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

REPLY BRIEF FOR THE PETITIONERS

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May 29, 2018

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Petitioners respectfully submit this reply brief to address three new issues raised by AT&T Mobility LLC ("AT&T") in its Brief In Opposition ("Opp. Br.").

INTRODUCTION

This Petition presents the question whether the Federal Arbitration Act of 1925 ("FAA") is exempt from constitutional scrutiny.

Petitioners sought to test the FAA's validity under the First Amendment Petition Clause, which this Court has confirmed protects every citizen's right to sue in court.[1] Petitioners argue that the FAA, as applied by the courts to non-negotiable form consumer arbitration contracts, is unconstitutional because it empowers private entities to compel citizens—who have no genuine choice—to waive their Petition Clause rights to sue in court. The lower court undisputedly immunized the FAA against judicial review of that question.

Because it found that the FAA merely *permits* rather than *compels* private infringements of citizens' First Amendment rights (and notwithstanding that the FAA then compels courts to enforce those private infringements), the Ninth Circuit held that the FAA cannot be challenged unless the private infringers are state actors. But since only private entities draft consumer arbitration clauses, no consumer can ever meet that requirement, or hence challenge the FAA.

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[1] This Court's precedents make clear that the Petition Clause "protects the rights of individuals to appeal to courts … for resolution of legal disputes". *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) (citations omitted).

Former Chief Judge Patricia Wald wrote that "it simply does not follow that, if the [private entities'] decisions [to use their government-granted power] are *not* state action, then the statute itself is not state action, and is exempt from constitutional scrutiny." *Alliance for Comm'ty Media v. FCC*, 56 F.3d 105, 132 n.4 (D.C. Cir.1995 (Wald, J., dissenting in part) (emphasis in original). This Court *unanimously endorsed* Judge Wald's position in *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), which held—in the context of a similar First Amendment challenge—that private infringers did *not* need to be state actors. *See* Petition ("Pet.") 14-18.

The Ninth Circuit agreed that *Denver Area* held that state action existed with respect to a permissive statute that, like the FAA, made a First Amendment right "vulnerable" to private infringement in a context where the Government could not itself infringe that right. *Id.* at 782 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). But the Ninth Circuit refused to follow that holding here.

Although *Denver Area* unanimously rejected the notion that only statutes that *command* private actors to infringe others' free speech qualify as state action while laws that simply *authorize* private First Amendment violations do not, the court below nevertheless applied that rejected analysis here. Pet. 3-4, 14, 24, 32.

The decision below not only conflicts with *Denver Area*, it sets a dangerous precedent. If not reversed, the ruling will enable lawmakers to trample on citizens' civil and constitutional rights by

drafting other laws that, like the FAA, both *authorize* private infringements that were *not* previously permitted and then *compel* the judiciary to enforce them. Pet. 28-32. No law should be immune from judicial review, and no lawmaker should be beyond the Constitution's reach. But the Ninth Circuit's decision does both of those things by issuing a ruling that insulates the FAA from constitutional inspection.

AT&T's opposing brief does not dispute these critical points. Instead, AT&T makes three new arguments. Two concern state action and require but a brief response. The third vainly contests the merits of Petitioners' First Amendment challenge.

A. No Conflict Exists Among The Lower Courts Because The Question Presented Here Is One Of First Impression.

AT&T wrongly suggests that the Ninth Circuit simply ruled consistently with "long-settled" law. Opp.Br. 6. No other court has even considered the issue that Petitioners raise, that the FAA *itself* constitutes state action under *Denver Area*. That is a "question[] of first impression." Order Granting Plaintiffs' Motion to Certify For Immediate Interlocutory Appeal, No. 3:15-cv-03418-EMC, Dist. Ct. Dkt. No. 68, at 3 (June 27, 2016).

AT&T's cases all address whether state action arises from the *entry of a court order* enforcing an arbitration agreement or an arbitration award. *See* Opp. Br. 6. Petitioners did not make that argument before the Ninth Circuit, and they do not make it here.

