**No. 02-15416**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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DARCY TING, Individually, and on behalf of all others similarly situated, and CONSUMER ACTION, a non-profit membership organization, both as private attorneys general,
*Plaintiffs and Appellees*,

vs.

AT&T, a New York corporation,
*Defendant and Appellant*.

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Appeal from the United States District Court
for the Northern District of California
The Honorable Bernard Zimmerman, United States Magistrate Judge
No. C 01-02969 BZ

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# APPELLEES' ANSWERING BRIEF

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## COUNTER STATEMENT OF ISSUES PRESENTED

1. If a detariffed long distance carrier is required to comply with a state's law relating to contract formation, does that constitute an "unjust or unreasonable" preference that is preempted by the Federal Communications Act? (No.)

2. When the evidence shows that a contract of adhesion is a surprise to consumers and bars consumers from effectively vindicating their statutory rights, is the contract unconscionable under California law? (Yes.)

3. When AT&T expressly represented to the district court that it was not arguing that the Federal Arbitration Act preempts plaintiffs' claims, may AT&T raise that issue in this appeal? (No.)

## INTRODUCTION

This is a lawsuit seeking to prevent AT&T from unilaterally imposing on its long distance customers an unconscionable contract designed to eliminate their rights. Prior to August 1, 2001, long distance carriers were not required to form contracts with their customers, because the terms of long distance service were governed by tariffs filed with the Federal Communications Commission ("FCC"). When long distance service was deregulated, however, the FCC ordered long distance carriers to form contracts with their customers effective August 1, 2001. Accordingly, AT&T drafted the Consumer Services Agreement ("CSA"), and sent it to AT&T customers in May and June of 2001. The company, however, purposefully tailored the language of both the mailing and the CSA so that

customers would not read them – and would not realize that AT&T sought effectively to destroy their rights.

AT&T's supposed goal, reiterated in its brief to this Court, was to require its customers to submit all claims too large for small claims court to binding arbitration. Instead of creating a contract that would have legally achieved that goal under California laws applicable to all contracts, AT&T drafted the CSA so it would (a) sharply limit the remedies available to consumers by, among other things, banning punitive damages and remedies provided by state consumer protection statutes; (b) prohibit AT&T customers from participating in class actions against it; (c) impose significant costs upon many consumers pursuing arbitration; (d) create a two year limitations period for all consumer claims; and (e) force its customers to obey draconian secrecy provisions.

Plaintiffs maintain in this case that these provisions are procedurally and substantively unconscionable, and therefore violate California's Consumers Legal Remedies Act, Civ. Code § 1750, *et seq.* ("CLRA") and the Unfair Competition Law Business & Professions Code §§ 17200, *et seq.* ("UCL"). Following a full trial on the merits, the district court agreed and enjoined their enforcement as illegal.

In this appeal, AT&T primarily argues that, even if its conduct and these

contract provisions are illegal under California law, AT&T cannot be stopped from stripping consumers of their statutory rights because California's contract formation and consumer protection laws (and all other states' similar contract and consumer protection laws) are preempted by the Federal Communications Act and the Federal Arbitration Act. AT&T also briefly denies that some of the terms of the CSA are illegal under California law. Each of AT&T's arguments is wrong.

## COUNTER STATEMENT OF FACTS

### I. FACTS ABOUT THIS LAWSUIT

The district court's 74 page opinion exhaustively describes the facts of this case, and plaintiffs will not replicate that discussion here. Nonetheless, some of the key facts need to be highlighted on this appeal.

The district court found that the CSA was procedurally unconscionable, because the evidence showed that the CSA is a contract of adhesion, that the CSA was communicated to AT&T's customers in a manner that ensured that most of them would be "surprised" to learn of its terms, and that AT&T's customers had no meaningful choice to reject the challenged terms of the CSA because most other major long distance carriers had adopted similar terms.

With respect to the question of whether the CSA is a contract of adhesion, it is undisputed that AT&T offered this contract to its customers on a take-it-or-leave-it,

non-negotiable basis. Excerpts of Record ("ER") 96, 899-900, 932-33.

