**No. 16-16915**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

MARCUS A. ROBERTS, KENNETH A. CHEWEY, ASHLEY M. CHEWEY, and JAMES KRENN, on behalf of themselves and all others similarly situated,
*Plaintiffs-Appellants*,

v.

AT&T MOBILITY LLC,
*Defendant-Appellee*.

On Appeal from an Order of the United States District Court for the Northern District of California, No. 3:15-cv-3418-EMC,
Judge Edward Chen, Presiding

# BRIEF OF DEFENDANT-APPELLEE AT&T MOBILITY LLC

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

AT&T Mobility LLC is a nongovernmental corporate entity that has no parent company. AT&T Mobility LLC's members are all privately held companies that are wholly-owned subsidiaries of AT&T Inc., which is the only publicly held company with a 10 percent or greater ownership stake in AT&T Mobility LLC.

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## STATEMENT OF JURISDICTION

The jurisdictional statement in plaintiffs-appellants' opening brief is accurate.

## ISSUES PRESENTED

Plaintiffs are AT&T customers who each agreed to arbitrate their disputes with AT&T. AT&T moved to enforce plaintiffs' arbitration agreements, and plaintiffs resisted that motion by contending that the Petition Clause of the First Amendment bars application of the Federal Arbitration Act to enforce their arbitration agreements. The district court granted AT&T's motion and compelled arbitration. The following issues are presented in this appeal:

1. Whether the district court correctly rejected plaintiffs' Petition Clause challenge because plaintiffs failed to satisfy the state action requirement.

2. Whether, even if plaintiffs could show state action, the district court's order should be affirmed on the alternative ground that plaintiffs' Petition Clause challenge fails on the merits.

## INTRODUCTION

Plaintiffs agreed to resolve their disputes with AT&T through arbitration on an individual basis. They do not deny—nor could they—that *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), holds that the Federal Arbitration Act requires enforcement of those agreements.

In the years since the Supreme Court's decision in *Concepcion*, numerous plaintiffs have tried to circumvent that ruling through a number of imaginative arguments, all of which courts have rejected:

- In *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), this Court refused to recognize an "effective vindication" exception to *Concepcion*, and also rejected the contention that the Supreme Court's holding permitted fact-based arguments that a particular arbitration clause was exculpatory.
- In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Supreme Court rejected an "effective vindication" exception to *Concepcion* in the context of federal claims, holding that a class-action waiver in an arbitration

agreement was fully enforceable and that "our decision in [*Concepcion*] all but resolves this case." *Id.* at 2312.

- Just last year, in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), the Supreme Court reversed a California state court decision that adopted what this Court had termed a "nonsensical" interpretation of an arbitration agreement (*Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013)) in order to avoid enforcing the agreement under *Concepcion*. The Supreme Court observed that "[l]ower court judges are certainly free to note their disagreement with * * * this Court," but cannot "refus[e] to recognize * * * superior authority": "The [FAA] is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act." 136 S. Ct. at 468.

Now, in what can only be described as a last-gasp attempt to avoid *Concepcion*, plaintiffs here assert that the Federal Arbitration Act, applied by courts in thousands of cases since it was enacted more than 90 years ago, is unconstitutional. Plaintiffs' theory that the FAA violates the Petition Clause of the First Amendment has never been

accepted by any court or endorsed by even one unbiased commentator.[1]

In fact, plaintiffs' counsel raised this argument in an *amicus* brief in *Italian Colors*, and *not one Justice* thought that the argument merited even a reference, either in the majority opinion or in the dissent. *See* Br. of Profs. of Civ. Proc. as *Amici Curiae* in Support of Respondents, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 390981, at *1, *10-13.

The district court (Chen, J.) properly rejected this unsupported contention, holding that the First Amendment, including its Petition Clause, applies only when there is "state action," and there is none in the context of plaintiffs' arbitration agreements with AT&T, which are purely private contractual arrangements.

That accords with the prior holding of this Court—and many others—that "neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action." *Duffield v.*

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[1] AT&T is aware of only one article that embraces plaintiffs' argument, and it was written by one of plaintiffs' counsel. *See* Alexander H. Schmidt, *Challenging the Supreme Court's* American Express *Decision Under The First Amendment Petition Clause*, 28 Antitrust 39 (Summer 2014).

*Robertson Stephens & Co.*, 144 F.3d 1182, 1202 (9th Cir. 1998), *separate holding overruled on other grounds*, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc).

Plaintiffs focus their argument on a plurality opinion of the Supreme Court issued two years *before Duffield*—*Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996)—contending that it radically changed state-action doctrine. No court has ever read the fractured opinions in *Denver Area* to accomplish the dramatic change in the law that plaintiffs suggest. And for good reason: *Denver Area* simply applied long-settled principles to reach the unsurprising conclusion that a federal statute and regulations authorizing speech censorship constituted state action. That holding is inapplicable here, where the claimed limitation on plaintiffs' petition right stems from a contract, and is not imposed upon them by a law or regulation.

Plaintiffs separately try to sidestep the numerous state-action holdings arrayed against them by characterizing their objection to enforcement of their private arbitration agreements as a "direct" challenge to the FAA. But that contention is foreclosed by *American*

*Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), in which the Supreme Court rejected—three years after *Denver Area*—a virtually identical attempt to manufacture state action out of private conduct.

Even if plaintiffs could somehow overcome the threshold state-action obstacle, their Petition Clause challenge fails on the merits, and the Court can and should address that issue now.

The Petition Clause at most prohibits restrictions on *access* to the courts—it does not guarantee a judicial determination of the merits of every controversy.[2] Plaintiffs have not been deprived of access to court for multiple reasons.

To begin with, as the existence of this case demonstrates, the FAA authorizes courts to decide legal challenges to AT&T's arbitration agreements. It also provides for court determination of challenges to any award issued by the arbitrator.

Even more significant, the arbitration agreements themselves afford plaintiffs the right to pursue their claims in small-claims court.

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[2] The Petition Clause provides that "Congress shall make no law * * * abridging * * * the right of the people * * * to petition the Government for a redress of grievances." U.S. CONST. AMEND. 1.

Plaintiffs decided not to avail themselves of that opportunity, and therefore have no basis whatever to assert a deprivation of any right to seek redress in court.

If plaintiffs' reading of the Petition Clause were correct, a host of statutes and doctrines restricting the power of courts to hear the merits of claims would become subject to strict-scrutiny review, ranging from statutes of limitations to heightened pleading standards to abstention doctrines. That would require invalidation of numerous long-settled procedural rules.

Finally, even if plaintiffs had a right to have a court decide their claims, they voluntarily entered into the arbitration agreements, agreeing to relinquish any such right in exchange for swift and cost-free arbitration. Constitutional rights are waivable, and are frequently waived. Plaintiffs' agreements effect a valid waiver of any Petition Clause right they could assert.

The dramatic consequences of plaintiffs' novel argument cannot be overstated: endorsing their legal theory would render unconstitutional at least twenty decisions of the Supreme Court

enforcing agreements under the FAA. The Court should reject that audacious, and wholly unsupportable, request.

The district court's order granting AT&T's motion to compel arbitration should be affirmed.

## STATEMENT OF THE CASE

Plaintiffs Marcus Roberts, Kenneth and Ashley Chewey, and James Krenn are AT&T customers who entered into a pre-dispute arbitration agreement with AT&T. R2. Plaintiffs acknowledged in their operative amended complaint that their Wireless Customer Agreements all require them to arbitrate their disputes with AT&T on an individual basis. R119.

### A. The arbitration provision

AT&T has tailored the arbitration process to make arbitration easy and attractive for consumers and their counsel, including (R97-99):

- **Cost-free arbitration**: For claims up to $75,000, "AT&T will pay all [American Arbitration Association ('AAA')] filing, administration, and arbitrator fees" unless the arbitrator

determines the customer's claim "is frivolous or brought for an improper purpose";[3]

- **Small claims court option**: Either party may bring a claim in small claims court as an alternative to arbitration;
- **$10,000 minimum award**: If the arbitrator issues an award in favor of a customer that is greater than "AT&T's last written settlement offer made before an arbitrator was selected," AT&T will pay the customer $10,000 rather than any smaller arbitral award;
- **Double attorneys' fees**: If the arbitrator awards the customer more than AT&T's last written settlement offer made before an arbitrator was selected, then "AT&T will * * * pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses (including expert witness fees and costs), that [the] attorney reasonably

[3] Even if an arbitrator concludes that a customer's claim is frivolous, if the claim is for less than $10,000, the arbitration provision would cap the amount of costs the customer would have to pay at $200, the amount the consumer is responsible for under the AAA's consumer arbitration rules.

accrues for investigating, preparing, and pursuing [the] claim in arbitration";[4]

- **Choice of in-person, telephonic, or no hearing**: For claims of $10,000 or less, the customer has the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a telephonic hearing, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator";
- **Conveniently located hearing**: Arbitration will take place "in the county * * * of [the customer's] billing address"; and
- **Full individual remedies available**: The arbitrator can award any form of relief on an individualized basis (including statutory and punitive damages, attorneys' fees, and injunctions that would affect the claimant alone) that a court could award.