B. Applying *Denver Area* To The FAA Would Not Dramatically Change State Action Doctrine Or Constitutionalize Every Private Contract.

AT&T's hyperbole that Petitioners' argument "is breathtaking in its scope," would "revolutionize state-action doctrine" and lead to strict scrutiny review of even confidentiality, settlement and employment agreements is similarly baseless. Opp. Br. 1, 6, 13-16. Not even the Ninth Circuit accepted these contentions. Petitioners have shown that *Denver Area*'s result was consistent with this Court's state action precedents. Pet. 6-18.[2]

Denver Area's state action analysis reaches only private contractual infringements that *would not occur but for* the State's *authorization* of the private infringements. The cable operators there did not have a right under pre-existing law to censor their programmers. *See Denver Area*, 518 U.S. at 734 (statute permitting cable operator censorship altered previous law prohibiting it); *id.* at 743 ("the provision arises in a very particular context -- congressional *permission* for cable operators to regulate programming that, *but for* a previous Act of Congress [prohibiting regulation], would have had no path of access to cable channels free of an operator's control") (second emphasis added).

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[2] AT&T attempts to limit *Denver Area* to its facts by arguing that the plurality there "endorsed" the petitioners' arguments for why the case was "special" for state action purposes. Opp. Br. 12-13. But the plurality was merely reciting the petitioners' arguments, not adopting them. *See* 518 U.S. at 738-39.

Confidential settlements, employment contracts and trade secret agreements involve long-held legal rights. Statutes that simply acknowledge without altering the contracting parties' pre-existing balance of rights are not "the type of state action" that implicates the Constitution. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 487 (1988) ("self-executing" statutes of limitation not "type of state action" subject to due process challenge but claim-filing deadlines triggered by judicial acts are).

By contrast, the FAA, singled out consumers' rights to sue in court "for vulnerability to private censorship in a context where [censorship] is not otherwise permitted." *Denver Area*, 518 U.S. at 782. The FAA is state action because it changed the law to compel courts to enforce previously unenforceable private Petition Clause violations.

C. The Underlying Petition Clause Challenge Has Merit.

1. Summary of Petition Clause Argument.

This Court has never been asked to consider the FAA in light of the First Amendment. If there is tension between the Petition Clause and the FAA, the Petition Clause must prevail. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) ("Where a specific statute … conflicts with a general constitutional provision, the latter governs.").

Petitioners assert that the FAA, as applied to non-negotiable form consumer arbitration contracts, violates the Petition Clause for the following reasons:

1. The First Amendment guaranties the right to petition all three branches of the Government[3] and, thus, embodies a constitutional right to sue in court. *Borough of Duryea*, 564 U.S. at 387.

2. Congress cannot infringe that right directly or indirectly. "The First Amendment would … be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

Congress cannot enact a law directly barring "AT&T's customers from suing in court" or requiring "AT&T to compel its customers to waive their right to sue in court," or a law that indirectly has the same effect, including permissive laws that, "*in actuality*, will 'abridge'" the First Amendment. *Denver Area*, 518 U.S. at 739 (plurality op.) (emphasis in original).

3. The FAA, as applied to non-negotiable consumer contracts, indirectly violates the Petition Clause because it empowers entities like AT&T to take away consumers' rights to sue and commands the judiciary to enforce AT&T's use of that government-granted power.

4. There are at least substantial grounds to question whether applying the FAA to non-negotiable consumer contracts violates the Petition Clause. Given that, and the FAA's ambiguity concerning

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[3] "Congress shall make no law … abridging … the right … to petition the Government for a redress of grievances". U.S. CONST. AMEND. I.

Congress' intent to reach consumer transactions,[4] the constitutional avoidance doctrine comes into play. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Under that doctrine, the FAA cannot be read to infringe citizens' rights to sue in court unless Congress evinced "'the clearest indication'" that it intended that result. *Id.* at 577 (citation omitted).