With respect to the question of surprise, the trial included extensive testimony and documentary evidence demonstrating that AT&T intentionally informed its customers about the CSA in a manner that guaranteed that few of them would notice the challenged terms.[1] "AT&T characterized the [creation of the CSA] as a non-event," for example, "thereby imposing on its customers the artificial notion that they would be unaffected by the changes resulting from [the CSA]." ER 935-36. In one in-house document, an AT&T official said that the mailing containing the CSA should be crafted so that it was not a "call to action" for customers. ER 509. Another AT&T official wrote that they did not want customers to "pay attention to the details," SER 104, and that AT&T "downplayed" the CSA. ER 898. AT&T designed the envelope that contained the CSA so that it would look like "junk mail," ER 464, 897, SER 100, and its marketing studies showed that many class members would not even open the mailing. ER 507, 896. The cover

[1] Some of the AT&T documents establishing that it wanted consumers to see the CSA as a non-event are at Supplemental Excerpts of Record ("SER") 43, 101-07, 118-124, 399-402; ER 464, 507, 509. Consistent with AT&T's thinking, Celinda Lake, who has conducted polls for the Clinton and Gore presidential campaigns, the *Wall Street Journal*, and many other clients, testified that based upon a survey of 800 AT&T customers in California, the vast majority of them would be surprised to learn of the terms of the CSA. SER 58-72. Todd Hilsee, a nationally recognized communications expert, testified that the CSA was communicated in a completely ineffective manner. SER 73-91.

letter for the CSA contained a single bolded message telling consumers that they did not need to do anything, and AT&T's own studies revealed that after reading that sentence most people would stop reading the mailing and throw it out without learning of the CSA's terms. ER 464, 894-95.

With respect to the meaningful choice issue, the district court found that "the carriers who service 2/3 of the California market all include substantially similar dispute resolution provisions in their contracts." ER 901. It would have been difficult for consumers to identify carriers without such provisions, and AT&T told those of its customers who complained about arbitration that "all of the other major long distance carriers have also included an arbitration provision in their service agreements." ER 901-02, SER 110-11.

The district court found four features of the CSA substantively unconscionable. First, by its terms, section 4 of the CSA limits punitive and other statutorily-provided damages not merely for negligence, but for "any other claim," and provides that these limitations "apply whether the claim is based on contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory." ER 401, 921-928.

Second, the district court analyzed the costs that the CSA's arbitration clause would impose on consumers. The CSA provides that any customer who either (a)

has claims exceeding $10,000, or (b) wants to have an in-person hearing must bring her claim under the American Arbitration Association ("AAA")'s Commercial Rules. ER 400-01, 904-05. After discussing the extensive evidence introduced about the magnitude of the costs that consumers would bear under these rules, ER 904-08, 944-46, the district court concluded that "in a number of situations, large arbitration costs will preclude class members from effectively vindicating their legal rights." ER 944.

Third, the CSA prohibits AT&T's customers from bringing or taking part in class actions against it. Prior to the CSA taking effect, consumers had successfully prosecuted a number of class actions against long distance phone carriers. ER 885-86, 908-910. In one case, AT&T paid 100% of the class members' damages, ER 909, and in another case a class recovered $88 million from another long distance carrier. ER 909-910. The parties here stipulated that none of the lawyers in these earlier cases could have brought those cases on an individual basis, whether in court or arbitration. ER 101-04, 910-11. In addition, the record contained extensive expert testimony that no consumer would have been able to retain competent counsel to handle such cases on an individual basis. SER 132-134, 137-

141, 146.[2] As a result, the district court found, "the prohibition on class action litigation [in the CSA] functions as an effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, would serve to shield AT&T from liability even in cases where it has violated the law." ER 911.

Fourth, the CSA includes a sweeping confidentiality provision making secret and requiring secrecy about all facts about any dispute in arbitration. ER 400. The district court concluded that this provision was "one-sided, oppressive, and devoid of justification ...." ER 941-42.