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[4] The contractual entitlement to double attorneys' fees "supplements any right to attorneys' fees and expenses [the customer] may have under applicable law." Thus, even if an arbitrator were to award a customer less than AT&T's last settlement offer, the customer would still be entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

### B. AT&T's motion to compel arbitration

Plaintiffs filed this putative class action, alleging that AT&T did not disclose that it might reduce the download speeds of customers with unlimited data plans under certain limited circumstances. R108.

Uncontested evidence shows, however, that plaintiffs were fully aware that AT&T's unlimited data plan allowed for a reduction in speed in the event of abnormally excessive data usage. R94-97. Before *renewing* their unlimited data plan contracts, plaintiffs had experienced speed reduction, received multiple text messages warning of speed reduction, or discussed the issue with an AT&T representative.

Plaintiffs' account histories raise numerous individualized questions of disclosure, reliance and damages. Those questions are better suited for resolution in individual arbitration, to which plaintiffs contractually agreed, than in a class action, which they had contractually waived. *Id.*

AT&T moved to compel arbitration. R83. It explained that the Supreme Court, this Court, and numerous district courts have held that the FAA requires enforcement of AT&T's arbitration provision. R90 (citing *Concepcion*, 563 U.S. 333; *Coneff*, 673 F.3d 1155).

Plaintiffs opposed the motion, arguing that enforcing their arbitration agreements would infringe their First Amendment right to petition the government. SR69-93.[5] Plaintiffs addressed state action only briefly, spending less than one full page of their twenty-five page opposition on the issue, and citing *Denver Area* a single time, in one of the opposition's 132 footnotes. SR71-72 & n.6.

At the outset of the hearing on the motion, Judge Chen made clear to the parties that he was interested in "spend[ing] our time discussing the threshold issue here of state action." R48. Plaintiffs' counsel then shifted gears, exhuming *Denver Area*; declaring it plaintiffs' "strongest case" in response to questioning by Judge Chen; and arguing that it means that any statute that allows private parties to restrict others' speech qualifies as state action. R71-72.

### C. The district court's amended order compelling arbitration

The district court granted AT&T's motion, rejecting the Petition Clause challenge on the ground that plaintiffs had failed to show state action. SR96-108.

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[5] References to "SR_" refer to AT&T's Supplemental Excerpts of Record.

Plaintiffs sought reconsideration, contending that the district court had "overlooked" their argument that they met the standard for state action under their interpretation of *Denver Area*. Dkt. No. 54, at 8-10. The district court granted the motion, agreeing to reconsider its prior ruling, but issued an amended order again compelling arbitration. R1.

The district court "agree[d] with AT&T that it would well be within its rights in deeming the *Denver Area* argument waived" because of plaintiffs' failure to develop it until the "hearing on the motion to compel arbitration" and the motion for reconsideration. R8. But Judge Chen nonetheless addressed the merits of the argument, explaining that *Denver Area* "did not overturn" prior Supreme Court precedents addressing state action. R10-13. And Judge Chen reiterated his rejection of plaintiffs' other state-action arguments.

Specifically, the amended order rejected three separate arguments by plaintiffs for the existence of state action. *First*, the district court found "no merit to Plaintiffs' assertion that the mere fact of judicial enforcement" of an arbitration agreement "automatically establishes state action." R3-7. Judge Chen noted that

this Court's decision in *Ohno v. Yasuma*, 723 F.3d 984 (9th Cir. 2013), forecloses that argument, and also precludes plaintiffs' reliance on *Shelley v. Kraemer*, 334 U.S. 1 (1948), which this Court held "'has generally been confined to the context of discrimination claims under the Equal Protection Clause.'" R4 (quoting *Ohno*, 723 F.3d at 998). Plaintiffs have stated that they "do not appeal" the district court's holding that judicial enforcement of an arbitration agreement does not establish state action, nor do they rely on *Shelley* on appeal. Pls. Br. 7.

*Second*, the district court rejected plaintiffs' argument that "there is state action based on Congress's enactment of the FAA" and Supreme Court decisions interpreting it. R7-12. Judge Chen noted that this argument was "similar to that rejected by the Ninth Circuit in *Duffield*." R7. Judge Chen was also unpersuaded by plaintiffs' newfound reliance on *Denver Area*: he emphasized that "the plurality provided no clear analysis" and in all events its "assumption of state action * * * must be seen in its proper context," which involved regulation of "cable operators" with "unique monopolistic power" who

are "unusually involved with the government." R10-12 (quotation marks omitted).

The district court further explained that plaintiffs' reading of *Denver Area* could not be correct because "[t]he plurality did not overturn (nor could it)" *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), in which the Supreme Court held that a private contract for a sale of goods under New York's Uniform Commercial Code was not state action attributable to the State of New York. R11. Nor could plaintiffs' reading of *Denver Area* be squared with the Supreme Court's subsequent decision in *American Manufacturers*, which "continued to adhere to the general proposition that a law permitting private conduct does not constitute state action." R11 (citing *Am. Mfrs.*, 526 U.S. at 53-54). Judge Chen concluded: "*Denver Area* did not establish a categorical rule that a statute which permits private parties to restrict the speech or other rights of private citizens constitutes as a general matter state action." R12.

*Finally*, the district court rejected plaintiffs' argument that the FAA as interpreted by the Supreme Court so encourages arbitration that AT&T's choice to use arbitration "must be deemed that of the

State." R14-17 (quotation marks omitted). As an initial matter, the court noted that "this specific argument was not raised in Plaintiffs' papers," and thus the court again "could disregard it as waived." R14. Judge Chen nonetheless addressed it on the merits, holding that "Plaintiffs have not established the requisite degree of government coercion or encouragement * * * to establish state action." R15. He observed that "no court has yet to hold or suggest that there is sufficient encouragement or coercion by virtue of the FAA to implicate state action." R15-17 (collecting cases).

Following the amended order again compelling arbitration of their claims, plaintiffs moved for certification of two issues for interlocutory appeal: "(1) whether there is state action under *Denver Area* * * *; and (2) whether there is state action under the 'encouragement' test." R20. The district court granted the motion (R19-22), and this Court granted plaintiffs permission to appeal.

## SUMMARY OF ARGUMENT

The First Amendment, like most other provisions of the Bill of Rights, protects only against *governmental* intrusion. The district court correctly held that plaintiffs' attempt to oppose AT&T's

enforcement of its private arbitration agreements with plaintiffs on Petition Clause grounds falters at the outset, because there is no state action.

The Supreme Court has repeatedly refused to constitutionalize private agreements: "Private use of state-sanctioned private remedies or procedures does not rise to the level of state action." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988). Consistent with that principle, this Court, and many others, have unequivocally held that "neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action." *Duffield*, 144 F.3d at 1202. After all, the FAA comes into play only when there is an enforceable private agreement. A request for a court order enforcing that agreement by a private party like AT&T is not state action.

Neither of plaintiffs' efforts to circumvent this well-settled and dispositive principle have merit. First, plaintiffs rely heavily on a single sentence in the Supreme Court's plurality opinion in *Denver Area*, even though it pre-dates this Court's concededly on-point decision in *Duffield*. Yet *Denver Area* was based on the special characteristics of cable systems and holds at most that a law

conferring censorship authority on entities closely tied to the government, and withdrawing prior statutory protection against censorship, can be equivalent to government-imposed speech restrictions and therefore constitute state action.

The Supreme Court subsequently confirmed that plaintiffs cannot manufacture state action by claiming, as plaintiffs do here, that they are bringing a "direct" challenge to a law authorizing private conduct. *Am. Mfrs.*, 526 U.S. at 50. Nor do plaintiffs seriously confront the practical consequences of adopting their argument, which dramatically change state action doctrine and constitutionalize wide swathes of contract law.

Plaintiffs' alternative argument—that the FAA so encouraged AT&T to use arbitration that it was in truth the government's choice rather than AT&T's—is equally meritless. That argument is foreclosed by the Supreme Court's decision in *American Manufacturers* and this Court's decision in *Duffield*. Plaintiffs' encouragement argument is a thinly veiled policy attack on arbitration and the Supreme Court's arbitration precedents, and should be rejected out of hand.

