No. 17-1287

In the Supreme Court of the United States

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

Petitioners,

v.

AT&T MOBILITY LLC,

Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioners are customers of respondent AT&T Mobility LLC ("AT&T") whose customer agreements include arbitration provisions. After petitioners filed this lawsuit, AT&T moved to enforce the arbitration agreements under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Petitioners objected on the ground that the provisions of the FAA governing the enforcement of arbitration agreements purportedly violate their First Amendment right to petition the courts for redress. Relying on this Court's decisions in *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999), and *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978), the courts below rejected that First Amendment challenge for lack of state action.

The question presented is:

Whether a party opposing enforcement under the FAA of an arbitration contract between private parties may challenge either the court's decision to enforce the contract or the provisions of the FAA authorizing enforcement as a violation of the First Amendment's Petition Clause, notwithstanding this Court's repeated holdings that the requisite state action is not present when courts enforce private agreements.

RULE 29.6 STATEMENT

Respondent 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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Petitioners' argument is breathtaking in its scope. They assert that the FAA is unconstitutional: by providing for the enforcement of arbitration agreements between private parties, the FAA supposedly infringes the First Amendment's protection of "the right of the people * * * to petition the Government for redress of grievances." And petitioners' novel legal rule is not limited to arbitration contracts: it also would apply the First Amendment strict-scrutiny standard to laws providing for judicial enforcement of confidentiality agreements and protection of trade secrets.

Not surprisingly, the district court and the court of appeals rejected this contention. And petitioners do not even try to argue that the unanimous conclusion of these courts conflicts with the decision of any other lower court.

That is because petitioners' argument is squarely foreclosed by this Court's precedents.

The First Amendment, including its Petition Clause, applies only when there is "state action"—"the party charged with the deprivation must be a person who may be fairly said to be a state actor." Pet. App. 5-8 (quoting *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). That standard cannot be satisfied here, because AT&T is not a state actor.

Petitioners appear to recognize that reality (see Pet. 26), and contend that this Court's plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996), radically changed state-action doctrine to dispense with the state-actor requirement. The Ninth Circuit correctly rejected this contention; neither this Court nor any lower court has ever read the fractured opinions

in *Denver Area* to accomplish such a transformation in the law.

The petition should be denied.

STATEMENT

Petitioners are customers of AT&T Mobility LLC ("AT&T") who agreed to arbitrate any disputes with AT&T pursuant to an arbitration agreement essentially identical to the one that this Court considered in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).

They instituted this putative class action against AT&T in July 2015, alleging that AT&T did not disclose that it might temporarily reduce the download speeds of customers with unlimited data plans who consume a high amount of data during their monthly billing cycle. Seeking to represent a putative nationwide class of customers, petitioners asserted claims under California and Alabama common law and consumer-protection laws. Pet. App. 3.

AT&T moved to compel arbitration under the FAA. Petitioners opposed the motion on the ground that an order compelling arbitration would violate their rights under the Petition Clause. Pet. App. 3.

The district court (Chen, J.) issued an order compelling arbitration. Pet. App. 23-51. The court held that because "there is no state action in the instant case, [petitioners] lack a viable First Amendment challenge to the arbitration agreements." Pet. App. 51.

The district court nonetheless certified the question under 28 U.S.C. § 1292(b), and the Ninth Circuit accepted the appeal.

The court of appeals (Hawkins, Fletcher, and Tallman, JJ.) unanimously affirmed. Pet. App. 1-22.

The court began its analysis by recognizing that "'[a] threshold requirement of any constitutional claim is the presence of state action.'" Pet. App. 5 (citation omitted). "By requiring courts to 'respect the limits of their own power as directed against * * * private interests, the state action doctrine 'ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts." Pet. App. 5-6 (quoting *American Manufacturers Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999)).

