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 JONATHAN C. KALTWASSER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS[1]

Jonathan C. Kaltwasser is the class representative in *Kaltwasser v. Cingular Wireless*, LLC, 2009 WL 3157688 (9th Cir. Oct. 01, 2009), which was joined for purposes of oral argument below with the instant case. Undersigned counsel argued Kaltwasser's suit in the consolidated oral arguments before the Ninth Circuit. Kaltwasser represents a class of consumers that includes persons with the same form of AT&T Moblility, Inc. ("ATTM") contract as the one at issue in this appeal. Thus, the legal issues raised in the instant suit are similarly applicable to Kaltwasser's suit. Given Kaltwasser's personal and representative stake in the outcome of this case, he has a strong interest in the Court affirming the Ninth Circuit.

SUMMARY OF THE ARGUMENT

ATTM urges this Court to find that the Federal Arbitration Act ("FAA") preempts the lower court's rulings. However, in making its preemption arguments, ATTM incorrectly presumes that the Ninth Circuit (and the District Court) determined that ATTM's class action waiver was *per se*

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no person or entity other than amicus curiae and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No counsel for a party authored this brief in whole or in part. The parties have consented to the filing of this brief.

unconscionable, invalidated ATTM's arbitration clause on that basis, and therefore discriminated against arbitration which the FAA was designed to prevent. In fact, the lower courts did none of these things. The Ninth Circuit (and the District Court) actually made very limited rulings. Specifically, the lower courts found the unrelated class action waiver unconscionable in this specific case based on generally applicable contract law. In doing so, the lower courts articulated no *per se* rules concerning class action waivers and unconscionability. They instead proceeded through an individualized analysis of the case, paying special attention to the particulars of this agreement, including ATTM's "favorable" arbitration "premiums." The District Court examined the specific terms of the arbitration agreement, in turn, praising portions of it along the way, in an effort to uphold the agreement. In the end, the lower courts found that in the context of this case ATTMs "premiums" were largely illusory and found they did not transform a small claim (usually less than $30) into one that was reasonably feasible for an individual to bring, even in an arbitration.

The lower courts then struck the arbitration clause only because ATTM put a specific provision in its agreement that mandated that the entire arbitration clause was to be deemed void if the class action waiver was voided (hereafter referred to as the "self-destruct" clause). California law is clear that in absence of ATTM's self-destruct clause the agreement to arbitrate would have been enforced just without the unconscionable class action waiver.

This means the lower courts enforced the provisions at issue that address what the FAA is designed to protect – the parties ability to agree to arbitrate or not. That the lower courts found unconscionable an unrelated class action

waiver provision does not run afoul of the FAA's central purpose.

The FAA is an anti-discrimination statute that requires courts to assure equal enforcement of arbitration agreements as that afforded any other contract between the parties. The FAA did not federalize contract law, which its express savings clause for state contract laws of general applicability in Section 2 makes clear. Rather, the FAA set a federal policy of placing arbitration agreements on par with other contracts. The statute was intended to fit arbitration agreements into state contract law. Its purpose was not to preclude enforcement of state law contractual rights if they are drafted inside the heading "Arbitration Agreement" as ATTM urges.

The FAA instead protects the rights of parties to submit disputes to arbitration rather than litigation. Its scope therefore only concerns the question of whether to arbitrate or not to arbitrate. Because the Ninth Circuit's opinion did not discriminate against the parties' legitimate choice to arbitrate or not to arbitrate, the decision should be affirmed.

ATTM's attempt to tie the class action waiver to the agreement to arbitrate by its self-destruct

clause does not transform an otherwise unrelated provision into one the FAA is designed to protect. If it did, then all a party would need to do is tie any right or covenant within the agreement to the agreement to arbitrate to secure FAA protection of that term and to take it out of the realm of state unconscionability and other state contract laws of general applicability. Such would render the FAA's express savings

clause in Section 2 preserving generally applicable state contract laws nothing more than a nullity, which is clearly contrary to the FAA's express purpose.

ATTM further attempts to color this case by incorrectly claiming that California's generally applicable unconscionability law with respect to class action waivers is out of step with other states and creates an effective ban on class action waivers. However, none of these things are so.

In fact, California has no categorical rule prohibiting class action waivers in contracts; only in cases where the waiver serves as an exculpatory clause is the waiver void due to unconscionability. The vast majority of state courts, and federal courts applying state law, have under rules similar to California's found certain provisions within arbitration agreements, such as class action waivers, to be unconscionable.

Further, the lower courts simply held that a term involving a class action waiver in the dispute between Concepcion and ATTM was unconscionable.

It passed no judgment on the arbitration agreement and made no *per se* rule that the class action waiver was unconscionable in all instances. Indeed, California courts have upheld class action waivers under different facts, and would presumably have done so if the facts of Concepcion's case were different. The only reason the entire arbitration agreement was invalidated here was the self-destruct clause ATTM placed within the agreement. Since ATTM required in its contract that the arbitration agreement not be enforced if the class action waiver was found unconscionable, it cannot lay the blame for lack of enforcement of its arbitration agreement on judicial animus towards arbitration.

Nor should ATTM's attempt to discount the class action right as merely procedural be accepted. Indeed, ATTM incorrectly made this a predicate of the certified question it posed to this Court. In fact, California statutes make the right to bring a class action a substantive right. Likewise, California public policy treats the right to bring a dispute as a class action as an important right.