Even assuming for argument's sake that plaintiffs had established state action, the district court's order compelling arbitration can and should be affirmed on any of a number of alternative grounds:

- First, a private lawsuit is not a "petition" protected by the Petition Clause at all.
- Second, even if it were, the Petition Clause at most protects *access* to courts. Plaintiffs in fact have that access, albeit not to the extent that their lawyers might wish. Indeed, AT&T's arbitration clause specifically permits plaintiffs to sue in small claims court. True, it does not confer the right to pursue a class action in court or to have a court of general jurisdiction *decide* their claims on the merits. But courts have repeatedly rejected the notion that the Petition Clause entitles a party to all procedures available in court.
- Third, and in any event, plaintiffs do not deny that they entered into a contract with AT&T in which they agreed to swift and cost-free arbitration. They accordingly agreed to forego any First Amendment rights to invoke the full panoply

of court procedures, just as they waived their Seventh Amendment right to a trial by jury, something that happens in federal courts every day.

## ARGUMENT

### I. Plaintiffs Fail To Satisfy the State Action Prerequisite For A Petition Clause Challenge.

The Petition Clause right, like "most rights secured by the Constitution, * * * protect[s] only against infringement ***by governments***." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (emphasis added) (quotation marks omitted). Accordingly, "state action is a necessary threshold" that plaintiffs "must cross before [courts] can even consider whether" a defendant has "infringed upon [their] First Amendment rights." *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996).

Courts have consistently rejected claims that the state action requirement is satisfied by a court's enforcement of a private agreement, because a contrary conclusion would subject every private agreement to the constraints that the Constitution imposes on government activity.

Plaintiffs pay lip service to that limitation, but then propound a new state action test that entirely circumvents it: every contract could be subjected to constitutional constraints through the pleading device of challenging the state or federal law permitting enforcement of the agreement, rather than challenging the judicial action enforcing the agreement. Plaintiffs rest that test on a plurality opinion of the Supreme Court that neither the Supreme Court nor any court of appeals has ***ever*** cited in support of a finding of state action. The Court should reject this obvious attempt to avoid clearly-established limits on the state action doctrine.

### A. AT&T's Enforcement Of A Private Agreement Is Not State Action.

The Supreme Court has repeatedly held that "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action." *Tulsa Prof'l Collection Servs.*, 485 U.S. at 485 (citing *Flagg Bros.*, 436 U.S. at 155-56).

That is why every court to address the issue, including this Court, has held that "neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action." *Duffield*, 144 F.3d at 1202; *see also Smith v. Am. Arbitration Ass'n*, 233 F.3d 502,

507 (7th Cir. 2000) ("The fact that the courts enforce these [arbitration] contracts * * * does not convert the contracts into state or federal action[.]"); *Katz v. Cellco P'ship*, 2013 WL 6621022, at *6 (S.D.N.Y. Dec. 12, 2013) ("Verizon is a private actor, not a state actor, and there is no state action in the application or enforcement of the parties' private agreement to arbitrate"), *aff'd in relevant part*, 794 F.3d 341 (2d Cir. 2015).[6]

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[6] *See also, e.g.*, *Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999) ("no state action in the application or enforcement of the arbitration clause"); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1192 (11th Cir. 1995) ("mere confirmation of a private arbitration award by a district court is insufficient state action"); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1469 (N.D. Ill. 1997) ("compelling arbitration [is] not state action[]"); *United States v. ASCAP*, 708 F. Supp. 95, 97 (S.D.N.Y. 1989) ("The mere approval by this Court of the use of arbitration did not create any state action.").

This Court has also found no state action in the analogous context of First Amendment challenges to enforcement of settlement agreements and other contracts. "In the context of First Amendment challenges to speech-restrictive provisions in private agreements or contracts, domestic judicial enforcement of terms that could not be enacted by the government has not ordinarily been considered state action." *Ohno*, 723 F.3d at 998-99 & n.16; *see also United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995) ("where a court acts to enforce the right of a private party which is permitted but not compelled by law, there is no state action for constitutional purposes").

These holdings are consistent with—and compelled by—"the essential dichotomy between public and private acts" that "ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts." *Am. Mfrs.*, 526 U.S. at 52-53. As this Court has explained, "'[i]f, for constitutional purposes, every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated.'" *Ohno*, 723 F.3d at 999 (quoting *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968)). Plaintiffs agree—or at least do not dispute—that judicial enforcement of obligations arising under a private contract does not amount to state action. *See* Pls. Br. 7; R3-7.

Instead, in an effort to circumvent this well-established and dispositive principle, plaintiffs offer two alternative arguments for their claim of state action. They contend first that *Denver Area* stands for the proposition that a plaintiff can avoid this settled restriction on state action through artful pleading: alleging a "direct" challenge to the constitutionality of a statute or other governmental rule that permits enforcement of the agreement. Pls. Br. 22-37.

Second, they assert that AT&T's choice to draft and enter into private arbitration agreements with its customers has been so encouraged by the FAA and the Supreme Court's interpretations of it that AT&T's "choice must in law be deemed that of the State." Pls. Br. 37-46 (quoting *Duffield*, 144 F.3d at 1200). Neither contention withstands scrutiny.

### B. *Denver Area* Did Not Upend Settled State-Action Doctrine.

*Denver Area* provides no support for plaintiffs' argument. The case involved a First Amendment challenge to "three statutory provisions that seek to regulate the broadcasting of 'patently offensive' sex-related material on cable television" and the associated regulations issued by the Federal Communications Commission. 518 U.S. at 732-33 (plurality op.).

Plaintiffs seize on a comment by the plurality that "[a]lthough the [lower] court said that it found no 'state action,' it could not have meant that phrase literally, for, of course, petitioners attack * * * a congressional statute—which, by definition, is an Act of 'Congress.'" 518 U.S. at 737 (cited at Pls. Br. 26). They then argue that the plurality's statement means that the state action requirement is

satisfied in every case in which a plaintiff frames its claim as a challenge to the constitutionality of a federal statute. That effort to portray a single sentence in a plurality opinion as effecting a dramatic expansion of state action fails for multiple reasons.

*1.* Denver Area *stands only for the settled proposition that speech restrictions imposed by government constitute state action.*

The single sentence on which plaintiffs rely did not constitute the *Denver Area* plurality's holding with respect to state action. Rather, it was part of the plurality's description of the lower court decision under review. The plurality's holding, which expressly turned on cable operators' extensive involvement with the government, did not effect any change in state action principles.

a. The *Denver Area* plurality's decision.

One of the statutory provisions challenged in *Denver Area* "*permit[ted]* cable system operators to prohibit 'patently offensive' (or 'indecent') programming transmitted over leased access channels." 518 U.S. at 737 (plurality op.). Prior law had barred cable system operators from exercising any editorial control over the content of programs carried on these channels.

Congress, "in an effort to control sexually explicit programming conveyed over access channels," enacted the provision permitting operators to enforce a policy of prohibiting "patently offensive" depiction of "sexual or excretory activities or organs." *Id.* at 734. In other words, the challenged provision permitting operators to control indecent speech represented a limited carve-out from the government's complete prohibition of cable operator control over the content of these channels.

The court of appeals had rejected a First Amendment challenge to this provision. It held that there was no state action in Congress's decision to "restore to cable operators editorial discretion an earlier statute had removed." *Alliance for Cmty. Media v. FCC*, 56 F.3d 105, 115 (D.C. Cir. 1995) (*en banc*).

The Supreme Court plurality began its analysis by explaining the court of appeals' state action analysis. It pointed out that "[a]lthough the court [of appeals] said that it found no 'state action,'" the court of appeals "could not have meant that phrase literally, for, of course, petitioners attack (as "abridg[ing] * * * speech") a

congressional statute—which, by definition, is an Act of 'Congress.'" 518 U.S. at 737.

"More likely," the plurality stated, the court of appeals' state action holding rested on the lower court's view of "this statute's 'permissive' provisions as not themselves restricting speech, but, rather, as simply reaffirming the authority to pick and choose programming that a private entity, say, a private broadcaster, would have had in the absence of intervention by any federal, or local, governmental entity." *Id.* (emphasis added).

The plurality disagreed with the lower court's analysis of the statute's effect. It "recognize[d] that the First Amendment, the terms of which apply to government action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict speech." *Id.* But, the plurality concluded, the statute before it did not genuinely involve only "the decisions of *private citizens* to permit, or to restrict speech." *Id.* (emphasis added).

The plurality endorsed arguments for finding state action that turned on "circumstances that * * * make the analogy with private broadcasters inapposite and make these cases *special* ones,

warranting a different constitutional result." *Id.* at 737-38 (emphasis added). These "special" characteristics included the plurality's view that "cable operators have considerably more power to 'censor' program viewing than do broadcasters"; that concern about operators' "exercise of this considerable power" originally led local and federal governments "to insist that operators provide leased and public access channels free of operator editorial control"; and that cable operators "are unusually involved with government" because they "depend upon government permission and government facilities (streets, rights-of-way) to string the cable necessary for their services." *Id.* at 738-39.

b. The *Denver Area* plurality rested its finding of state action solely on cable operators' unusual involvement with the government.