Based on the foregoing, the district court concluded that "AT&T sought to shield itself from liability . . . . AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in [the arbitral] forum." ER 954-55. Accordingly, the district court found the challenged provisions of the CSA to be unconscionable and illegal, and enjoined them.

## II. THE COMMUNICATIONS ACT AND DETARIFFING

AT&T claims that two sections of the Federal Communications Act, 47 U.S.C.

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[2] AT&T never challenged any of this testimony via cross examination. AT&T's only effort to refute it was through the testimony of its own expert, law professor George Priest. The district court found that Professor Priest's testimony was not persuasive, as he was not knowledgeable about the area. ER 912.

§ 151, *et seq.* ("FCA" or "the Act"), § 201 and § 202, preempt plaintiffs' claims. The caselaw that AT&T relies upon, however, focuses upon a third provision of the Act, § 203, which does not apply to plaintiffs' claims because of the deregulation of long distance service. Pursuant to the deregulation amendments to the FCA of 1996, the FCC stripped § 203 of its preemptive force effective August 1, 2001. This is one of the first cases to address FCA preemption since the FCC took this action. Understanding the preemption issues posed by AT&T requires discussion of the principal terms of the FCA bearing upon preemption, and an awareness of how the law of FCA preemption has radically changed as a consequence of deregulation. FCA § 201 provides that "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful. . . ." 47 U.S.C. § 201. AT&T argues that this section means that state laws of contract formation and breach and consumer protection laws may never render any term of a long distance carrier's contract unconscionable.

Section 202 of the FCA provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, or by any means or device, or to make or give any undue

> or unreasonable preference or advantage to any particular person, class of persons, or locality . . . .

47 U.S.C. § 202. AT&T contends that plaintiffs' claims are preempted by § 202 because application of California law to AT&T's conduct in California constitutes "unjust or unreasonable discrimination" that gives California customers an "undue or unreasonable preference or advantage."

Prior to the FCC's implementation of deregulation on August 1, 2001, the most important preemptive section of the FCA was § 203. This section provides that common carriers shall file schedules with the FCC setting out their rates, and their "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203. These schedules became known as tariffs. For many decades, long distance telephone service was governed by these tariffs, which were filed with and approved by the FCC. Unlike the qualified language of § 202 (which prohibits only "unjust or unreasonable" discrimination and "undue or unreasonable" preferences), the preemptive force of § 203 was absolute in its scope. "If approved, the tariff exclusively controlled the rights and liabilities of the parties as a matter of law." ER 884. The reason for the absolute preemptive force of these tariffs was simple: "A tariff filed with a federal agency is the equivalent of a federal regulation." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998). Accordingly, state laws conflicting with these FCC-approved tariffs were held to

be preempted. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998).

The absolute preemption of § 203 was embodied in "the filed rate doctrine," which was the "central principle of the regulatory scheme for interstate telecommunications carriers." *Lipton v. MCI Worldcom, Inc.*, 135 F.Supp.2d 182, 187 (D.D.C. 2001) (citation omitted). The original purposes of the filed rate doctrine included preventing the carrier from discriminating in price or service among its customers, but "[t]hese purposes are no longer widely supported," and the doctrine became a "vestige." *Id.* In addition, the FCC determined that the doctrine "may undermine consumers' legitimate business expectations," *Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C.Rcd. ¶ 17,021 at 17 (2000), and eliminated it.

In 1996, Congress deregulated long distance service. It did this by amending the FCA to permit the FCC to forbear from enforcing § 203, and thus to eliminate the filed rate doctrine. Congress envisioned the 1996 Amendments as a dramatic break with the past that would revolutionize long-distance service by greatly decreasing the scope of the FCC's role. The Senate floor manager, Senator Pressler, stated that "[t]his is the most comprehensive deregulation of the telecommunications

industry in history. . . ." Cong. Rec., June 12, 1995, at 15618.[3] "[T]he Act was 'deregulatory,' in the intended sense of departing from traditional 'regulatory' ways that coddled monopolies." *Verizon Commun. Inc. v. FCC*, 122 S.Ct. 1646, 1668 n. 20 (2002).