The FAA's drafting history reveals that Congress *rejected* applying the FAA to *any* non-negotiable contracts. The initial bill provided that "any contract" submitting disputes to arbitration would be enforced.[5] Congress—led by Senator Thomas Walsh (a former plaintiffs' trial lawyer)—excised the "any contract" language and limited the FAA's final scope to "contract[s] evidencing a transaction involving commerce,"[6] which in 1925 meant purely interstate commerce, *not* consumer

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[4] *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 133-34 (2001) (Souter, J., dissenting) ("there are two quite different ways of reading the scope of the Act's provisions," one based on Congress' narrow 1925 understanding of its commerce power, and an "elastic" understanding based on its modern commerce power); *id.* at 116-17, 119 (majority opinion acknowledging ambiguity); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 286, 292 (1995) (Thomas, J., dissenting).

[5] *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. (1923), at 2 ("1923 Senate Hearing").

[6] *See* S. Rep. 68-536, at 1-2 (1924); 66 Cong. Rec. 2759, 2761 (1925).

transactions.[7] This edit was made because Congress and the businesspeople who sponsored the bill agreed the FAA should *not* apply to "take it or leave it" contracts (as form contracts were then called) since such contracts "are really not voluntary" and enable powerful people to "take advantage of the weaker" to deprive them of any "real opportunity to prosecute [their] action."[8]

The 1925 Congress thus did not "clearly indicate" an intention to permit powerful entities to use form contracts to deprive consumers of their right to sue in court. Under the avoidance doctrine, the FAA, which can be reasonably construed as not applicable to form contracts, *must be* construed that way. *See BE&K Construction Co. v. NLRB*, 536 U.S. 516, 536 (2002) (analyzing Petition Clause issue).

5. This Court's earlier FAA decisions did not consider the FAA's constitutional implications. The Court's use of the "elastic" meaning of "commerce" to conclude in *Allied-Bruce* and *Circuit City* that the FAA applies to consumer form contracts was a reasonable interpretation under standard statutory construction principles. But under constitutional statutory construction principles, it is the Court's

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[7] *E.g., Hammer v. Dagenhart*, 247 U.S. 251, 271-72 (1918) (Commerce Clause reaches only interstate purchases and sales of goods); *Paul v. Virginia*, 75 U.S. 168, 183-84 (1869) ("contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia" is not "commerce").

[8] *See* 1923 Senate Hearing at 9-11; *Arbitration of Interstate Commercial Disputes: Hearings on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16 (1924), at 14-15.

"plain duty to adopt that construction which will save the statute from constitutional infirmity." *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 407 (1909) (citation omitted). *Accord* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247-51 (2012). This Court's earlier FAA cases, therefore, do not control Petitioners' Petition Clause challenge.[9]

AT&T does not take issue with most of the above analysis. The two arguments it does make lack merit.

2. The Petition Clause Guaranties Merits Hearings in Court.

The Petition Clause guarantees a right to petition "the Government" "for a redress of" "grievances," which cannot be "abridged." U.S. CONST. AMEND. I. Textual analysis reveals that the drafters of the Bill of Rights' intended to preserve Americans' right to be heard in court on the merits.

"*The Government*." The "right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport*

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[9] *Compare Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938) ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.") (overruling *Swift v. Tyson*, 41 U.S. 1 (1842)). *See also Citizens United v. FEC*, 558 U.S. 310, 363 (2010) ("This Court has not hesitated to overrule decisions offensive to the First Amendment.").

Co. v. Trucking Unlimited, 404 U. S. 508, 510 (1972). The progression of drafts of the Petition Clause evolved from petitioning only the "Legislature" to petitioning the entire "Government," which in the Constitution means all three branches. *See* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U.L. REV. 899, 954-62 (1997).

"*Redress*" means "the setting right of what is wrong … relief from wrong or injury … compensation or satisfaction for a wrong or injury." *Webster's Encyclopedic Unabridged Dictionary of the English Language* 1617 (1996) ("*Webster's*"). *Cf. Novak v. Andersen Corp.*, 962 F.2d 757, 761 (8th Cir. 1992) ("redress" "means 'to compensate' … [an] injury"). The Petition Clause "right of access" means the right "to be heard", *Cal. Motor Transport*, 404 U.S. at 513, on petitioners' claims for "redress" from injury.