Plaintiffs are wrong in asserting that the *Denver Area* plurality categorically held that asserting a constitutional challenge to a law, without more, automatically satisfies the state action requirement—for two reasons. *First*, the sentence on which they rest their entire argument is not even part of the plurality's own analysis or holding.

*Second*, the plurality's holding rested on the special characteristics of cable systems, which are not present here.[7]

To begin with, the sentence in the plurality opinion on which plaintiffs rely is not part of the plurality's state action analysis; it is part of the plurality's description of the court of appeals' holding. The plurality first references the court of appeals' holding—"that it found no 'state action'"—and says that the lower court "could not have meant that literally" because there was a challenge to an Act of Congress. And the plurality then goes on to explain what the court of appeals in fact held: that the statute's "'permissive' provisions" did not "themselves restrict[] speech." 518 U.S. at 737.

The explanation in a Supreme Court opinion of what a lower court *did not hold* provides no indication of the Supreme Court plurality's own holding, particularly because the plurality disagreed with the lower court's analysis.

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[7] Indeed, as plaintiffs acknowledge (Pls. Br. 27), the *Denver Area* plurality's state action analysis is far from clear, and blends into its substantive First Amendment analysis. Because the plurality held that there was no First Amendment violation, it is not even clear that the plurality in fact concluded that the state action requirement was satisfied. That further undermines plaintiffs' argument that *Denver Area* revolutionized state action doctrine.

Moreover, at no point did the plurality state, or even hint, that every challenge to an Act of Congress *would* satisfy the state action requirement. If the plurality had concluded that the challenge to a federal statute by itself were sufficient to establish state action, there would have been no need for the plurality to discuss the reasons why the particular circumstances of permitting cable operators to censor programming "make these cases special ones, warranting a different constitutional result." On the theory plaintiffs advance here, the challenge to the statute alone would have sufficed—but in fact that was not sufficient for the plurality.

Second, the state action rationale enunciated by the plurality rested entirely on the particular characteristics of cable systems. Plaintiffs do not even try to argue that the special circumstances relied upon by the *Denver Area* plurality are present here.

Nor could they. The industry-specific intertwinement between cable operators and the government is completely different from the operation of the FAA, which provides a cause of action for obtaining specific performance of private contracts between private parties to arbitrate private disputes.

For both of these reasons, the plurality's description of the decision below is far too slender a reed to support the change in state action doctrine that plaintiffs ascribe to it.[8]

Finally, plaintiffs also claim to find support for their new, more lenient state-action test in a sentence in the separate opinion of Justice Kennedy, joined by Justice Ginsburg: "State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State." Pls. Br. 29 (quoting *Denver Area*, 518 U.S. at 782 (Kennedy, J., concurring in part and dissenting in part)). But a

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[8] Plaintiffs insist that the plurality must have implicitly endorsed language from Judge Wald's dissent in the D.C. Circuit that "it strikes me as a wholly untenable proposition that a statute duly enacted by the Congress of the United States could be anything other than state action." *Alliance for Cmty. Media*, 56 F.3d at 132 n.4 (Wald, J., dissenting) (cited at Pls. Br. 26). But as plaintiffs are forced to concede, ***none*** of the many opinions in *Denver Area* "expressly address[ed] Judge Wald's argument." Pls. Br. 30. And, as explained in the text above, the plurality did *not* rest its state action determination solely on the existence of a federal statute. In short, nothing in the plurality opinion vests Judge Wald's language with precedential, or even influential, force.

single statement by two Justices does not constitute a holding of the Court: the plurality opinion did not endorse this statement.

Moreover, plaintiffs again err in attempting to divorce a single sentence from the context of the challenge at issue in *Denver Area*: the prior statute barring all censorship by cable operators followed by the withdrawal of that protection only for certain "indecent" speech. As Justice Kennedy put it, the First Amendment problem with the challenged regulations, and the underlying statutory provisions, was that they "single[d] out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted." *Denver Area*, 518 U.S. at 782 (Kennedy, J., concurring in part and dissenting in part).

The facts here bear no resemblance to those relied on by Justices Kennedy and Ginsburg. The statute challenged in *Denver Area* empowered cable operators to unilaterally restrict speech over the objection of the channel operators. The FAA, by contrast, applies only when there is an agreement *by both parties* to resolve disputes through arbitration. Plaintiffs here were no more forced to enter into

an arbitration agreement with AT&T than they were forced to buy AT&T's service.

*Denver Area* thus stands only for the commonplace principle that a federal statute and regulations that restrict speech (in that case, because of the unique status of cable operators and the withdrawal of protection against censorship previously conferred) constitute state action. For that reason, it is unsurprising, then, that in the 21 years since it was decided, the Supreme Court has ***never*** relied on, or even cited, *Denver Area* in addressing state action, and only one published decision of a federal court of appeals has ever cited it in reference to state action—in passing—in holding that there was ***no*** state action.[9] The decision broke no new ground.

c. *Denver Area*'s holding is fully consistent with the Supreme Court's longstanding test for state action, and that test is not satisfied here.

*Denver Area*'s consistency with settled state action principles is confirmed by assessing the facts of that case and this one under the

[9] *See Yeo v. Town of Lexington*, 131 F.3d 241, 249 (1st Cir. 1997) (citing *Denver Area* for the proposition that the First Amendment "'ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech'").

Supreme Court's "two-part approach" to deciding whether state action is present.

That test states:

> First, the deprivation [of a constitutional right] must be caused by ***the exercise of some right or privilege created by the State*** * * *. Second, ***the party charged with the deprivation must be a person who may fairly be said to be a state actor***.

*Lugar*, 457 U.S. at 937 (emphasis added); *see also*, *e.g.*, *Am. Mfrs.*, 526 U.S. at 50. Both of these elements were present in *Denver Area*; neither is present here.

The first *Lugar* factor is absent because plaintiffs are challenging the action of AT&T, a private party, in drafting and entering into contracts with its customers. By contrast, in *Denver Area*, the plurality concluded that the infringement of speech was a result of the operation of the statute and FCC regulations.

*Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), demonstrates the critical distinction for purposes of the first *Lugar* factor between obligations arising under a contract and those created by the state—with only the latter qualifying as state action. The dispute in *Cohen* involved a promise of confidentiality between a reporter and his

source, and the newspapers argued that the First Amendment barred the enforcement of that promise. The Court held that there was state action based on the holding of the "Minnesota Supreme Court * * * that if [the source] could recover at all it would be on the theory of promissory estoppel, a state-law doctrine which, in the ***absence*** of a contract, ***creates*** obligations ***never explicitly assumed*** by the parties." *Id.* at 668 (emphases added).

The Court found that the absence of a contract made the situation analogous to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which found state action in courts' speech-restricting application and enforcement of libel laws—*i.e.*, duties imposed by the state through public law obligations—specifically, state tort law—not private contract. *Cohen*, 501 U.S. at 668.[10]

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[10] As the Washington Court of Appeals has explained, *Cohen* bars a finding of state action in the enforcement of a private settlement agreement that restricted speech. The court explained that "[i]n *Cohen*, the state created the duty before it enforced that duty," and "judicial enforcement of [a] settlement agreement," by contrast, "does not require application of a state common law doctrine to create the duty enforced." *State v. Noah*, 9 P.3d 858, 870-71 (Wash. Ct. App. 2000).

In *Denver Area*, the federal statute and regulations were the source of the alleged speech infringement. Here, the claimed infringement of Petition Clause rights arises from a contract. Plaintiffs chose to become AT&T customers and enter into agreements with AT&T. And it was AT&T's choice, not the government's, to seek to enforce the arbitration agreements it has with plaintiffs.

This Court has explained that "an action to compel arbitration is in essence a suit * * * to compel specific performance of the arbitration agreement." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1125 (9th Cir. 2008) (alterations and quotation marks omitted). It therefore is not the enforcement of a state-created legal duty as in *Cohen* or *Sullivan*.

The absence in this case of the second *Lugar* factor—that the deprivation of the right at issue must result from a government actor—is explained by the Supreme Court's *Flagg Brothers* decision.

The respondent, Brooks, was evicted from her apartment. Brooks agreed to have Flagg Brothers proceed with the moving and storage in its warehouse of her possessions. Flagg Brothers later

claimed that Brooks had failed to keep her account up to date, and threatened to sell her stored property under the authority of New York's Uniform Commercial Code § 7-210, which permits a warehouseman to sell stored property to satisfy a lien. *See* 436 U.S. at 151-53 & n.1. Brooks sued, arguing that the threatened sale would deprive her of her property in violation of the Due Process and Equal Protection Clauses. *Id.* at 153.