Invoking this Court's decision in *Lugar*, 457 U.S. at 937, the court below stated:

> We apply a two-part state action test. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state[.]" "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." While the second *Lugar* prong "does not restrict the application of the Constitution solely to governmental entities," a private party's actions must be "properly attributable to the State." Otherwise, "private parties could face constitutional litigation whenever they seek to rely on some [statute] governing their interactions with the community surrounding them."

Pet. App. 6 (citations omitted).

The court of appeals observed that "[u]nder *Lugar*, AT&T's conduct must be attributable to the state," but that petitioners sought to "circumvent"

that requirement "by bringing a 'direct First Amendment challenge to the FAA and its Supreme Court[] interpretations[.]'" Pet. App. 6.

The court of appeals held that "the Supreme Court already rejected that argument in *American Manufacturers*" and applied the state-actor requirement in *Flagg Brothers*, another case involving a challenge to a statute. Pet. App. 6-7. The Ninth Circuit concluded:

> Just as the plaintiffs in *American Manufacturers* and *Flagg Bros.* had to show the private defendants were "state actors," AT&T's conduct must be fairly attributable to the state. Plaintiffs cannot convert AT&T into a state actor simply by framing their FAA challenge as "direct." If every private right were transformed into a governmental action just by raising a direct constitutional challenge, "the distinction between private and governmental action would be obliterated."

Pet. App. 8 (citations omitted).

The court below then turned to petitioners' argument that the plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996), contained an "implicit edict" that "changed this established state action framework and made 'proving private arbitration clause drafters to be state actors unnecessary.'" Pet. App. 8.

"As an initial matter," the court stated, petitioners' "reading must be incorrect, as *Denver Area* did not overrule *Flagg Bros.*, decided eighteen years earlier; nor was *Denver Area* overruled by *American Manufacturers*, decided three years later." Pet. App.

9. And the court engaged in a detailed analysis of *Denver Area*, see Pet. App. 9-14, to conclude that "the splintered decision—even considered in a vacuum—does not stand for the sweeping proposition [petitioners] assert" and that petitioners "cannot invoke *Denver Area* to evade *Lugar*. They must show AT&T is a state actor." Pet. App. 9, 14.

Turning to that question, the court of appeals rejected petitioners' contention that "'the FAA's mandate and the Supreme Court's corresponding enforcement of consumer adhesion forced arbitration contracts have sufficiently encouraged the drafting of such contracts, particularly in the mobile phone industry, so as to hold the State fairly responsible for their burgeoning use.'" Pet. App. 15-16. The court below held that this claim "stretches the encouragement test too far." *Id.* at 16; see also *id.* at 16-22.

The court of appeals concluded:

> "[P]ermission of a private choice cannot support a finding of state action," and "private parties [do not] face constitutional litigation whenever they seek to rely on some [statute] governing their interactions with the community surrounding them." Plaintiffs must, but cannot, show AT&T's conduct is attributable to the state.

Pet. App. 22 (citations omitted).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with the decision of any other lower court and, as the court of appeals demonstrated in its painstaking analysis, is fully consistent with this Court's decisions. Moreover, this case is an especially poor vehicle to take up

petitioners' invitation to revolutionize state-action doctrine, because their underlying Petition Clause challenge is fatally defective for multiple reasons. The Court should deny the petition.

A. There Is No Conflict Among The Lower Courts.

Petitioners do not even try to argue that the decision below conflicts with the ruling of another lower court. Nor could they. The court of appeals' ruling is an uncontroversial application of long-settled state-action principles as to which the lower courts are in agreement.

Indeed, no court has *ever* agreed with petitioners' view that the FAA's mandate that courts enforce private arbitration agreements constitutes state action. See, *e.g.*, *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[.]"); *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 is insufficient state action"); *Sharp Corp.* v. *Hisense USA Corp.*, 292 F. Supp. 3d 157, 175-76 (D.D.C. 2017) (citing additional cases).

To the contrary, lower courts have long agreed that "[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." *Edwards* v. *Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968).