The withdrawal of FCC regulation, however, was not meant to herald an era of lawlessness in the telecommunications industry. Instead, the framers of the 1996 Amendments intended that state law would play an important role in preserving consumer protections. *See* ER 886-87 (citing comments of Senator Gorton about the crucial role of state consumer protection laws).[4]

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[3] *See also* Senator Pressler, Con. Rec., June 8, 1995, at 15355 ("This bill is much more deregulatory than any we have had before us"); Representative Oxley, Cong. Rec., Aug 2, 1995, p. 21696 ("This is the most deregulatory bill in American history"); Senator Pressler, Cong. Rec., June 12, 1995, at 15619 ("It is time we reduce the Federal bureaucracy"); Peter W. Huber, et al., *Federal Telecommunications Law* § 1.9 at 53 (1999) ("The Telecom Act of 1996 will likely be remembered as the most important piece of economic legislation of the 20th Century.")

[4] Many Senators expressed concern for federalism and the role of states throughout debate on the bill. *E.g.,* Statement of Senator Kempthorne, Cong. Rec., June 14, 1995 at 15985 (favoring states' rights in the context of public rights-of-way); Senator Stevens, Cong. Rec., June 8, 1995 at 15338 (same in the context of permitting carriers to operate); Senator Kerrey, *id.* at 15339 (same); Senator McCain, Cong. Rec., June 8, 1995 at 15372 (same in context of the internet in schools); Senator Boxer, Cong. Rec., June 14, 1995 at 16003 (same in context of cable TV provisions). *Cf.* Senator Thomas, Cong. Rec., June 8, 1995, at 15356 ("The FCC's regulatory track record is horrendous.") *See also* Phillip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the*

Similarly, an outside expert brought in by proponents to speak at the Congressional hearings in favor of the bill explained that there was no need for continued FCC regulation of tariffs because carriers could be adequately governed by underlying state laws such as contract law: "let the telecommunications industry be a business. We have a healthy body of contract, corporate, and common law that can more readily and flexibly absorb the complexities of this industry in many cases than could regulatory agencies." *Telecomm. Policy Reform: Hearing on S.642 before the Comm. on Commerce, Science, and Transp.*, 104th Cong. 108 (1995) (statement of Clay Whitehead, former Director of Office of Telecommunications Policy).

Accordingly, acting pursuant to the 1996 Amendments, 47 U.S.C. § 160(a), the FCC ended the system of tariffs. 11 F.C.C. Rcd. 20,730 (1996). In the place of tariffs, the FCC required that the same backdrop of laws, "incentives and rewards" that govern companies in other fields would apply to carriers. 11 FCC Rcd. 20,730 at ¶ 4.

AT&T reacted with alarm to the FCC's position that, in the detariffed environment, long distance carriers would be subject to state consumer protection

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*Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1694 (2001) ("the Telecommunications Act of 1996 . . . [is] perhaps the most ambitious cooperative federalism regulatory program to date.")

laws.[5] It filed a petition requesting that the FCC announce that it was going to continue to enforce § 201 and § 202 as they related to the terms of long distance service; and make an express statement that this continued enforcement would "exclusively" govern the terms of service. ER 692-93. AT&T did not get what it wanted. In its substance, as the district court found, the FCC "granted in part and denied in part AT&T's petition. . . ." ER 889. The FCC's Order on Reconsideration provided in relevant part:

> the [FCA] continues to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory. [However,] *we note that the Communications Act does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the Second Report and Order, consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime*.

12 FCC Rcd 15,014 at ¶ 77 (emphasis added).

Thus, while the FCC clarified that it would continue to regulate the "rates, terms and conditions" of service, it made equally clear that issues of *contract formation and breach* would now be governed by state law and that consumers would now have remedies under state consumer protection and contract laws as to issues

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[5] AT&T had also unsuccessfully opposed complete detarriffing, hoping it could continue to "limit [its] liability through tariff provisions." 12 FCC Rcd. 15,014 at ¶ 8 (1997).

regarding the legal relations between the carrier and customer. In no place did the order say that any body of state law was preempted.