The Court rejected that constitutional claim, holding that a "warehouseman's proposed sale of [stored] goods * * * as ***permitted*** by New York Uniform Commercial Code § 7-210," is not state action. *Id.* at 164-66 (emphasis added). Although of course the New York legislature had adopted the UCC, and thus New York law required the state court to decline to preclude the sale, that fact did not amount to state action because the challenged deprivation of property was not caused by the enactment of the UCC. Instead, the claim was really about the enforcement by a private party, Flagg Brothers, of its rights arising out of the parties' bailment: "the State of New York has not compelled the sale of a bailor's goods, but has merely announced

the circumstances under which its courts will not interfere with a ***private*** sale." *Id.* at 166 (emphasis added).

Here, as in *Flagg Brothers*, there is no government actor: The arbitration agreement is a purely private arrangement; and the sole defendant in this case is AT&T, a private entity. In addition, as discussed above (at pages 21-24), the enforcement of a private agreement in court does not constitute state action.

In *Denver Area*, by contrast, the sole defendants were the FCC and the United States, and the infringement of rights arose from the statute and regulations, which withdrew previously-granted protection against censorship. And the cable operators who helped effectuate that infringement had a close relationship to the government. *See* pages 25-33, *supra*.[11]

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[11] *Denver Area* is similar in this respect to *Tulsa Prof'l Collection Servs.* The Supreme Court explained in that case that enforcement of a statute of limitations "falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." 485 U.S. at 487. It found state action in the "nonclaim statute" before it, which barred creditor claims against an estate if not filed within a specified period after a probate court ordered the publication of notice of probate proceedings, because the probate court was "intimately involved throughout." *Id.* And "without that involvement the time bar is never activated," because "the nonclaim statute becomes operative only after probate proceedings have been

Thus, the outcome in *Denver Area* is fully consistent with the settled state action principles. And those same principles demonstrate why neither of the two state action prerequisites are present here.

*2. Plaintiffs' reading of* Denver Area *is foreclosed by subsequent decisions of the Supreme Court and this Court.*

In addition to failing on its own terms, plaintiffs' overbroad reading of *Denver Area* would require overruling post-*Denver Area* precedents from the Supreme Court and this Court.

Three years after *Denver Area*, the Supreme Court confirmed that state-action principles had not changed.

*American Manufacturers* involved a due process challenge to a private insurer's decision to withhold payments pending an independent review of a disputed medical treatment. 526 U.S. at 44-47. Like plaintiffs here, the *American Manufacturers* plaintiffs sought to circumvent "the traditional application of [the Court's] state-action cases"—and the "state actor" requirement in particular—by

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commenced in state court." *Id.* In other words, state action was present because action by a government entity was necessary to "trigger[] the time bar." *Id.*

characterizing their claim as a "direct" challenge to the law authorizing the insurer's action. *Id.* at 50. The plaintiffs in *American Manufacturers* insisted that so long as they framed their argument in those terms, the Court "need not concern" itself "with the 'identity of the defendant' or the 'act or decision by a private actor or entity who is relying on the challenged law.'" *Id.*

The Supreme Court disagreed. It explained that the argument "ignores our repeated insistence that state action requires *both* an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State' * * * *and* that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *Id.* (quoting *Lugar*, 457 U.S. at 937).

Plaintiffs say *American Manufacturers* is different because the plaintiffs in that case sought monetary damages for the alleged constitutional violation. Pls. Br. 33-34. But nothing in the Supreme Court's holding supports that attempted distinction. Rather, the Court explained that it would disregard the plaintiffs' self-serving characterization of their challenge as a "facial" or "direct" one and instead "identify[] 'the specific conduct of which the plaintiff

complains.'" *Am. Mfrs.*, 526 U.S. at 51 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

The *American Manufacturers* plaintiffs were ultimately complaining about "a *private insurer*'s decision to withhold payment for disputed medical treatment" (*id.*)—just as here, plaintiffs are complaining about the decisions by AT&T, a private party, to enter into arbitration agreements with its customers and to seek to enforce its agreements. Indeed, plaintiffs concede that their constitutional challenge is raised "defensively in response to AT&T's motion to compel arbitration." Pls. Br. 34.

Likewise, Plaintiffs have no convincing answer to this Court's decision in *Duffield*, issued three years after *Denver Area*. *Duffield* is dispositive: It confirmed that when (as here) "no federal law ***require*[*s*]**" parties to agree to arbitrate, "no state action is present in simply enforcing that agreement." 144 F.3d at 1201 (emphasis added). *Duffield* thus confirms the very distinction between laws mandating private conduct and those merely permitting it that plaintiffs say *Denver Area* obliterated. And plaintiffs concede that they cannot distinguish *Duffield* on procedural grounds,

acknowledging that "the plaintiff in *Duffield* was similarly postured." Pls. Br. 34 n.4 (citing *Duffield*, 144 F.3d at 1200).

All plaintiffs are left with, then, is their argument that neither *Duffield* nor *American Manufacturers* "cite[d] or consider[ed] *Denver Area*." Pls. Br. 34 & n.4. But the obvious reason for those courts' silence is that *Denver Area* did not alter settled state-action law in the first place. Indeed, that is why there is no hint of *ex post* judicial authority, or even any existing academic commentary, to support plaintiffs' reading of *Denver Area*.

*3. Plaintiffs' reading of* Denver Area *would lead to a limitless expansion of state action.*

Plaintiffs' expansive reading of *Denver Area* does not merely contravene decisions by the Supreme Court and this Court. It would render the state action requirement all but meaningless and eliminate any distinction between private and governmental action.

Plaintiffs say that "normative justice demands" that any legal rule authorizing private conduct be subject to direct constitutional challenge. Pls. Br. 31; *see also id.* at 16-22. But that expansive view would constitutionalize all of contract law. For purposes of the state action doctrine, the FAA is no different than the UCC and common

law, all of which make private contracts enforceable.[12] And under plaintiffs' view, every principle of contract law must be subjected to constitutional scrutiny—as long as the plaintiff's complaint challenges the legal rule itself, rather than the court's application of the legal rule.

Indeed, plaintiffs concede as much when they maintain that the Supreme Court's decision in *Flagg Brothers* would have come out differently if the plaintiff had merely framed the case differently, by directly challenging the constitutionality of New York's UCC. Pls. Br. 33. But the presence of state action does not, and should not, turn on the plaintiff's pleading choices.

Even if artificially cabined to the First Amendment, plaintiffs' theory would open to constitutional challenge a wide variety of private agreements never before thought to involve state action. After all, numerous private contracts restrict parties' speech against the backdrop of legal rules permitting such restrictions.

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[12] Under plaintiffs' theory of state action, it makes no difference whether the challenged rule is of legislative or judicial origin. *E.g.*, Pls. Br. 19 (arguing that both "Congress and courts" are "ordinarily definitive state actors").

Parties to settlement agreements, for example, routinely agree that they will not disclose the contents of those agreements. Such agreements may also include non-disparagement clauses, which plaintiffs' theory would subject to constitutional scrutiny despite courts' view that a "settlement's non-denigration term does not implicate First Amendment rights." *Fisher v. Biozone Pharms., Inc.*, 2017 WL 1097198, at *7 (N.D. Cal. 2017); *FreeLife Int'l, Inc. v. Am. Educ. Music Pubs., Inc.*, 2009 WL 3241795, at *6 (D. Ariz. 2009); *see also generally George*, 91 F.3d at 1229 ("[T]he First Amendment protects individuals only against government, not private, infringements upon free speech rights.").

Virtually all private employment agreements and policies would also be placed under the constitutional microscope, as private employees must routinely agree to restrictions on their speech. *See, e.g.*, Mary E. Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996). The First Amendment standard limiting government employers' restrictions of employees' speech, *see Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006), would apply to private employers whenever a private employer sought to enforce a restriction in court.

In addition, the law protects trade secrets from disclosure and enforces private nondisclosure agreements, but plaintiffs' view of state action opens the door to constitutional challenge to any jurisdiction's version of the Uniform Trade Secrets Act. *See also, e.g.*, Gideon Parchomovsky & Alex Stein, *Intellectual Property Defenses*, 113 COLUM. L. REV. 1483, 1509 n.146 (2013) ("The Uniform Trade Secrets Act was adopted by nearly all states and the District of Columbia.").

* * *

In short, there is no basis for attributing the dramatic changes in the law that plaintiffs propose to the *Denver Area* plurality opinion. That opinion effected no change in state action standards.

### C. The FAA Does Not So Significantly "Encourage" Arbitration As To Transform Private Parties Into State Actors.

Plaintiffs' alternative state action argument is equally meritless. The Supreme Court has held that a private actor's conduct could be fairly attributable to the state if the state "has provided ***such significant encouragement*** * * * that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004 (emphasis added); *accord Am. Mfrs.*, 526 U.S. at 52 (quoting same); *Duffield*, 144

F.3d at 1202. Invoking this doctrine, plaintiffs argue that AT&T is a state actor because the FAA, as interpreted by the Supreme Court, so "encouraged" the use of arbitration that AT&T's decision to draft and use private arbitration agreements was not its own.

