatment of arbitration. Section 2 of the Act realizes this aim through what is essentially an equal protection clause for arbitration requiring that "state laws hostile to arbitration" be invalidated. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). Section 2 exempts from preemption state actions based on "grounds [that] exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A state judicial decision that does not treat arbitration "in a manner different from that in which it otherwise construes nonarbitration agreements," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), or "singl[es] out arbitration provisions for suspect status," *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), is not discriminatory, and thus is not preempted by § 2.

Yet, in this case, Petitioner AT&T Mobility, LLC ("AT&T") asks this Court to depart from that settled understanding and conclude that a rule of California contract law, pursuant to which a class waiver in its arbitration agreement was found to be unconscionable, is preempted—even though the state law would prohibit a class waiver from being enforced in arbitration, *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), or court, *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001). AT&T ignores clear California precedent indicating that, but for its having drafted an arbitration clause dictating that the clause would "blow up" if its class action ban were unenforceable, California courts would have granted specific performance of the contractual agreement to arbitrate. The only thing California courts did not enforce was a ban on class actions.

AT&T contends that "even if nominally neutral," California law "predictably and inevitably will have a far greater impact on arbitration agreements" than on non-arbitration agreements. Pet. Br. 30. The reason the law may impact arbitration agreements barring class adjudication more often than non-arbitration agreements is that, pursuant to industry practice of including an arbitration clause in each cell phone contract of adhesion, there are few, if any, contractual disputes about the validity of the clause in litigation. The impact AT&T identifies does not, however, qualify as actionable discrimination under § 2.

ARGUMENT

I. Congress Enacted the FAA to Eradicate the Common Law's Purposeful Discrimination Against Arbitration, and to Place Arbitration on Equal Footing With Litigation.

There is a long, and well-documented, history of courts purposefully discriminating against arbitration and favoring litigation as a means of dispute resolution. *See Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 270 (1995); *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1009-10 (S.D.N.Y. 1915) (noting that courts had adopted the "singular view of juridical sanctity which reasons that, because the Legislature has made a court, therefore everybody must go to the court"). One account of the origins of this discrimination states that compensation for English judges was tied to the number of cases they heard, and allowing another form of dispute resolution to blossom would likely have led to less

work and less pay. *See Scott v. Avery*, 5 H.L. Cas. 811 (1856) (Campbell, L.J.); Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 Colum. L. Rev. 35, 44, 49 (1983); *but see Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 984 & n.16 (2d Cir. 1942) (stating that although "able historians have stressed this pecuniary motive as an important factor in the struggles for jurisdiction between the several English court," it may be "unjustified"). Another, more charitable account is that courts believed that it was against public policy to enforce pre-dispute arbitration agreements. *Kulukundis Shipping Co.*, 126 F.2d at 983.

Whatever the motivation, courts protected their role in dispensing justice and unfavorably treated arbitration as a second-class means of dispute resolution. The common-law rule against specific enforcement of arbitration agreements arose to render such agreements unenforceable so long as the non-breaching party revoked his or her promise to arbitrate prior to an award of damages. Although a non-breaching party could obtain damages for the breach, such damages typically were nominal. *See* 1 Ian R. Macneil, *et al.*, *Federal Arbitration Law* § 4.3.2.2, at 4:18 (Little, Brown 1999). The doctrine's application to bar specific performance of pre-dispute arbitration agreements—but not post-dispute arbitration agreements or arbitral awards, both of which also ousted the courts of jurisdiction—was said to evidence "judicial jealousy rather than judicial reasoning." *Park Constr. Co. v. Indep. Sch. Dist. No. 32, Carver County*, 296 N.W. 475, 477 (Minn. 1941).

Courts employed other means to disadvantage arbitration. For example, they would not stay a legal action pending a determination of arbitrability. *See Hurst v. Litchfield*, 12 Tiffany 377, 379 (N.Y. 1868). Nor would courts permit a pre-dispute arbitration agreement to operate as a complete bar to an action at law. *See U.S. Asphalt Ref. Co.*, 222 F. at 1010.