The FCC subsequently stated unequivocally that consumers "are protected by the full range of state laws, including those governing . . . consumer protection, and deceptive practices." SER 113. The FCC's top official for phone matters stated that detarriffing "will require long-distance phone companies to abide by the same consumer protection laws as any other company does." SER 108. Plaintiffs' claims here involve precisely those laws.

## SUMMARY OF ARGUMENT

AT&T attacks the district court's decision on three grounds. First, it argues that the FCA preempts all of plaintiffs' claims. Second, it argues that it did not violate California law. Third, it argues that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. ("FAA"), preempts some of plaintiffs' claims. Each of these arguments is without merit.

AT&T's first argument is that the FCA preempts all of plaintiffs' claims because it absolutely prohibits any variation in any term of a carrier's long distance contracts from one state to another. This argument is simply wrong. Plaintiffs' claims are not barred by express preemption, field preemption or implied conflict preemption.

To begin with, there is no express preemption here because neither § 201 nor § 202 speaks of preemption or barring state law, and neither mentions state laws of contract formation or consumer protection laws. In addition, the FCA contains several savings clauses for state laws, that preclude a finding of express preemption.

Similarly, there is no field preemption here, as the language of the Act makes clear that it does not bar all state regulation.

Plaintiffs' claims are also not barred by implied conflict preemption. First, plaintiffs' claims do not conflict with the policies of the FCC. The FCC's unqualified position is that carriers must comply with state laws of contract formation, and plaintiffs' raise claims of contract formation under California law. To insert a single unconscionable provision into a contract is illegal in California, and illegal contract terms – void terms – never come into existence or *form* part of a valid contract.

Second, plaintiffs' claims do not conflict with Congress' purposes. Notwithstanding AT&T's many assertions to the contrary, plaintiffs have never sought any preference for the citizens of California and the district court's order requires no preference. If there is to be any differentiation between AT&T's contract with California citizens and citizens in other states, it will be entirely of

AT&T's choosing.

In addition, it is not an "unjust or unreasonable discrimination" under § 202 for a detariffed carrier to comply with state laws of contract formation and state consumer protection laws. AT&T cites several pre-detariffing cases on FCA preemption, but these cases were based upon and drew their justification from the absolute preemption necessitated by the tariff system and the filed rate doctrine. With detariffing, the FCC required carriers to replace tariffs with contracts with their customers. Since there is no federal law of contract, the FCC necessarily required that carriers comply with state contract law.

AT&T's preemption argument is also counter to the structure of the FCA. Several provisions of the 1996 Act explicitly preserve a role for state consumer protection laws. Yet, as the trial court found, the CSA would effectively insulate AT&T from any liability for violating state consumer protection laws – a result flatly contrary to the overall goals of the FCA. This Court should not read § 201 and § 202 in a way that would permit AT&T to vitiate consumer protection laws preserved by or incorporated into in several other sections of the FCA.

Moreover, even if this Court holds that the FCA does generally preempt state contract and consumer protection laws, AT&T's FCA preemption argument concerning plaintiffs' claims fails because a more specific federal statute, the FAA,

directly authorizes the sort of state law claims asserted here. Accordingly, even if AT&T is correct about FCA preemption in general, the FAA overrides the FCA in this circumstance.

AT&T's second argument – that the challenged terms of the CSA comply with California law – is equally untenable. The parties stipulated that the CSA is a contract of adhesion and the district court found that AT&T's customers would be surprised to learn of the CSA. Accordingly, the CSA is procedurally unconscionable.

AT&T does not seriously challenge the district court's holding that the CSA's limitations on liability and confidentiality provisions are substantively unconscionable under California law. With respect to the district court's holding that the CSA was substantively unconscionable for imposing prohibitive costs on those consumers who will have claims subject to the AAA's Commercial Rules, AT&T's principal response is that most consumers will not have claims that would qualify for those Rules. The district court's conclusion that a significant number of customers will have such claims is well supported, however, as consumers raising claims such as fraud could easily have claims that qualify for the Commercial Rules.