When ATTM's incorrect premises are cast aside and the actual facts, law and application thereof by the courts below are considered, neither the Ninth Circuit nor the District Court ran afoul of the FAA. They instead acted in accord with the purpose of the FAA and properly applied generally applicable state contract law as the FAA expressly permits. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. THE NINTH CIRCUIT DID NOT INVALIDATE ATTM'S ARBITRATION AGREEMENT OR VOID ITS CLASS ACTION WAIVER IN ALL INSTANCES AS ATTM ARGUES.

ATTM posits its preemption arguments as if the Ninth Circuit (and the District Court) determined ATTM's class action waiver was *per se* unconscionable, invalidated ATTM's arbitration clause on that basis, and therefore discriminated against arbitration which the FAA was designed to prevent. In fact, the lower courts did none of these things.

First, the Ninth Circuit held that under the particular circumstances in the case at bar the class action waiver was unconscionable. The chief consideration of the Ninth Circuit in reaching this conclusion was that Concepcion's claim was for $30.00, that ATTM's alleged "favorable terms" for individual arbitration were not sufficient to make a $30.00 claim reasonably feasible for an individual to bring, and therefore in that specific context the class action waiver was unconscionable. In so holding, the Ninth Circuit did not invalidate the class action waiver for all purposes as ATTM intimates. Rather, it merely applied generally applicable principles of

unconscionability under California law to the specific facts of the case presented. This is what the FAA's savings clause expressly preserves. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

Second, the Ninth Circuit struck the arbitration clause only because ATTM put a specific self-destruct clause in its agreement that mandated that the entire arbitration provision was to be deemed void if the class action waiver was voided. In short, the Ninth Circuit voided the arbitration provision because it was following the express terms of the agreement that ATTM wrote. Absent ATTM's "self-destruct" clause, the Ninth Circuit would have found the class action waiver unconscionable for Concepcion's particular case and sent the matter to arbitration for the arbitrator to determine if a class was certifiable in this instant case and to resolve the merits of Concepcion's claim. Indeed, that is precisely how the Ninth Circuit has handled unconscionable class action waivers with arbitration agreements that did not have ATTM's self-destruct clause. *See Gentry v. Superior Court of Los Angeles County*, 42 Cal.4th 443, 466 (2007)("Generally speaking, when an arbitration agreement contains a single term in violation of public policy, that term will be severed and the rest of the arbitration agreement enforced."); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000)(found unconscionable portion of arbitration agreement that did not provided minimum protections for unwaivable rights and enforced remainder of arbitration agreement).

ATTM's attempt to cast this case as one where the Ninth Circuit made a blanket prohibition of class action waivers and of arbitration is simply untrue. When viewed in the true light of what the Ninth Circuit actually did, it is abundantly clear that it not only followed applicable law, but it did not discriminate against arbitration, and instead actually favored arbitration by giving ATTM the benefit of every favorable inference for arbitration in its unconscionability analysis. Since the FAA was designed solely to prevent discrimination against the parties' right to agree to arbitrate, the Ninth Circuit's decision is not contrary to the FAA. Thus, there is no basis to find FAA preemption here since the Ninth Circuit's conduct is not contrary to the FAA.

A. The Ninth Circuit Narrowly Held The Class Action Waiver Was Unconscionable Under The Particular Circumstances Of The Case, And Merely Enforced The Agreement's Express Clause Requiring The Arbitration Provision Be Voided In That Event.

A close reading of the lower courts' opinions shows that the courts did not invalidate the arbitration agreement, much less discriminate against arbitration. Rather, ATTM had an agreement to arbitrate into which it inserted an unrelated class action waiver coupled with a self-destruct clause that expressly conditioned the validity of the entire arbitration agreement on the enforcement of the waiver. The lower courts found the unrelated class action waiver unconscionable in this specific case based on generally applicable contract law. The courts then enforced ATTM's self-destruct clause and voided the arbitration agreement. California law is clear that in the absence of ATTM's self-destruct clause the agreement to arbitrate would have been enforced just without the unconscionable class action waiver.

This means the lower courts enforced the only two provisions at issue that address what the FAA is designed to protect – the parties ability to agree to arbitrate or not. That the lower courts found unconscionable a third unrelated class action waiver provision does not run afoul of the FAA's central

purpose. ATTM's attempt to tie the class action waiver to the agreement to arbitrate by its self-destruct clause does not transform an otherwise unrelated provision into one the FAA is designed to protect. If it did, then all a party would need to do is tie any right or covenant within the agreement to the agreement to arbitrate to secure FAA protection of that term and to take it out of the realm of state unconscionability and other state contract laws of general applicability. Such would render the FAA's express savings clause a nullity and is clearly contrary to the FAA's express purpose.

1) The Agreement to Arbitrate

As a back drop, it must be noted that the agreement in question was a contract of adhesion, written by ATTM and presented to the consumers here without any opportunity for negotiation or amendment. *See Laster v. T-Mobile USA, Inc.,* 2008 WL 5216255 at *9 (S.D. Cal. 2008). This means ATTM was in full control of the provisions at issue.

Though ATTM placed several sections under the rubric "Arbitration Agreement," only the first section contains the three provisions at issue here. In that first section, only subsections 1-5 and 7 can properly be classified as being part of the agreement to arbitrate. Pet. Cert. 57a. Collectively, they comprise the first of the three provisions at issue – the agreement to arbitrate.