As this Court has observed, "American courts initially followed English practice, perhaps just stand[ing] . . . upon the antiquity of the rule prohibiting arbitration clause enforcement, rather than upon its excellence or reason." *Allied-Bruce*, 513 U.S. at 270 (alteration in original; quotation marks omitted). But the English practice was not without its American detractors. *See* H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924) (recognizing that American courts had "frequently criticised the rule [against specific enforcement] and recognized its illogical nature and the injustice which results from it").

Congress responded in 1925 by enacting the FAA. The Act, "first and foremost," seeks to end the prevalence of "antiarbitration rule[s]" in American law, *Allied-Bruce*, 513 U.S. at 270-71 (citation omitted), such as the common-law rule against specific performance of arbitration agreements, *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part) (citing S. Rep. No. 536, 68th Cong., 1st Sess., 2-3 (1924)); and it seeks to place agreements to arbitrate and other contracts on equal footing, *see Volt Info. Scis, Inc.*, 489 U.S. at 474; *accord Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).

Section 2, the FAA's "centerpiece," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), embodies this non-discrimination principle and is best understood as an equal protection clause for arbitration. *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1955 & n.171 (2003). It requires that an arbitration agreement "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. Accordingly, "States may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce*, 513 U.S. at 281.

II. State Laws That Purposefully Discriminate Against Arbitration Are Preempted.

Consistent with this anti-discrimination principle, the Court has repeatedly held that state laws that discriminate against arbitration are preempted. It has otherwise *never* held that § 2 preempts a facially neutral state law that is non-discriminatory in purpose and effect.

Thus, for instance, in *Perry*, 482 U.S. at 484, this Court held that § 2 preempts a state law exempting wage-and-hour claims from "any private agreement to arbitrate." Invoking the FAA's non-discrimination paradigm, it explained that state law may neither treat an arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements," nor "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding." *Id.* at 492 n.9.

In *Southland Corp.*, 465 U.S. at 16, the Court held that § 2 preempted a provision of California Franchise Investment Law requiring judicial consideration of claims brought under the statute and precluding enforceability of a contract to arbitrate. The law at issue did not apply to contracts generally but purposefully singled out the arbitral process for disfavor by seeking to lodge exclusive jurisdiction in the courts over claims asserted under the Franchise Investment Law. *See id.* at 5; *see also Preston v. Ferrer*, 552 U.S. 346, 356, 358 (2008) (reaffirming that state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA).

In *Casarotto*, 517 U.S. at 681, the Court concluded that § 2 preempted a state law requiring that, absent a conspicuous notice of an arbitration clause on the first page of the contract, the contract was not arbitrable. Borrowing language from equal protection doctrine, the Court reasoned that States could not, consistent with § 2, "singl[e] out arbitration provisions for suspect status." *Id.* at 687.

Lastly, in *Allied-Bruce*, 513 U.S. at 269, the Court invalidated a state law "making written, predispute arbitration agreements" unenforceable, because the state law exhibited the type of "judicial hostility to arbitration agreements" that § 2 prohibits. *Id.* at 272.

III. California Law Does Not Purposefully Discriminate Against Arbitration and Thus Is Not Preempted.

This Court should hold, in view of § 2's "fundamental nondiscrimination principle," Pet. Br.