AT&T also challenges the district court's holding that the CSA's ban on class

actions is substantively unconscionable. The district court found that this provision of the CSA will prevent many of AT&T's customers from effectively vindicating their statutory rights. This conclusion was well supported by the evidence at trial, however, and is required by California law. AT&T and its *amici* focus, by contrast, on cases involving lesser (or no) factual records and the laws of other jurisdictions.

In the final attack on the district court's decision, AT&T and its *amici* argue that the FAA preempts the California state laws on which the district court relied. While this argument is wrong on the merits, it cannot be heard in this case. AT&T explicitly informed the district court at the pre-trial conference that it was not arguing that the FAA preempted California law and AT&T made no such argument from that point through the conclusion of the case in the district court. It is not free to advance this argument now. Moreover, AT&T's FAA preemption argument is flatly wrong. The California laws at issue do not single out arbitration for disfavored treatment compared to other contracts and apply to virtually all contracts that consumers may enter. They do not fall within either of the categories of laws that are preempted by the FAA.

## I. STANDARD OF REVIEW

"We review for abuse of discretion the district court's imposition of a permanent injunction, but review any determination underlying the grant of the injunction by the standard that applies to that determination." *LaVine v. Blaine School Dist.,* 257 F.3d 981, 986 (9th Cir. 2001). "Supported findings of fact are reviewed for clear error." *Berkla v. Corel Corp.*, 290 F.3d 983, 990 (9th Cir. 2002). Questions of preemption are reviewed *de novo*. *AGG Enterp. v. Washington County*, 281 F.3d 1324, 1327 (9th Cir. 2002).

## II. THE FCA DOES NOT PREEMPT PLAINTIFFS' CLAIMS

### A. There Is a Presumption Against Federal Preemption of State Law.

"Preemption analysis begins with the 'presumption that Congress does not intend to supplant state law.'" *AGG Enterp. v. Washington County*, 281 F.3d 1324, 1327 (9th Cir. 2002). *See also Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (a party seeking preemption of state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action.") "[P]reemption provisions are narrowly and strictly construed...." *Charas v. TWA*, 160 F.3d 1259, 1264 (9th Cir. 1998).

### B. There Is No Express or Field Preemption Here.

There are three types of preemption:

> (1) *express preemption* – "where Congress explicitly defines the extent to which its enactments preempt state law"; (2) *field preemption* – "where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy"; and (3) *conflict preemption* – "where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

*Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000), *cert. denied*, 531 U.S. 929 (2000) (emphasis in original) (citations omitted).

The FCA does not expressly preempt the plaintiffs' claims. AT&T relies upon § 201 of the Act, which requires that the terms of service be just and reasonable, and § 202, which forbids unjust or unreasonable preferences in long distance service. Neither of these provisions uses the term preemption, however, and neither section speaks of foreclosing state laws of contract formation or consumer protection statutes. While the FCC is empowered to enforce § 201, there are many circumstances where FCC regulation and state law may and do co-exist:

> A potential federal remedy is not necessarily inconsistent with state remedies . . . . We perceive no conflict. Moreover, the availability of state law remedies is consistent with the 1996 amendments' objective to achieve maximum benefits for consumers and providers through reliance on the competitive marketplace, in which state law duties and remedies ordinary are enforceable.

*Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 1376-77 (2001).

In addition, the FCA contains several Savings Clauses. The FCA states that

**"nothing in this Act . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act . . . are in addition to such remedies."** 47 U.S.C. § 414 (emphasis added). *See also* 47 U.S.C. § 253 (preserving "consumer protection" laws relating to new carriers entering the long distance field); 47 U.S.C. § 254 (preserving a role for states in ensuring that universal service is available at rates that are just, reasonable and affordable); 47 U.S.C. § 261(c) (preserving state laws that further competition in the provision of phone exchange services). The Supreme Court has interpreted express preemption provisions narrowly in statutes where there are Savings Clauses. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 868 (2000) (reading express preemption provision of National Traffic and Motor Vehicle Safety Act narrowly not to reach any common law claims in light of Act's savings clause). Under these circumstances, it is clear that the FCA does not expressly preempt plaintiffs' claims.