"*Grievances*." The Petition Clause protects individuals' right to redress even "private" and "personal grievance[s]." *Borough of Duryea*, 564 U.S. at 394; *BE&K Constr.*, 536 U.S. at 524-25, 530-37 (Petition Clause protects private lawsuits); *Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("Great secular causes, with small ones, are guarded … grievances for redress" under the Petition Clause).

"*Abridge*" means "to reduce or lessen …; diminish; curtail." *Webster's* at 6. Merely chilling fundamental rights is unconstitutional. *Citizens United*, 558 U.S. at 336-37. The FAA abridges the Petition Clause by empowering private entities to deprive citizens of judicial redress through form contracts and requiring courts to stay lawsuits and to

confirm arbitrators' merits rulings (absent corruption), thereby curtailing courts' discretion and ability to adjudicate consumers' requests for redress. *See* 9 U.S.C. §§ 3, 9-11.

AT&T's argument that the Petition Clause does not *require* the Government to consider petitions misses the critical point that the FAA *removes courts' discretion and ability to consider* petitions. A statute stating "the President cannot consider consumer petitions" would impair First Amendment rights just as much as one stating "consumers cannot petition the President." So would a law compelling the President "to refer all petitions to arbitrators and to defer to their decisions." Yet that is exactly what the FAA unconstitutionally compels the judiciary to do.

That the FAA permits courts to hear challenges to arbitration provisions and awards does not satisfy the Petition Clause because the FAA prevents consumers from *advocating* for judicial redress on the merits of their claims. The Petition Clause's preservation of the right to advocate for redress was recognized in *Am. Bus. Ass'n v. Rogoff*, 649 F.3d 734 (D.C. Cir. 2011), which AT&T cites. *See id.* at 740-41 (Congress' revocation of agency's authority to *remedy* plaintiffs' complaint did not limit plaintiffs' Petition Clause right to *advocate* before Congress to restore agency's authority). *Rogoff* holds that Congress can rescind remedial powers *itself* had granted to an agency. It does not stand for the proposition that Congress can rescind citizens' constitutionally-granted right to seek redress from *both* state and federal courts and compel them to seek redress only from private arbitrators.

3. Petitioners Have Not Waived Their Petition Clause Rights.

Contractual waivers of constitutional rights must be "knowing, voluntary and intelligent." *Leonard v. Clark*, 12 F.3d 885, 889–90 (9th Cir. 1993). This Court has without exception applied this heightened standard to contractual waivers, and it has expressed acute concern when waivers purport to arise from form contracts. *See Fuentes v. Shevin,* 407 U.S. 67, 94-96 (1972); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-88 (1972); *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393 (1937); *cf.* *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-45 (1967) (waiver of First Amendment defense at trial).

This Court recently reaffirmed that waivers of Article III rights to access courts (which parallel Petition Clause rights of access) must be knowing and voluntary. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015) (even *after* a dispute arises, right to Article III court is waivable *only* if litigant is "'aware of the need for consent and the right to refuse it" and still voluntarily appears). "'[N]otification of the *right to refuse'* adjudication by a non-Article III court *'is a prerequisite to any inference of consent.*'" *Id*. at 1448 (emphasis added) (citation omitted).

If *post*-dispute contractual waivers of the right to access courts are invalid absent a genuine option *not* to consent, AT&T's *pre*-dispute waiver in its arbitration clause must likewise be unenforceable because it gives consumers *no option* but to consent.

The *Cohen v. Cowles Media* majority's silence in response to a dissenter's suggestion that "waiver …

requirements" were not met does not mean that the constitutional waiver standard is inapplicable to non-negotiable form contracts. Waiver was irrelevant to the majority's analysis because the speech-restricting agreement was *voluntary* and negotiated. *See Cohen*, 501 U.S. 663, 665, 669-70 (1991).

CONCLUSION

For the foregoing and all previously stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 29, 2018