Subsection 1 of the Arbitration Agreement provides that claims between ATTM and the

consumer will be submitted to arbitration. *Id.* at 57a-58a. Subsection 2 provides the initial procedures for how either party must proceed in order to initiate arbitration, including relevant forms and contact information. *Id.* at 58a. Subsection 3 provides the organization through whom arbitration will be conducted and the procedures that will govern. *Id.* at 59a-60a. Subsection 4 describes the so-called "premium" payment provision, wherein if the consumer has a claim that is less than $7,500 and, after initiating and proceeding with a significant portion of the arbitration procedure but before choosing the arbitrator, ATTM makes a written offer that is less than the eventual arbitration award, ATTM will pay the consumer $7,500 and double attorneys' fees for the consumer's attorney. *Id.* at 60a-61a. Subsection 5 further clarifies the terms under which attorneys' fees may be recovered. Subsection 7 provides that the consumer may reject subsequent changes made to the arbitration agreement. *Id.* at 61a-62a. Subsections 1-5 and 7 combined properly comprise the entirety of the arbitration agreement.

2) <u>The Class Action Waiver Provision</u>

ATTM tacked Subsection 6 onto the Arbitration Agreement, but it actually cannot be said to be encompassed on agreement to arbitrate or not. The first part of Subsection 6 reads:

> (6) The arbitrator may award injunctive relief only in favor of the individual

> party seeking relief and only to the extent necessary to provide relief warranted by the party's individual claim. YOU AND CINGULAR AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and Cingular agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding…

Id. at 61a (emphasis in original).

This first portion of subsection 6 is a class action waiver provision. This waiver is separate and distinct from the arbitration agreement because it does not concern the forum in which the claim will be heard. An arbitration clause is merely a "subset" of forum selection clauses. See e.g. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 533, 534 (1995); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). The class action waiver is independent of the agreement to arbitrate, and instead represents the waiver of a substantive right that can easily remain in the arbitration context. A class action is not mutually exclusive of arbitration; the two can be combined quite easily. California has long promoted class arbitration. *see Keating v.*

Superior Court of Alameda County, 31 Cal.3d 584 (1982), reversed in part on other grounds sub nom. *Southland Corp. v. Keating*, 104 S.Ct. 852 (1984). Moreover, the AAA—the organization ATTM chose to conduct its arbitration—has guidelines and procedures that permit and govern class arbitrations. Available at: http://www.adr.org/sp.asp?id=21936.

Had this been the entirety of the arbitration clause, then the court would likely have proceeded as it did in *Armendariz*, 24 Cal.4th 83. In *Armendariz*, the court of appeals held that a provision that did not provide certain minimum protections for unwaivable rights in an employment arbitration agreement was unconscionable, so it severed the provision from the contract, but enforced the remainder of the arbitration agreement. *See also Fittante v. Palm Springs Motors, Inc.*, 105 Cal.App.4th 708 (2003) (court severed unconscionable appeals clause from the remainder of the arbitration agreement and compelled arbitration). As the California Supreme Court more recently acknowledged, "Generally speaking, when an arbitration agreement contains a single term in violation of public policy, that term will be severed and the rest of the arbitration agreement enforced." *Gentry*, 42 Cal.4th 443, 466.

3) <u>ATTM's Self-Destruct Clause</u>

The third provision that ATTM has tried to characterize as being part of the arbitration agreement, but in substance stands aside, is the statement that purports to invalidate the entire

arbitration agreement if the class action waiver is not enforced. The last sentence of subsection 6 reads:

> *If this specific proviso is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.*

Pet Cert 61a (emphasis added).

ATTM complains that the District Court discriminates against arbitration agreements, and as evidence of such discrimination it points to the District Court's invalidating the arbitration agreement in the instant case. However, the District Court here was doing little more than honoring the language of the contract that ATTM wrote, which required nullification of the entire arbitration provision if the class action waiver provision was unenforceable.

ATTM's inclusion of this self-destruct clause shows it suspected that in certain instances its class action waiver would be found unconscionable, and it chose to condition the enforcement of the arbitration agreement on whether or not the proviso was enforced. Through the insertion of this provision, ATTM has placed the courts in an untenable position. Had the District Court enforced the arbitration agreement after finding the class action waiver unconscionable, ATTM would now be arguing that the District Court ignored the intent of the parties and is not enforcing the contract as written.

But for this clause in the contract, the Court's holding would not have necessitated the invalidation of the entire arbitration clause. The court's holding was merely that in the specific context of the Concepcions' small-dollar claim there must be included in this agreement a route that preserves the important benefits of class action arbitration or litigation. *Laster,* 2008 WL 5216255 at *14 (S.D. Cal. Aug. 11, 2008*).*

ATTM revised the arbitration agreement in an attempt to provide what it has argued is an adequate substitute to class action. The District Court and the Ninth Circuit considered the revised arbitration agreement in its particulars and found that the class action waiver provision, as it operated in these circumstances, was unconscionable. ATTM foresaw this possibility and chose to foreclose all options other than bi-lateral arbitration through its weaving a class action waiver and self-destruct clause into its arbitration agreement. Contracts are a matter of choice and ATTM was entitled to opt for this all-or-nothing approach. But it is factually incorrect and highly

disingenuous for ATTM to force the court's hand through the explicit terms of the contract and then complain when the Court honors those selfsame terms.[2]

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[2] It is worth noting that had the self-destruct clause not been a part of the arbitration clause, class arbitration would not have been waived and the matter would have proceeded in arbitration, but that is not to say that the matter would have necessarily proceeded in arbitration as a class. An arbitrator, chosen according to the terms of the agreement, would have applied the American Arbitration Association's (AAA) class

B. Rather Than Discriminating Against Arbitration, The Ninth Circuit's Analysis Evinces A Favorable Disposition Towards Arbitration.