To state the argument is to refute it: plaintiffs cannot point to a single case even remotely suggesting that the FAA took the decision whether to draft and enter into private arbitration agreements out of the hands of private parties.[13] On the contrary, this Court already has rejected the precise argument—more than once.

Almost three decades ago, the Court held that "[a]lthough Congress * * * has provided for some governmental regulation of private arbitration agreements" in the FAA, "we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim." *FDIC v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987).

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[13] Indeed, plaintiffs thought so little of this argument that they did not even bother to include it in their opposition to AT&T's motion to compel arbitration. *See* SR59-95. As the district court noted, "this specific argument was not raised in Plaintiffs' papers" and could be "disregard[ed] * * * as waived." R14.

More recently, the Court held that the SEC's approval of NASD and NYSE rules ***requiring*** broker-dealers to enter into arbitration agreements did not so "encourag[e] the mandatory arbitration requirement" as to make the requirement state action. *Duffield*, 144 F.3d at 1201. As the Court explained, "[m]ere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Id.* at 1200 (quoting *Blum*, 457 U.S. at 1004-05).

If, as *Duffield* held, the government's approval of rules of "[p]rivate entities" ***mandating*** the use of arbitration agreements did not constitute sufficient "encouragement" to make the drafters of those agreements state actors (144 F.3d at 1200), then the FAA, which simply requires that courts enforce arbitration agreements to which parties voluntarily agree, surely does not either.

Plaintiffs' argument is also foreclosed by *American Manufacturers*. There, the plaintiffs argued that the challenged law so "encouraged" private insurers to withhold payments for disputed medical treatments as to make the insurers state actors. 526 U.S. at 53. The Court held that this argument "cannot be squared with our

cases," because "this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy." *Id.* Thus, "a finding of state action on this basis would be contrary to the 'essential dichotomy'" between "public and private acts that our cases have consistently recognized." *Id.* at 52-53 (citation omitted).

The same is true here. As one court has put it: "The Court rejects plaintiff's argument that the very existence of the FAA constitutes 'significant encouragement' of Verizon to include an arbitration agreement in its customer contracts * * * ." *Katz*, 2013 WL 6621022, at *6. The FAA's "promotion" of arbitration "in terms of both enforcing private agreements and encouraging efficient dispute resolution * * * hardly constitutes the kind of significant encouragement necessary to a finding of state action," the court continued, but rather "is more akin to the 'kind of subtle encouragement'" found insufficient for state action in *American Manufacturers*. *Id.* (quoting *Am. Mfrs.*, 526 U.S. at 53).

In an effort to evade these cases, plaintiffs repeatedly insist that it is not the FAA standing alone, but rather the Supreme Court's

decisions holding that the FAA favors arbitration and applies to consumer contracts that so encourage arbitration as to make AT&T a state actor. *E.g.,* Pls. Br. 15-16, 38, 40, 43, 46.

But that argument is contrary to a fundamental principle, underscored by this Court—that the meaning of a statute and its authoritative judicial interpretations are one and the same. Plaintiffs themselves concede (Pls. Br. 15-16) that "the Supreme Court's 'construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" *Murphy*, 724 F.3d at 1225; *accord Rivers v. Roadway Exp. Inc.*, 511 U.S. 298, 312-13 (1994).

Moreover, plaintiffs' argument fails on its own terms to undermine this Court's binding opinion in *Duffield*, because most of the Supreme Court's decisions that plaintiffs attack actually predate *Duffield*. For example, the Court held that the FAA applies to form consumer contracts three years before *Duffield*. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277-81 (1995); *see* Pls. Br. 6 (acknowledging same). The Supreme Court held that the FAA applies to all contracts within "the full reach of the Commerce

Clause" eight years before that. *Perry v. Thomas*, 482 U.S. 483, 490 (1987). And the Court's statements about the federal policy "favoring arbitration" appear as early as the 1980s. *E.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."). Plaintiffs' argument thus was available to, but not adopted by, this Court in *Duffield*.

To be sure, *Concepcion* and *Italian Colors* post-date *Duffield*. But plaintiffs' argument that those decisions—in particular, the language in *Concepcion* that "the FAA was designed to promote arbitration" (563 U.S. at 345)—encouraged ***AT&T*** to enter into arbitration agreements with its customers borders on the nonsensical. AT&T was the petitioner in *Concepcion*; it hardly could have been "encouraged" by that decision to enter into arbitration agreements with these plaintiffs, as those agreements were formed years before *Concepcion* was decided. Plaintiff Marcus Roberts purchased his phone and data plan in 2008 (R122); Plaintiffs Kenneth and Ashley Chewey purchased their phone and data plan in 2009

(R123); and Plaintiff James Krenn purchased his phone and data plan in 2008 (R125). Indeed, AT&T and its predecessor Cingular Wireless have used arbitration for well over a decade. *See, e.g.*, *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 979 (9th Cir. 2007) (noting that the plaintiff's agreement with Cingular in January 2005 contained an arbitration clause), *overruled by Concepcion*, 563 U.S. 333.

Moreover, the Supreme Court has repeatedly stated, as recently as earlier *today* and as early as the 1980's, that the FAA acts as a neutral rule of enforceability that places arbitration provisions "'on equal footing with all other contracts.'" *Imburgia*, 136 S. Ct. at 468 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); *accord, e.g.*, *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, No. 16-32 (May 15, 2017), Slip op. at 1;[14] *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).[15]

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[14] Available at https://www.supremecourt.gov/opinions/16pdf/16-32_o7jp.pdf.

[15] Plaintiffs also place far too much weight on the statements by this Court that "[s]ome might argue that our interpretation of *Concepcion* goes too far beyond the initial purpose of the FAA" and

At the end of the day, plaintiffs fail to come anywhere close to meeting the standard that they themselves recognize: "[w]hether the [encouragement] test is met is a 'necessarily fact-bound' inquiry." Pls. Br. 38 (quoting *Lugar*, 457 U.S. at 939). In other words, plaintiffs have offered no evidence that AT&T's decision to draft and use private arbitration agreements was not its own.

Rather, plaintiffs' argument is a rehash of commentators' criticisms of the Supreme Court's arbitration decisions and stale policy attacks on arbitration, culminating in a demand that the Supreme Court be "held responsible" for plaintiffs' dissatisfaction with the state of the law. Pls. Br. 39, 43. But, as Justice Breyer explained in his opinion for the Court in *Imburgia*, holding the Supreme Court "responsible" for its decisions in the manner plaintiffs

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"[i]n our view, *Concepcion* crystalized the directive * * * that the FAA's purpose is to give preference (instead of mere equality) to arbitration provisions." Pls. Br. 44 (quoting *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1159-60 (9th Cir. 2013)). Those statements are not holdings that the FAA so encourages private arbitration agreements as to make the use or enforcement of those agreements attributable to the State. In all events, the Supreme Court's language in *Concepcion* does not come close to the concrete, significant encouragement needed to convert private arbitration agreements into state action. *See Katz*, 2013 WL 6621022, at *6; page 48, *supra*.

suggest is not the proper role of lower courts. *See Imburgia*, 136 S. Ct. at 468; *see also, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").[16]

## II. Plaintiffs Cannot Establish A Petition Clause Violation.

Even if plaintiffs could somehow overcome the state action hurdle, this Court should affirm the district court's order compelling arbitration on the alternative ground that plaintiffs cannot prevail on the merits of their Petition Clause challenge. Indeed, the Court could affirm on that ground without reaching the state action issue, because it may affirm the district court's order "on any ground raised below and fairly supported by the record." *Proctor v. Vishay Intertech., Inc.*, 584 F.3d 1208, 1226 (9th Cir. 2009).[17]

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[16] Plaintiffs' *amicus*, Public Justice, is even more explicit in its desire to see *Concepcion* gutted, pining for a return to the pre-*Concepcion* landscape in which some states refused to enforce agreements to arbitrate disputes on an individual basis. *E.g.*, Pub. Justice Br. 15, 26.

[17] This Court's jurisdiction under 28 U.S.C. § 1292(b) "is not limited to deciding the precise question the district court certified"; rather, "the *entire* order is certified for appeal." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 952 n.10 (9th Cir. 2002) (quotation marks omitted); *accord Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court").

Judicial economy warrants rejecting plaintiffs' Petition Clause challenge now rather than remanding the issue to the district court in the event the Court finds state action. The result of a remand would simply be further delay: whichever side loses in the district court will seek a second interlocutory appeal—AT&T by right (*see* 9 U.S.C. § 16(a)) and plaintiffs under Section 1292(b). The delay and added expense of serial interlocutory appeals is unwarranted. That is especially so because plaintiffs' have no prospect of success, for two reasons.