B. There Is No Conflict With This Court's State-Action Precedents.

The Ninth Circuit's decision rests on a faithful application of this Court's state-action decisions.

1. AT&T Is Not A State Actor.

The First Amendment, like most provisions of the Bill of Rights, protects only against *governmental* intrusion. For that reason, this Court's decisions defining the reach of these constitutional protections have consistently preserved "the essential dichotomy between public and private acts." *Am. Mfrs.*, 526 U.S. at 52-53. A plaintiff therefore must show that "the party charged with the deprivation [of a constitutional right] must be a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937; see also Pet. App. 6.

Applying that settled framework, this Court has repeatedly refused to construe the state action doctrine in a manner that would subject the terms of private agreements to the constitutional limitations applicable to government action, even when the courts are invoked to enforce those agreements. As this Court has explained, "[p]rivate 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) (citing *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978)).

Petitioners here do not challenge the court of appeals' determination that AT&T is not a state actor when it seeks to enforce under the FAA an arbitra-

tion agreement between private parties. See Pet. 26; Pet App. 15-22.

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

Attempting to circumvent this Court's holdings, petitioners argue that, because they supposedly have asserted a "direct" challenge to the constitutionality of the FAA, they need not show that AT&T is a state actor. Pet. 4-5, 20, 33. But the court below correctly concluded that this contention too is precluded by this Court's precedents. Pet. App. 7.

a. *American Manufacturers Ins. Co.* v. *Sullivan*, 526 U.S. 40 (1999), involved a due process challenge to a private insurer's decision to withhold payments pending review of a disputed medical treatment. *Id.* at 44-47. Like petitioners here, the plaintiffs in *American Manufacturers* sought to circumvent "the traditional application of [the Court's] state-action cases"—and the "state actor" requirement in particular—by characterizing their claim as a "direct" challenge to the law authorizing the insurer's action. *Id.* at 50. The *American Manufacturers* plaintiffs insisted that because their argument was framed as a facial challenge, 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.'" *Ibid.*

The Court rejected that argument, explaining that it "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.'" *Ibid.* (quoting

Lugar, 457 U.S. at 937). In that case—as here—the defendant "charged with the deprivation" was not a "state actor" and the constitutional claim therefore failed.

This Court had reached the same conclusion in *Flagg Brothers*. In that case, after movers had stored the plaintiff's possessions, the movers threatened to sell her property to satisfy her overdue balance, as permitted by a Uniform Commercial Code provision authorizing a warehouseman to sell stored property to satisfy a lien. 436 U.S. at 151-53 & n.1. The plaintiff sued, arguing that the sale would deprive her of her property in violation of the Due Process and Equal Protection Clauses. *Id.* at 153.

This Court rejected that constitutional claim, holding that a "warehouseman's proposed sale of [stored] goods * * * as *permitted* by" the UCC is not state action. *Id.* at 164-66 (emphasis added). Although of course the New York legislature had adopted the UCC, and thus state law required the court to allow the sale to proceed, that fact did not amount to state action because the *UCC* did not cause the challenged deprivation of property. Instead, the lawsuit involved the enforcement by a private party (the moving company) 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 *American Manufacturers* and *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. Under these precedents, it is AT&T—not the

government—that is alleged to be depriving petitioners of their Petition Clause rights by invoking its arbitration agreements with them. And, as in those cases, the state action requirement applies, and is not satisfied, even though AT&T's argument for enforcing its private agreement rests on a federal law.[1]

b, Petitioners argue (Pet. 14-18, 32-34) that that this Court's fractured ruling in *Denver Area* provides a different rule of decision. But as the unanimous Ninth Circuit panel explained, *Denver Area* did not "change[] this established state action framework." Pet. App. 9.

Denver Area 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.); see also Pet. App. 9-10 & n.2.