The District Court and Ninth Circuit's analyses of ATTM's contract illustrates a general preference for arbitration, rather than the discriminatory posture alleged by ATTM. The District Court did not hold that any class action waiver in an arbitration agreement is unconscionable. *See Laster v. T-Mobile USA*, Inc., 2008 WL 5216255 (S.D. Cal. 2008). The court articulated no *per se* rules concerning class action waivers and unconscionability. It instead proceeded through an individualized analysis of the case, paying special attention to the particulars of this agreement. The District Court examined the specific terms of the arbitration agreement, in turn, praising portions of it along the way, in an effort to uphold the agreement. *Id.* at *10-12.

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arbitration guidelines, which largely mirror those set forth in FRCP 23. Available at: http://www.adr.org/sp.asp?id=21936. Only if the arbitrator chosen by the parties found that all AAA class action requirements had been met would the dispute have proceeded in arbitration as a class.

1) The Lower Courts Considered ATTM's Purported Favorable Arbitration "Premiums" In Finding The Class Action Waiver Unconscionable In This Case.

The District Court began by examining the more generous revised arbitration agreement rather than the original agreement between the parties. *Id.* at *6-7. The Court found that the contract was one of adhesion, triggering a review of whether it was unconscionable on its face or as applied. The District Court applied the test for unconscionability under California law as addressed in *Discover Bank v. Superior Court of Los Angeles*, 36 Cal.4th 148, 162-3 (2005).

Discover Bank test addressed the California court's concern that in certain contracts of adhesion, between parties of vastly unequal bargaining positions, where the dispute concerned very little money, the party in the superior bargaining position could use a class action waiver as a *de facto* exculpatory clause and thereby circumvent longstanding California contract law. *Discover Bank* held that:

> when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve 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,…such waivers are unconscionable under California law and should not be enforced.

Id.

The *Discover Bank* rule does not outlaw class action waivers if the waiver provides for some "adequate substitute for the class action or arbitration mechanism," *Id.* at 162. ATTM claimed to have offered such an adequate substitute in the form of its "premium," wherein if a consumer proceeds through the entire course of arbitration and the ultimate arbitration award is greater than ATTM's last written offer prior to choosing the arbitrator, then the consumer receives $7,500 and the consumer's attorney receives double attorney fees. The District Court found to the contrary and the Ninth Circuit affirmed, holding that the "premiums" did not serve as an adequate substitute to class action or class arbitration. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855-56 (9th Cir. 2009). Though ATTM presents the "premium" as a guarantee that individuals' claims would be satisfied, the premium was not shown to be such or to serve the same important functions of class actions.

The steps the consumer is required to go through in order to be "eligible" for the premium are worth recounting in order to show the inadequacy of

the premium as a substitute for a class action or class arbitration, at least where the disputes involve low dollar amounts, such as the Concepcions', which amounted to less than $30.

First, the consumer must exhaust the options available through ATTM's customer service. Next, the consumer must send by certified mail a written Notice of Dispute to ATTM, detailing the nature of the dispute and the specific relief sought. Pet.Cert. 58a. If no agreement is reached between the consumer and ATTM within 30 days, then the consumer may commence arbitration by submitting her demand and advancing the filing fee to AAA. *Id.* (ATTM states that it will reimburse the consumer for the filing fee some time in the future, though there is nothing that details the time frame for reimbursement or whether interest is included. *Id.* at 58a-59a.). The consumer may hire counsel to aid her in the arbitration, in which case she will likely have to advance additional fees and costs. The consumer will be liable for her own attorneys' fees unless she ultimately wins in arbitration an amount greater than ATTM's last written offer.

Following the consumer's submission demanding arbitration, ATTM may submit its answering statement. This process of submissions and replies may repeat itself several times. Some time after all submissions have been made, an arbitrator will be chosen. *Id.*

After the consumer has proceeded through the entire arbitration submission process, ATTM may

make written offers, the last of which is to be measured against the arbitrator's ultimate award. If, after the consumer has devoted a significant amount of "time, effort and emotional resources to pursue arbitration," and advanced arbitration costs and attorneys' fees, ATTM makes a written offer for the full amount requested (often less than $30), then it is almost guaranteed that the $7,500 premium and double attorney fees will be foreclosed to the plaintiff. *Laster*, 2008 WL at *10. The "premium" then serves in no way as incentive for consumers with small claims to proceed with arbitration since it is easily avoided by ATTM's last minute offer. Nor does the "premium" address the important benefits that California courts have found are part of class action mechanisms.

2) The Lower Court's Determination That The Class Action Waiver Was Unconscionable In This Case Is In-Line With Longstanding Law On Similar Exculpatory Clauses.

The lower courts' analyses to determine whether the class action waiver amounted to an exculpatory clause was in line with longstanding California statutory and common law that disfavors exculpatory clauses. For more than a century, contract law in California has found exculpatory clauses void as against public policy when the public interest is implicated. *See, e.g., Gardner v. Downtown Porsche Audi*, 180 Cal.App.3d 713 (1986) (exculpatory clause used by repair garage held to be

void as against public policy); *Tunkl v. Regents of the University of California*, 60 Cal.2d 92 (1963) (exculpatory clause used by hospital for future negligence held to be void as against the public interest); *Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal. 298 (1912) (exculpatory clause in contract with telegraph company void as against public interest).