*First*, the use of private arbitration does not implicate the Petition Clause. The Clause does not guarantee that the government respond to a petition or the use of a particular process to resolve a request presented to the government. *Second*, any rights conferred by the Petition Clause can be waived by private agreement, as plaintiffs have done here. It is therefore not surprising that in the over 90 years since the FAA was enacted, no one has seriously suggested that it violates the First Amendment.

### A. The Petition Clause Does Not Guarantee Plaintiffs A Judicial Determination Of The Merits Of Their Claim.

Plaintiffs' Petition Clause claim suffers from two independent defects.

To begin with, the Petition Clause does not apply to lawsuits between private parties. As Justice Scalia has explained, it is "quite doubtful" that "a lawsuit is a constitutionally protected 'Petition'" at all. *Borough of Dureya, Pa. v. Guarnieri*, 564 U.S. 379, 403 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part). He catalogued the "abundant historical evidence that 'Petitions' were directed to the executive and legislative branches of government, not to the courts." *Id.* at 403-04; *see also id.* at 399 (Thomas, J., concurring in the judgment) ("For the reasons set forth by Justice Scalia, I seriously doubt that lawsuits are 'petitions' within the original meaning of the Petition Clause of the First Amendment.").

And as Justice Scalia correctly pointed out, "[t]he Court has never actually *held* that a lawsuit is a constitutionally protected 'Petition.'" *Id.* at 402 (Scalia, J., concurring in the judgment in part and dissenting in part). In *Guarnieri*, for example, the applicability of the Petition Clause was never disputed because the parties had

"litigated the case on the premise that Guarnieri's grievances and lawsuit are petitions protected by the Petition Clause." 564 U.S. at 387.

Moreover, to the extent that the Supreme Court has suggested that the Petition Clause protects a right to access courts, it has done so *only* in the context of suits filed by prisoners, not purely private suits such as this one. And the Court has held that any right to access courts is limited to suits by prisoners "in order to attack their sentences, directly or collaterally, [or] in order to challenge the conditions of their confinement" imposed by the government. *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Justice Scalia's opinion for the Court cautioned, however, that the "slight extension of the right of access to the courts" from criminal appeals and habeas corpus actions to include civil rights suits could go no further—any such right does not entitle prisoners, for example, to file "shareholder derivative actions [or] slip-and-fall claims." *Id.* at 354-55.[18] The Petition Clause therefore does not apply here.

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[18] This Court also has not squarely addressed the scope of the Petition Clause outside of the prisoner context. In *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993), for example, the Court "expressly

Next, even if the petitioning right did encompass private lawsuits, "the First Amendment does not impose any affirmative obligation on the government" to respond to a "petition." *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 465 (1979); *see also*, *e.g.*, *Minn. State Bd. for Community Colls. v. Knight*, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment or in this Court's case[s] interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications[.]"); *Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 739 (D.C. Cir. 2011) (Petition Clause "does not even 'guarantee[]" any "official *consideration* of a petition") (citation omitted).

Accordingly, the attempts by plaintiffs (and *amicus* Public Justice) to bend the Petition Clause to serve their preference for class-wide litigation are misguided. Litigants have no right under the Petition Clause to any particular legal "process" in court, such as certification of a class action or the consideration of their claims on the merits. Rather, "in all of the cases addressing meaningful access

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decline[d] to reach the underlying question of whether" an agreement between a firefighters union and the city "actually implicates the Union's First Amendment rights," instead holding that such rights, if any, were waived. *Id.* at 889.

[under the Petition Clause], the focus is on the *access* to the court, not the court's response or behavior upon receiving the petition." *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 864 (6th Cir. 2012).

The Sixth Circuit in *EJS* therefore rejected the argument by the plaintiff that the Petition Clause entitled it to a particular procedure on its request for re-zoning, holding that there is simply "no support for the proposition that the right to meaningful access" to the courts requires "meaningful *process*" once a lawsuit has been filed. *Id.* And even in the prisoner context, the Supreme Court has "disclaim[ed]" any right "to *litigate effectively* once in court," because that goes "beyond the right of access." *Lewis*, 518 U.S. at 354.

As the D.C. Circuit has explained, "[n]o case holds that" congressional "interfer[ence] with *the decisionmaker's ability to grant the remedy* the plaintiffs seek * * * abridges the Petition Clause." *Rogoff*, 649 F.3d at 741. Here, plaintiffs' ability to access the courts has not been precluded in any manner that implicates the Petition Clause. They have not identified any barrier to their initial filing of this lawsuit. Nor have they been hindered in asking the courts to decide the enforceability of their arbitration agreements, a right

generally guaranteed by the FAA[19] as well as their AT&T contracts. SR12.

Plaintiffs can also invoke the courts' jurisdiction after arbitration takes place. They may ask a court to confirm the award or to review it for bias, "corruption," "fraud," arbitrator "misconduct," and the "arbitrators[']exceeding" or "imperfectly executing" their "powers." 9 U.S.C. § 10(a).

Moreover, plaintiffs' arbitration agreements entitle them to bring individual claims in small claims court, which is undoubtedly a governmental institution. SR12. Indeed, that option is not only guaranteed by plaintiffs' arbitration agreements with AT&T, but also by the American Arbitration Association's consumer due process protocols, which are applicable to millions of consumer arbitration agreements.[20] Plaintiffs (or their counsel) may prefer to pursue a

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19 *See, e.g.*, *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 298-99 (2010) (holding that, in the absence of a valid agreement delegating issues of arbitrability to the arbitrator, "'the court' must resolve [any] disagreement" over the "enforceability or applicability to the dispute" of the parties' arbitration agreement) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

20 *See* Am. Arbitration Ass'n, Consumer Due Process Protocol Statement of Principles, Principle 5, available at https://perma.cc/FD9S-2QG3 ("Consumer ADR Agreements should

particular type of process (a class action) and outcome (a class-wide settlement) in court. But the Petition Clause does not grant them a constitutional entitlement to those procedures.

If plaintiffs were correct that the First Amendment entitles them not only to initial access to a judicial forum but also to consideration of their claims on the merits, then ***any*** limitation on a court's jurisdiction and ***any*** procedural rule that might preclude a court decision on the merits would be subject to strict-scrutiny review. The scope of that principle is breathtaking—encompassing laws limiting federal jurisdiction; abstention doctrines; the *forum non conveniens* doctrine; federal statutes such as the Antiterrorism and Effective Death Penalty Act of 1996, Prison Litigation Reform Act, and Private Securities Litigation Reform Act of 1995; heightened pleading standards such as those found in Federal Rule of Civil Procedure 9(b) and its state equivalents or in states requiring fact-based pleading; and many other limits.

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make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.").

Other common contract provisions that may preclude a court decision on the merits—such as contractual limitations periods, disclaimers of remedies and forum-selection and choice-of-law clauses—would also be invalid unless they could pass constitutional muster. And a wide range of doctrines directing courts to dispose of claims on procedural grounds (such as statutes of limitations, statutes of repose, and laches), or statutes repealing causes of action, would similarly be called into question.

In short, plaintiffs' Petition Clause challenge fails because the Petition Clause does not grant them a right to have a court adjudicate the merits of their claims. Plaintiffs' interpretation of the Petition Clause would upend all procedural limitations on plaintiffs' use of the courts.

### B. Plaintiffs Have Waived Any Right To Have A Court Of General Jurisdiction Adjudicate Their Claims.

Even if plaintiffs did have a right under the Petition Clause to have a court adjudicate the merits of their claims, they waived that right by entering into arbitration agreements. Under such agreements, "'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute

resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" *Concepcion*, 563 U.S. at 348 (citation omitted). Plaintiffs have not disputed AT&T's showing that they agreed to arbitrate, that arbitration of their claims will be cost-free and expeditious, and that AT&T's arbitration provision contains financial incentives that encourage AT&T to make generous settlement offers and encourage attorneys to represent them.

Plaintiffs insisted below, as they briefly do here (Pls. Br. 6), that their "right to sue in court can be waived only 'knowingly and voluntarily.'" But the heightened standard they propose does not apply as a matter of law. And even if it did, their arbitration agreements satisfy that standard.

*1. Waivers of Petition Clause rights are not subject to a heightened 'knowing and voluntary' standard.*

Plaintiffs' proposed knowing and voluntary requirement is wrong for multiple reasons.