28, and the presumption against preemption, *see Southland Corp.*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part), that the FAA does not preempt California unconscionability law insofar as it declares unenforceable the class waiver in the arbitration agreement at issue here. That California law would invalidate a class waiver in arbitral (*Discover Bank*, 113 P.3d at 1110) *and* judicial forums (*America Online*, 108 Cal. Rptr. 2d 699) demonstrates conclusively that the state law does not discriminate against arbitration in the sense contemplated by § 2.[3] "The arbitration clause [at issue here] is irrelevant to the unconscionability" of the class waiver. *See Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) (holding that FAA does not preempt Washington law deeming unenforceable certain class waivers in arbitration contracts). Instead, the state-law rule of unconscionability is concerned with "the vindication of substantive rights." *Discover Bank*, 113 P.3d at 1109. For these reasons, California law does not "singl[e] out arbitration provisions for suspect status," *Casarotto*, 517 U.S. at 687; nor does it treat

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[3] California law does not purposefully discriminate against arbitration, the standard under equal protection doctrine, *see Washington v. Davis*, 426 U.S. 229 (1976), to which Section 2 preemption doctrine is best analogized; nor is its impact discriminatory in the sense contemplated by civil rights laws, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Not "all class action waivers are necessarily unconscionable" under California law. *Discover Bank*, 113 P.3d at 1110. In fact, courts applying California law have found class-action bans not to be exculpatory in certain contexts. *E.g., Walnut Producers of Calif. v. Diamond Foods, Inc.*, 114 Cal. Rptr. 3d 449, 460-62 (Cal. Ct. App. 2010); *Dalie v. Pulte Home Corp.*, 636 F. Supp. 2d 1025, 1027 (E.D. Cal. 2009). The reasons why AT&T's class-action ban is exculpatory are set forth in Respondents' Brief at 3-4, 39-44.

AT&T's arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements," *Perry*, 482 U.S. at 492 n.9; and thus it is not preempted. In fact, in this case, the only reason the unconscionable class ban was not severed and the parties were not ordered to arbitrate is the agreement contains a "blowup clause." *See* App. 61a (requiring that in the event the class waiver is found to be unenforceable, the entire arbitration provision "shall be null and void"); *see, e.g.*, *Indep. Ass'n of Mailbox Center Owners, Inc. v. Superior Court*, 34 Cal. Rptr. 3d 659, 676 (Cal. Ct. App. 2005) (severing unconscionable class ban and compelling arbitration under the remaining contract).

In response, AT&T contends that "even if nominally neutral," California law "predictably and inevitably will have a far greater impact on arbitration agreements" than on non-arbitration agreements. Pet. Br. 30. The law may impact arbitration agreements barring class adjudication more often than non-arbitration agreements because the industry's practice is to include an arbitration clause in each cell phone contract of adhesion. That impact, however, does not qualify as actionable discrimination under § 2.

What is more, it would be improper to credit such an impact in determining whether the state law applies to "any contract" in the sense contemplated by § 2. Were that a relevant consideration, an industry could easily avoid compliance with facially neutral state laws lacking a discriminatory purpose or effect by banding together and adding an arbitration clause to all contracts and then claiming such state laws apply more often to arbitration

contracts than any other type of contract. Section 2 would then, in effect, "make arbitration agreements [not] as enforceable as other contracts, but [] more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). That was not what Congress intended when it preserved state-law grounds for revocation applicable to "any contract." Instead, it intended to place agreements enforceable in arbitration or courts on equal footing. California law is neutral in this regard and thus is not preempted.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief of the American Association for Justice as *Amicus Curiae* in Support of Respondents contains 2,434 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

October 6, 2010.

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CERTIFICATE OF SERVICE

I, Andre M. Mura, a member of the Bar of this Court, hereby certify that on this 6th day of October 2010, three copies of the Brief of the American Association for Justice as *Amicus Curiae* in Support of Respondents in the above-styled case were sent via Federal Express for overnight delivery to each counsel listed below. I further certify that all parties required to be served have been served.

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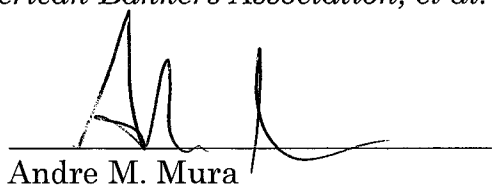

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