California statutory law has similarly stated that contract clauses that serve an exculpatory function, whether directly or indirectly are void as against public policy. ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." *California Civil Code Section 1668*.) In *Tunkl*, the Supreme Court of California articulated a host of nonexclusive factors that are relevant in finding an exculpatory clause void as against public policy. *Tunkl*, 60 Cal.2d at 98-101. Factors include whether the party seeking exculpation is: the type of business that is suitable for public regulation, performs service of importance to the public, concerns a matter of practical necessity for some, generally available to the public, in a stronger bargaining position, employs a contract of adhesion, does not negotiate terms, gaining some control over the other party. *Id.* These factors apply generally to all contracts and are applicable to a variety of terms that may be held to be exculpatory.

The state's concern regarding exculpatory clauses is no different than the concern expressed by

Judge Wisdom 40 years ago, and cited with approval by the United States Supreme Court: "[T]wo concerns underlie the rejection of exculpatory agreements: that they may be produced by overweening bargaining power; and that they do not sufficiently discourage negligence." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972), *quoting In re Unterweser Reederei, Gmbh v. M/S BREMEN and Unterweser Reederei GMBH*, 428 F.2d 888, 907-908 (5th Cir. 1970) (J. Wisdom, dissenting).

ATTM attempted to satisfy the *Discover Bank* test through the provisions added in the revised arbitration agreement that purported to provide a $7,500 premium and double attorneys' fees for small claims where the arbitrator awards the consumer more than ATTM's last written offer. The District Court noted that ATTM's premium provision may serve "a noble purpose, even if no customer ever actually receives it." *Laster v. T-Mobile USA*, Inc., 2008 WL 5216255 at *11 (S.D. Cal. 2008). Furthermore, the District Court found ATTM's informal procedures that precede possible arbitration to be "quick, easy to use, and prompts full or…even excess payment to the customer *without* the need to arbitrate or litigate." *Id.* (emphasis in original). The District Court's praising of parts of ATTM's revised process belies ATTM's attempt to characterize the District Court as having a knee-jerk animus against arbitration.

Following California law, the District Court concluded that ATTM's processes did not adequately protect small dollar claims and "the problem that small recoveries do not provide the incentive for any

individual to bring a solo action prosecuting his or her rights." *Id.*, quoting *Discover Bank*, 36 Cal.4th at 157. The problem was not whether those who proceed through the informal claim procedure, and then through the entire arbitration procedure, will eventually recover the $30 in dispute. The problem was that ATTM's processes required too much time, effort and energy for consumers with small dollar claims to invoke it.

The Ninth Circuit put this point succinctly: "[I]n the end, the premium payment provision does not transform a $30.22 case into a predictable $7,500 case…Thus, the maximum gain to a consumer for the hassle of arbitrating a $30.22 dispute is still just $30.22." *Laster v. AT&T Mobility*, 584 F.3d 849, 855-56 (9th Cir. 2009). Judge Posner has placed this notion in perspective, stating: "only a lunatic or a fanatic sues for $30." *Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Had this been a $30,000 claim rather than a claim for less than $30, the court would likely have found no unconscionability in the class action waiver, as it would have failed the third prong of the *Discover Bank* test, and would have referred the claim to arbitration consistent with ATTM's agreement.

The analysis that the lower courts performed on the arbitration agreement evinces a high regard and, indeed, preference for arbitration agreements. The courts did not simply find that the class action waiver made the arbitration agreement *per se* invalid. Rather, the courts analyzed the arbitration agreement in its particulars, providing every opportunity for the agreement to be upheld. And, as

discussed above, the agreement was upheld. The lower courts only held that, in the circumstances before them, the class action waiver was unconscionable. Then, in honoring the terms of the arbitration agreement and the self-destruct clause ATTM included, the courts enforced the express self-destruct clause and solely on that basis found the entire arbitration agreement "null and void." Pet. Cert. 61a.

II. CALIFORNIA COURTS HAVE NOT CREATED A "PRACTICAL BAN" ON CONSUMER ARBITRATION AGREEMENTS.

ATTM argues that since some California courts have held particular provisions unconscionable in certain circumstances, they are creating "for all practical purposes a ban on consumer arbitration agreements." Petitioner

Brief, 56. This argument is unfounded and rests on several specious premises.

First, ATTM assumes that any time an arbitration clause is invalidated, arbitration is being discriminated against. The FAA explicitly places arbitration on equal footing as contracts, so arbitration cannot be granted *de facto* immunity against general contract analysis. *Scherk,* 417 U.S. 506, 511 (1974). The instant case further illustrates the logical problems with this premise. Here, the lower courts simply held that a term involving a class action waiver in the dispute between

Concepcion and ATTM was unconscionable. It passed no judgment on the arbitration agreement, and the only reason the entire arbitration agreement was invalidated was the self-destruct clause ATTM placed within the agreement. Since ATTM required in its contract that the arbitration agreement not be enforced, it cannot lay the blame for lack of enforcement on judicial animus towards arbitration.

Second, the argument fails to account for class arbitration, which ATTM could have included in its agreement and, by doing so, preserved the possibility of both arbitration and a class mechanism. California has a long history of promoting class arbitration as an alternative to class litigation. *See Keating*, 31 Cal.3d 584. The courts have evinced no preference for class litigation over class arbitration because the concern is not with the forum, but rather the substantive rights stemming from membership in a class.

ATTM argues that since it believes that class arbitration would be less favorable to it than class litigation, and that it would prefer to forego all arbitration if class arbitration is an option, the courts are effectively imposing litigation at the expense of arbitration. ATTM is comparing arbitration agreements to an ideal alternative that would be most favorable to it, when the FAA only requires that states treat arbitration equally to the real alternative of litigation.