*First*, plaintiffs cannot explain why the standard for contractual waivers of Petition Clause rights should differ from the test governing waivers of the Seventh Amendment right to a jury trial. Six circuit

courts, including this one, have rejected arguments that a heightened standard requiring a "knowing and voluntary" waiver of the Seventh Amendment right to a jury should apply to the enforcement of an arbitration agreement.[21]

This Court has explained, for instance, that criminal cases involving knowing and voluntary waivers of jury trials are "simply beside the point" in this context, because "loss of the right to a jury trial is a necessary and fairy obvious consequence of an agreement to arbitrate." *Cohen*, 841 F.2d at 287. And the Seventh Circuit has

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[21] *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 994 (7th Cir. 2008); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1370-73 (11th Cir. 2006) (explicitly rejecting a "knowing and voluntary" requirement for the waiver of jury trial rights pursuant to an arbitration agreement); *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 506-07 (6th Cir. 2004) (same); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) ("[B]y agreeing to arbitration, Appellants have necessarily waived * * * their right to a judicial forum; and * * * their corresponding right to a jury trial."); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (holding that "[c]ommon sense" requires rejection of the argument that an arbitration agreement must "include an express jury waiver provision," because "[t]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate") (quotation marks omitted); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988), *overruled on other grounds by Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001).

explained that "an agreement to arbitrate * * * surrenders not only a jury trial but also the right to a judicial forum[,] [yet] [c]ourts do not impose special negotiation requirements on arbitration clauses in form contracts." *IFC Credit Corp.*, 512 F.3d at 994.

Forum-selection clauses may waive a party's constitutional due process rights by selecting a forum in which that party would otherwise not be subject to personal jurisdiction under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. But "[w]here * * * forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust' * * * their enforcement does not offend due process"—there is no heightened standard for finding a waiver. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

Plaintiffs' view of the Petition Clause would, in the district court's words, threaten to invalidate innumerable contract "provisions that arguably affect access to the courts," including not only arbitration clauses, but also, for example, "choice-of-venue, choice-of-law, statute-of-limitations, and limitations-on-damages provisions." R6. Federal Rule of Civil Procedure 12(h), which deems a personal

jurisdiction objection "waived" if not timely raised, even if inadvertently, would also be invalid.[22] And Federal Rule of Civil Procedure 38(d), which "waives" the right to a jury "unless its demand is properly served and filed," would itself be unconstitutional under plaintiffs' approach, as many failures to demand a jury trial are inadvertent.[23]

*Second*, the conclusion that a heightened waiver standard does not apply is further supported by the Supreme Court's decision in *Cohen*, 501 U.S. 663. The question in *Cohen* was whether a reporter's agreement not to reveal his source was enforceable in court on a promissory estoppel theory, even though judicial enforcement of the promise allegedly interfered with the reporter's First Amendment

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[22] Such waivers are common, as the Federal Rules themselves contemplate. As this Court has summarized in finding that a defendant waived its personal jurisdiction defense, "[i]n civil cases, Federal Rule of Civil Procedure 12(h)(1) mandates a waiver of the defense of lack of personal jurisdiction unless it is raised in the answer" or initial responsive pleading. *SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1337 (9th Cir. 1994) (citing *Elder v. Holloway*, 975 F.2d 1388, 1395 n.4 (9th Cir. 1991) (listing cases)).

[23] *See, e.g.*, *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1086-87 (9th Cir. 2002) (noting that neither "good faith mistake" nor "inadvertence" is "a sufficient basis to grant relief from an untimely jury demand"); *accord, e.g.*, *Sutton v. Atl. Richfield Co.*, 646 F.2d 407, 409 & n.3 (9th Cir. 1981).

rights. The Supreme Court rested its decision in part on the ground that "Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions which may be placed on the publication of truthful information are self-imposed." *Id.* at 671. Justice Souter's dissent argued that a heightened waiver test should have applied (see *id.* at 677), but the majority did not adopt that standard.

*Third*, plaintiffs claim that they are challenging the constitutionality of the FAA only "as applied" to consumer form contracts. *E.g.*, Pls. Br. 6-7, 15. But the FAA applies to ***all*** arbitration clauses in contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2. And as the Supreme Court has repeatedly explained, "[w]e have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal *the broadest permissible exercise* of Congress' Commerce Clause power." *Citizens*

*Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (emphasis added) (quoting *Allied-Bruce*, 513 U.S. at 273-74).[24]

Similarly, plaintiffs cannot find in the Petition Clause a special rule applicable only to consumer contracts—they surely do not suggest that consumers alone have the right to sue in court. Thus, as the district court noted, "Plaintiffs' argument here would apply not just to consumer contracts but commercial contracts as well," thereby imposing constitutionally-based limits on "enforcement of all arbitration agreements made possible by the FAA." R16. And not just the FAA, but state arbitration statutes as well—after all, those statutes too call for the enforcement of private arbitration agreements. *See, e.g.*, Cal. Civ. Proc. Code § 1281 ("A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.").

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[24] Plaintiffs' claim that Congress "*unequivocally rejected* the notion that the FAA" applies to consumer form contracts (Pls. Br. 7) is foreclosed by *Allied-Bruce*, in which Justice Breyer explained in his opinion for the Court that "when enacting this law," Congress "had the needs of consumers, as well as others, in mind." 513 U.S. at 280 (citing S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924)).

For all of these reasons, ordinary principles of contract law, and not the heightened knowing and voluntary standard plaintiffs propose, govern the waiver of Petition Clause rights by private arbitration agreements. And plaintiffs' waiver of any Petition Clause rights is clear under those principles.

Plaintiffs complain that AT&T's arbitration provision is located in a standard form contract, but have not challenged AT&T's showing of contract formation or invoked generally applicable California unconscionability doctrine under the FAA's savings clause. They have therefore waived any argument that they failed to form arbitration agreements with AT&T under generally applicable state contract law. For good reason. As this Court recently reiterated, "the adhesive nature of a contract, without more, would give rise to a low degree of procedural unconscionability at most." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261-62 (9th Cir. 2017); *see also Concepcion*, 563 U.S. at 346-47 ("the times in which consumer contracts were anything other than adhesive are long past").

California law further requires "the party opposing arbitration" on unconscionability grounds to "demonstrate that the contract * * *

is both procedurally *and* substantively unconscionable." *Poublon*, 846 F.3d at 1260 (emphasis added) (citing *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015)).

Plaintiffs have not argued that AT&T's arbitration provision is substantively unconscionable. Nor could they.

Arbitration under AT&T's provision will be cost-free and expeditious for plaintiffs. R97-99; SR11-13. AT&T's provision also affords each plaintiff the potential for a $10,000 minimum award and double attorneys' fees. *Id.* A federal judge has observed that a materially identical version of AT&T's arbitration 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. 2009) (Feess, J.). And the Supreme Court has recognized that AT&T customers are "essentially guarantee[d] to be made whole." *Concepcion*, 563 U.S. at 352 (quotation marks omitted)); *see also Coneff*, 673 F.3d at 1159.

*2. Plaintiffs knowingly and voluntarily agreed to arbitrate.*

Even if a heightened knowing and voluntary standard governs waivers of the Petition Clause right, plaintiffs still would not have a

viable constitutional challenge, because their proposed "knowing and voluntary" standard is met here.

It is undisputed that when plaintiffs obtained iPhones from AT&T retail stores:

- ***They each signed directly under an affirmation*** that "I have reviewed and agree to the rates, terms, and conditions * * * described in the Wireless Customer Agreement (including limitation of liability and ***arbitration provisions***) * * *." R93 (emphasis added).
- They each received a Customer Service Summary that highlighted the arbitration clause, notifying them that their contracts consist of (among other things) "[t]he Wireless Customer Agreement * * * **and its arbitration clause**." R93-94.
- Their contracts each ***began*** with a notice about arbitration (SR6):

> **PLEASE READ THIS AGREEMENT CAREFULLY TO ENSURE THAT YOU UNDERSTAND EACH PROVISION * * *. THIS AGREEMENT REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER THAN JURY**

> **TRIALS OR CLASS ACTIONS, AND ALSO LIMITS THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE.**

- The arbitration clause says in plain English (SR11):

> **[W]e each agree to resolve * * * disputes through binding arbitration or small claims court instead of in courts of general jurisdiction.** * * * Arbitration uses a neutral arbitrator instead of a judge or jury * * * **Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted.**

Plaintiffs did not dispute below that they read and understood these disclosures. And it is hard to understand plaintiffs' apparent position that agreeing "**to resolve *** disputes through binding arbitration or small claims court *instead of in courts of general jurisdiction***" is something less than a knowing and voluntary waiver of any right they may have had to pursue their claims on the merits in those courts.

* * *

At the end of the day, plaintiffs' novel and unsupported Petition Clause challenge is foreclosed by binding precedent (and common sense) at every step. This Court should put to rest plaintiffs' ill-fated

effort to elevate to constitutional status their disagreement with the Supreme Court's arbitration precedents.

## CONCLUSION

The district court's order granting AT&T's motion to compel arbitration should be affirmed.

Respectfully submitted,

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May 15, 2017

## STATEMENT OF RELATED CASES

Counsel for AT&T is unaware of any related cases pending in this Court.

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-1 because:

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 15th day of May, 2017, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that everyone who has filed a notice of appearance in this case is a registered CM/ECF user.

May 15, 2017

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