Petitioners seize on a comment by the plurality that "[a]lthough the [lower] court said that it found

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[1] Petitioners purport to distinguish *American Manufacturers* and *Flagg Brothers* because the plaintiffs in those cases sought monetary damages for the alleged constitutional violation, whereas petitioners here say they want only an injunction. Pet. 27. But as the Ninth Circuit pointed out in rejecting this "unsuccessful[] attempt to distinguish" those cases, this is a distinction without a difference. Pet. App. 9. Rather, as this Court explained in *American Manufacturers*, courts must disregard a plaintiff's self-serving characterization of his or her challenge as a "facial" or "direct" one and instead "identify[] 'the specific conduct of which the plaintiff complains.'" 526 U.S. at 51 (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982)). That instruction about how to decide whether state action exists applies regardless of the remedy that the plaintiff seeks.

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 Pet. 16). They then argue that the plurality's description of the lower court's holding implicitly created a new rule 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.

As the court below explained in its detailed analysis of *Denver Area* (Pet. App. 9-14), that effort to portray a single sentence in a plurality opinion as effecting a dramatic revision of the state-action doctrine fails for multiple reasons.

To begin with, *Denver Area* was bookended by the decisions in *Flagg Brothers*, "decided eighteen years earlier," and *American Manufacturers*, "decided three years later." Pet. App. 9. Nothing in *Denver Area*'s fractured opinions suggested an intent to overrule *Flagg Brothers*, and the Court in *Denver Area* of course could not have overruled the *subsequent* decision in *American Manufacturers*, which confirmed that *Denver Area* did not change state-action doctrine in the manner that petitioners suggest. See also Pet. App. 11 (noting that "the plurality opinion on which Plaintiffs rely is not binding").

If petitioners were correct that *Denver Area* had worked a sea-change in state-action doctrine, one would have expected the case to be cited repeatedly in the state-action context. But as the Ninth Circuit observed, "[i]n the 21 years since it was published, [this] Court has never even cited *Denver Area* in addressing state action." Pet. App. 9. Further, only one published decision of a court of appeals has ever done so—a passing reference in the course of holding that

there was no state action. 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").

Moreover, *Denver Area*'s holding rested on its "unique context, where cable operators were empowered by statute to censor speech on public television, and as a result were 'unusually involved' with the government." Pet. App. 13 (quoting 518 U.S. at 739); see also Pet. App. 9-11.

The plurality "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." 518 U.S. at 737. But, the plurality concluded, the statute before it did not genuinely involve only "the decisions of *private citizens* to permit, or to restrict speech." *Ibid.* (emphasis added).

The *Denver Area* plurality instead 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 gov-

ernment" 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.

If, as petitioners contend, 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." *Id.* at 738.

As the court below recognized, "[t]hese unique characteristics of cable systems are not at issue here" (Pet. App. 13), and petitioners do not argue otherwise. 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.[2]

Finally, petitioners' reading of *Denver Area* would work a dramatic change in state-action doctrine, constitutionalizing broad swaths of contract

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[2] Petitioners also rely on a statement in a concurring opinion in *Denver Area* that "[s]tate 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." Pet. App. 12 n.4 (quoting *Denver Area*, 518 U.S. at 782 (Kennedy, J., concurring in part and dissenting in part)). But as the court below noted, petitioners' interpretation of this statement as allowing facial constitutional challenges to statutes "is neither binding nor consistent with *American Manufacturers*." Pet. App. 12 n.4.

law and obliterating the distinction between governmental and private action that the state-action doctrine was intended to preserve.

After all, for purposes of state action, the FAA is no different than the UCC and common law, all of which, in some circumstances, require specific performance of private contracts. Under petitioners' view, therefore, every private contract is subject to constitutional scrutiny so long as the plaintiff's complaint challenges the legal rule requiring enforcement of the contract rather than the court's application of that rule.

Even if artificially cabined to the First Amendment, petitioners' theory would open to constitutional challenge a wide variety of private agreements never before thought to involve state action.