III. THE FAA EXTENDS PROTECTION ONLY TO THE QUESTION OF WHETHER OR NOT TO ARBITRATE

The FAA is an anti-discrimination statute that requires courts to assure equal enforcement of arbitration agreements as that afforded any other contract between the parties. The statute was intended to fit arbitration agreements into state contract law. Its purpose was not to preclude enforcement of state law contractual rights if they are drafted inside the heading "Arbitration Agreement." Because the Ninth Circuit's opinion did not discriminate against the parties' legitimate choice to arbitrate or not to arbitrate, the decision should be affirmed.

A. The FAA Is An Anti-Discrimination Statute Whose Sole Purpose Is To Ensure Parity Between Arbitration Agreements And Other Contracts.

The FAA did not federalize contract law, but rather set a federal policy of placing arbitration agreements on par with other contracts. The FAA was enacted by Congress in 1925 to remedy longstanding judicial hostility towards arbitration. *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1271 (2009).[3] The purpose of the statute was to place arbitration "upon the same footing as other

[3] Some have argued that the history of supposed judicial hostility toward arbitration has been greatly exaggerated. *See Macneil*, *American Arbitration Law: Reformation, Nationalization, Internationalization* 20 (1992).

contracts." *Scherk.*, 417 U.S., at 511 (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

Section 2 of the FAA provides both the breadth and limits of the FAA: "A written provision…to settle by arbitration a controversy… 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. As section 2 of the FAA makes clear, "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967). "Thus state 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." *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987) (emphasis in original).

Contract provisions do not get a pass simply by virtue of their inclusion in arbitration agreements, but rather must be treated and honored as if they appeared in any other contract. "[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening §2." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

The FAA is essentially an anti-discrimination statute. *See* Joshua Ratner & Christian Turner, *Origin, Scope, and Irrevocability of the Manifest Disregard of the Law Doctrine: Second Circuit Views*, 24 Quinnipiac L.Rev. 795, 797-98 (2006). It is in

some ways analogous to "a kind of 'equal protection clause' for contracts." *Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner*, 2. This has been the view of the California Supreme Court, describing the FAA as a statute that preempts state laws that "discriminate against arbitration clauses." *Discover Bank*, 36 Cal.4th 148, 167. As an anti-discrimination statute, the federal law only preempts state law that singles out agreements to arbitrate for worse treatment than other contractual provisions. Purposeful discrimination is the touchstone of violations of anti-discrimination law, and a mere imbalance is not sufficient to show discrimination. *See Washington v. Davis*, 426 U.S. 229 (1976).

B. The FAA Concerns Only The Agreement To Submit To Arbitration, And Not All Terms And Provisions Of Arbitration.

The FAA protects the rights of parties to submit disputes to arbitration rather than litigation. Its scope only concerns the question of whether to arbitrate or not to arbitrate. The FAA does not provide a federal safe harbor to any and all contract terms that are placed within the four corners of an arbitration agreement by virtue of the fact that the document is an arbitration agreement.

Though the FAA does not allow courts to discriminate against arbitration in favor of litigation, it also does not require the wholesale acceptance of any contract term, like the class action waiver here, simply because it is placed in an arbitration agreement. Such an interpretation of the FAA would effectively federalize contract law and sanction the use of *in terrorem* clauses. It would upset the federalist balance if the FAA effectively swallowed state contract law, and would impose a function for the FAA that was far greater than Congress intended.

"If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989)). Congress made clear its intent *not* to

substantively change state contract law through the savings clause of §2 of the FAA, which leaves states free to invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The purpose was to fit arbitration agreements into existing contract law, but here ATTM is contorting the language of the statute in arguing for a federal loophole to general contract law for class action waivers.

The legislative debate preceding passage of the FAA, or perhaps lack thereof, shows that the FAA was intended to be a limited statute concerned only with ensuring that parties' intent to arbitrate be honored in the same manner that any other valid contractual agreement would be honored. The sponsor of the House bill, Representative Graham, expressed this sentiment in a floor statement. "[The FAA] creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 n. 7 (1985) (quoting legislative history).

The FAA was a relatively uncontroversial piece of legislation that could not have been attempting more. At several times during the Judiciary Committee hearings, the Chairman asked for comments by anyone opposed to the legislation. No legislator or witness said an ill word about the legislation. At the last call for opposition to the bill, the Chairman remarked that there was no opposition, and "[he] knew of no real opposition when the bill was before the Senate subcommittee at the last session." Arbitration of Interstate Commercial

Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. Of the Comms. On the Judiciary, 68th Cong. (1924). Had the bill been intended to radically alter state contract law and upset the federalist balance, it is inconceivable that no legislator or witness would have opposed the bill in the Judiciary Committee.

Just as some contracts may have terms that are unwaivable, unconscionable, or stem from duress, "some arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights." *Little v. Auto-Stiegler*, Inc. 29 Cal.4th 1064, 1079 (2003). If state courts were unable to analyze arbitration agreements according to the same terms that they analyze other contracts, then parties could "wholly eviscerate" state legislative and judicial intent to require certain protections in all contracts by simply harboring unsavory, illegal, and unconscionable terms in arbitration clauses. Such a holding would construe the FAA in a way that "excessively encroach[es] on the powers which Congressional policy, if not the Constitution, would reserve to the states." *Southland Corp.* 465 U.S. at 19 (Stevens, J. concurring in part and dissenting in part) quoting *Metro Industrial Painting Corp. v. Terminal Co.*, 287 F.2d 382, 386 (2nd Cir. 1961).

If the FAA were interpreted expansively to reach all issues that may possibly touch upon arbitration, then the statute would produce a result antithetical to its central purpose; it would infringe upon the parties' freedom to contract. The FAA was passed in order to protect parties' rights to contract

with regards to the choice of judicial or arbitral forum. However, if the FAA is interpreted to include any provision that a party places within an arbitration agreement, then it will subsume all state contract law and principles.

State contract law is intended to protect the basic rights of parties in order to ensure a fair contract process and maintain the parties' rights to enter into a knowing and voluntary contract. Under ATTM's expanded interpretation of the FAA, state courts would be forced to uphold basic contract prohibitions such as liquidated damages clauses for punitive purposes or confession of judgment clauses. Similarly, state courts would be preempted from holding as unconscionable an arbitration agreement that provided death by hanging as the punishment for the losing party in a dispute, or from holding as invalid due to duress an arbitration agreement signed by one party at the point of a pistol.

If the FAA concerned anything more than the question of whether to arbitrate or not to arbitrate, then parties would essentially lose the very freedom that the FAA was intended to protect: their freedom to contract. It would also open the flood gates for the imposition of exculpatory clauses violating state law under the guise of an FAA preemption that Congress' express saving clause in the FAA and the legislative history show was never the intent of the FAA.

IV. CALIFORNIA LAW CONCERNING CLASS ACTION WAIVERS IS GENERALLY APPLICABLE AND IN LINE WITH MOST STATES.

Though this case does not require an in-depth analysis of California contract law because there were no *per se* rules concerning class action waivers and unconscionability, it is important to recognize that the California approach to class action waivers is largely in line with a majority of states. Furthermore, California treats the right to class action as a substantive right rather than merely procedural, and has therefore expressed a strong interest in preserving the right in circumstances where it is most necessary. Thus, the California courts' approach to the waiver of class action rights is generally applicable to contracts without regard to whether they include arbitration agreements.

A. The California Approach To Class Action Waivers Is Similar To The Majority Of Other States.

The vast majority of state courts, and federal courts applying state law, have found certain provisions within arbitration agreements, such as class action waivers, to be unconscionable. ATTM misrepresents the issue when it stated that 25 states and the District of Columbia have all had cases where class action waivers in arbitration agreements were enforced. Pet. Cert. 21-22. Almost half of the states listed have also refused to enforce some provision in arbitration agreements, including class

action waivers.[4] For that reason, California may be added to this list. California has no categorical rule prohibiting class action waivers in contracts; only in cases where the waiver serves as an exculpatory clause is the waiver void due to unconscionability. *See Discover Bank*, 36 Cal.4th 148. *Discover Bank* carefully articulated a precise situation where class action waivers may be used as exculpatory clauses, but in other situations they would likely be enforced.

In addition to the states enumerated in ATTM's petition for *certiorari*, the following states have refused to enforce class action waivers within arbitration agreements in certain circumstances: Arizona, *see Cooper v. QC Financial Services, Inc.*, 503 F.Supp.2d 1266 (D. Ariz. 2007) (payday loan contract); Florida, *see S.D.S. Autos, Inc. v. Chrzanowski*, 976 So.2d 600 (Fla. App. 2007) (automobile lease contract); Massachusetts, *see*

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[4] *See e.g. Leonard v. Terminix Intern. Co.*, 854 So. 2d 529 (Ala. 2002) (pesticide contract) (Alabama); *Caban v. J.P. Morgan Chase and Co.*, 606 F.Supp.2d (S.D. Fla. 2009) (credit card contract) (Delaware); *Dale v. Comcast*, 498 F.3d 1216 (11th Cir. 2007) (cable television contract) (Georgia); *Kinkel v. Cingular Wireless*, 857 N.E.2d 250 (Ill. 2006) (cellular telephone contract) (Illinois); *Lozado v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087 (W.D. Mich. 2000) (automobile sales contract) (Michigan); *Whitney v. Alltech Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. Appeals 2005) (cellular phone contract) (Missouri); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio App. 2004) (automobile sales contract) (Ohio); *Herron v. Century BMW*, 387 S.C. 525 (2010) (automobile sales contract) (South Carolina); *State ex rel. Dunlap v. Burger*, 211 W.Va. 549 (2002) (jewelry sales contract) (West Virginia). Mississippi does not permit class actions in its courts, so it does not apply to arbitration. See *American Bankers Ins. Co. of Florida v. Booth*, 830 So.2d 1205 (Miss. 2002) (Mississippi).

Skirchak v. Dynamic Research Corp., 508 F.3d 49 (1st Cir. 2007) (employment contract); New Jersey, *see Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 N.J. 1 (2006) (payday loan contract); New Mexico, *see Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008) (computer sales contract); North Carolina, *see Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93 (2008) (mortgage contract); Oregon, see *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087 (9th Cir. 2009) (internet equipment sales contract); Pennsylvania, *see Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006) (cable television contract); *Washington, see Scott v. Cingular Wireless*, 160 Wash.2d 843 (2007) (cellular telephone contract); Wisconsin, *see Coady v. Cross Country Bank*, 729 N.W.2d 732 (Wis.App. 2007) (credit card contract).