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 petitioners' 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. Mar. 23, 2017), and that judicial "enforcement of [a non-disparagement] agreement is not governmental action for First Amendment purposes," *United Egg Producers* v. *Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995). See also, *e.g.*, *Evans* v. *T-Mobile USA, Inc.*, 2017 WL 661797, at *2 (E.D. Tex. Feb. 16, 2017); *FreeLife Int'l, Inc.* v. *Am. Educ. Music Pubs., Inc.*, 2009 WL 3241795, at *6 (D. Ariz. Oct. 1, 2009).

Virtually all private employment agreements and policies would also be placed under the constitutional microscope. This Court's 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 contractual restriction on its employees' speech in court.

In addition, the law protects trade secrets from disclosure and enforces private nondisclosure agreements, but petitioners' 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, petitioners' expansive reading of *Denver Area* does not merely contravene decisions by this Court. It would largely obliterate the government action-private action distinction, and subject numerous private arrangements to constitutional limitations.

C. Petitioners' Underlying First Amendment Challenge Is Baseless.

Review is unwarranted for the additional reason—presented to the court of appeals—that the proposed Petition Clause challenge is doomed to fail on the merits for at least two independent reasons.

First, even if the right to petition encompassed the right to access the courts by filing a lawsuit—a

proposition that is far from clear[3]—the FAA does not intrude on any such right; petitioners did in fact file a lawsuit and had an opportunity to litigate the enforceability of their arbitration agreements. See 9 U.S.C. §§ 2-4.

Petitioners assume that the Petition Clause further guarantees them the right to have a court decide the merits of their claim, but "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[.]").

For that reason, the Petition Clause does not give litigants the right to any particular process. Rather, "in all of the cases addressing meaningful access [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); see also *Am. Bus Ass'n* v. *Rogoff*, 649 F.3d 734, 741 (D.C. Cir. 2011) ("No case holds that" congressional "interfer[ence] with the decisionmaker's ability to

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[3] Justices Scalia and Thomas have observed that it is "quite doubtful" that "a lawsuit is a constitutionally protected 'Petition'" at all. *Borough of Dureya* v. *Guarnieri*, 564 U.S. 379, 403 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part); 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.").

grant the remedy the plaintiffs seek * * * abridges the Petition Clause."). Here, petitioners' ability to access the courts was not hindered.

Second, even if the Petition Clause did guarantee petitioners a court ruling on their claims—and it does not—petitioners waived that right by agreeing to arbitration. As this Court has explained, "the waiver of the right to go to court" is "the primary characteristic of an arbitration agreement." *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017). Private agreements to waive constitutional rights are commonplace and routinely enforced; if that were not the case, then every settlement agreement would be unconstitutional.

Petitioners argued below that contracts cannot waive First Amendment rights absent "clear and compelling evidence" that the waiver was "knowing, voluntary, and intelligent," with "full awareness of the nature of the right" and "the consequences of the decision to abandon it." ECF 44, at 10 (quotation marks omitted). But that insistence upon a heightened waiver standard cannot be squared with this Court's decision in *Cohen* v. *Cowles Media*, 501 U.S. 663 (1991), in which the Court enforced a reporter's private agreement not to reveal his source without asking whether the reporter had "knowingly and voluntarily" waived his First Amendment right to speak. *Id.* at 671. As the Court explained, the "First Amendment does not confer * * * a constitutional right to disregard promises that would otherwise be enforced under state law." *Id.* at 672. In any event, petitioners did knowingly and voluntarily agree to AT&T's fully disclosed arbitration provision, which was repeatedly called to their attention, including in the acknowledgment immediately above their signa-

tures, which stated that they each "have reviewed and agree to the * * * Wireless Customer Agreement (including [its] limitation of liability and *arbitration* provisions)." ECF 46, at 10 (emphasis added).

In sum, petitioners' substantive First Amendment claim is as deeply flawed as their state action argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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