There is no categorical rule that holds class action waivers to be unconscionable, because unconscionability is by definition an individualized assessment that looks at the particulars of a contract.[5] "Unconscionability cannot be measured in a vacuum. Courts must consider the agreement's effect by examining the bargaining positions of the parties, the bargaining tactics they employed, the claims, and the procedures in place at the putative arbitral forum. Contract principles demand this depth of analysis." Kenneth R. Davis, *The*

[5] The U.C.C. §2-302(2) instructs courts to examine a contract's "commercial setting, purpose, and effect" as part of the unconscionability analysis. The *ad hoc* unconscionability analysis "almost necessarily precludes standardized rules concerning any determination of unconscionability." Richard A. Lord, 8 Williston On Contracts §18:11 (4th ed. 2009).

Arbitration Claws: Unconscionability in the Securities Industry, 78 B.U. L.Rev. 255, 315 (1998).

The California courts have followed this mode of analysis with regards to consumer class action waivers. *See Discover Bank*, 36 Cal.4th 148. The general concern behind *Discover Bank* was that parties with vastly superior bargaining power were using class action waivers in contracts of adhesion as exculpatory clauses in violation of California Civil Code §1668.[6] The *Discover Bank* test at issue in this case is not a general test for unconscionability, but rather a test to determine if class action or class arbitration waivers in contracts are exculpatory. *Arguelles-Romero*, 184 Cal.App.4th at 838.

The *Discover Bank* test is generally applicable to both arbitration and non-arbitration clauses that include class action waivers. It has admittedly been applied more to arbitration clauses, but this is only due to the fact that thus far other contracts have simply not included such waivers. "In California, private contracts that violate public policy are unenforceable," without regard to whether the agreement concerns arbitration or not. *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77, 94 (2003).

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[6] The concern with arbitration clauses buried in contracts of adhesion is nothing new to the FAA. One of the few concerns that any legislator expressed over the FAA was Chairman of the Senate Subcommittee on the Judiciary, Senator Sterling's concern over the possibility of arbitration clauses being slipped into adhesive contracts. Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. Of the Comms. On the Judiciary, 68th Cong. (1924).

In one of the few California cases that involved a class action waiver in the non-arbitration setting, the court did not hesitate to hold that the waiver was not enforceable under the *Discover Bank* standard. *In re YAHOO! Litigation*, 251 F.R.D. 459 (2008). Similarly, not all waivers of class action in arbitration agreements have been found unconscionable. *See e.g. Arguelles-Romero*, 184 Cal.App.4th at 838.

There is nothing to suggest that the different number of cases that result in a finding of class action waivers as unconscionable in arbitration agreements compared to number of cases with similar results in other contracts are evidence of any bias. The statistics touted for this purpose show little more than the fact that parties have attempted to put unconscionable terms in certain arbitration agreements more often than in other contracts.

There are simply few cases in California involving class action waivers in the non-arbitration setting, and an imbalance in input will naturally lead to an imbalance in output. Furthermore, even within the arbitration agreement arena there are large differences in contract terms between industries. In a study looking at cases before the American Arbitration Association, it was found that 100% of the cases involving cellular telephone contracts contained class arbitration waivers, while 0% of real estate contracts contained such waivers. Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association* 103 (Mar. 2009). These numbers illustrate the manner in which simple comparisons between the outcomes in

arbitration agreement cases and other contract cases can be highly misleading.

B. In California, The Right To Be Part Of A Class Action Is A Substantive Right And Not Merely Procedural As The Certified Question Assumes.

The certified question before this Court incorrectly assumes that the class action rights at issue are procedural. In California, the right to bring a class action is a substantive right that is protected by various statutes, including the Consumer Legal Remedies Act. Civ. Code, § 1750 et seq.; *see Armendariz*, 24 Cal.4th 83. The right to a class action, whether in a litigation or arbitration forum, has been held important when there is involved precisely the type of case that class actions were intended to remedy. ("Class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights." *Discover Bank*, 36 Cal.4th at 161). California's emphasis on protecting consumers through the right to participate in a class action echoes the same concerns articulated by Congress and the U.S. Supreme Court on the importance of class actions.[7]

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[7] Congress stated the importance of class actions in the findings of the Class Action Fairness Act: "Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 4 (2005) (codified as amended at 28 U.S.C. §§

The advantages of class action litigation or arbitration are not easily substituted. As two prominent commentators argued nearly 70 years ago, " [i]f each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law." Kalven and Rosenfeld, *The Contemporary Function of The Class Suit*, 8 U.Chi.L.Rev. 684, 686 (1941).

More recently, Judge Posner stated, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). The Supreme Court also has emphasized the importance of class action with regards to small dollar disputes: "Economic reality dictates that [a] petitioner's suit proceed as a class action or not at all." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 (1974).

1332(d), 1453, 1711-15). Similarly, the Supreme Court has articulated the importance of class actions: "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980).

California law is in line with this view on the significant import of class action and arbitration. In one of the cases upon which California's *Discover Bank* rule was based, an agreement unrelated to arbitration contained a provision that was equivalent to a class action waiver. *America Online, Inc. v. Superior Court of Alameda County*, 90 Cal.App. 4th 1 (2001) ("AOL"). *AOL* held that class action rights are significant, and rejected the argument that "the elimination of class actions for consumer remedies…is a matter of insubstantial moment." *Id.* at 18. In addition to the fundamental benefits afforded to the individual, "[a] class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims." *Vasquez v. Superior Court of San Joaquin County*, 4 Cal.3d 800, 808 (1971). The retention of some mechanism for class action is therefore a matter of public interest. Thus, it is not merely procedural as the certified question implies.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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