Nor can it be said that the FCA preempts the entire field of long distance telephone service. As noted, the FCA's savings clauses carve out important roles for state law. Where a statute expressly preserves an extensive role for states, any claim of field preemption is foreclosed. *E.g., Williamson*, 208 F.3d at 1151 ("the 'savings clause' [of the FLSA] indicates that it does not provide an exclusive

remedy.")

### C. There Is No Implied Conflict Preemption Here.

Implied preemption arises only when there is an "actual conflict" between federal and state law, either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). There is no such conflict here.

#### 1. The Lawsuit Does Not Conflict With the FCC's Purposes in Enforcing the FCA.

AT&T argues that state laws of contract formation and consumer protection are preempted if they would limit the terms of long distance service contracts. As the Counterstatement of Facts explains, however, the FCC disagrees with that position. In its Order on Reconsideration, the FCC stated explicitly that state laws of contract formation apply to long distance contracts, and that consumers would have remedies under state laws of contract and consumer protection regarding the "legal relationship" between the carrier and consumers. 12 FCC Rcd 15,014 at § 77. Plaintiffs' claims here are based on precisely these state laws.

AT&T states that the FCC "granted" AT&T's petition for reconsideration, and therefore that the FCC intended to preempt all state laws which might govern any term of long distance service. Brief at 12. However, in substance the FCC granted

AT&T's petition only in part. The FCC agreed with AT&T to the extent that it acknowledged that it was not wholly abandoning its authority under § 201and § 202. But the FCC declined to take the second and more important step requested by AT&T, and never claimed to exert *exclusive* federal authority over long distance

contracts. To the contrary, it firmly reasserted the important role to be played by state law effective August 1, 2001.

The FCC's detariffing orders also state that carriers are to be treated like all other businesses in unregulated markets, 11 FCC Rcd. 20,730 at ¶ 4, further disproving AT&T's position. All other unregulated businesses in the U.S. are subject to state contract law and state consumer protection laws. The FCC contemplates that AT&T is also subject to these laws.[6]

Remarkably, AT&T argues that the FCA preempts plaintiffs' claims even if they are ones of contract formation. That argument, however, is inconsistent with both the FCC's plain words and its decision to detariff long distance service. Once the FCC detariffed and carriers were required to form contracts with their customers, it became necessary for state law to govern contract formation because there is no

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[6] The FCC states that consumers are protected by the "full range" of state laws relating to contracts and consumer protection. SER 113.

general body of federal contract law. The filed rate doctrine arises from federal law, but a contract "is not the filed rate and therefore is not a simple creature of federal law." *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 487 (2d Cir. 1998). Given that contracts – unlike tariffs – are not a species of federal law, it follows that state law must govern them. *See Quayle v. MCI Worldcom, Inc.*, 2001 WL 132 9594 (N.D.Cal. 2001) (holding that "Plaintiffs' claims for breach of contract, and for fraudulent and deceptive business practices and unfair competition, arise under principles of state common law and statute.")

Through most of the proceedings below, AT&T conceded without qualification that state laws of contract formation were not preempted by the FCA. AT&T repeatedly argued to the district court that California's state law governed the question of whether the CSA was a valid contract. *See, e.g.*, SER 2, 11, 48. The district court's decision reflects this fact. ER 916-17. AT&T now insists, however, that California's law of contract formation does *not* govern whether a valid contract was formed if that law would "apply to questions of the substantive lawfulness" of any term of the CSA. Brief at 30. AT&T argues that only parts of California law (those that in no way limit AT&T, apparently) govern the question of contract formation. This radical departure from AT&T's repeated unqualified statements to the district court should not be permitted.

Plaintiffs claims are ones of contract formation, and therefore are not preempted by the FCA. Under the CLRA, it is illegal even to offer to enter into an unconscionable contract. The CLRA prohibits a party from "inserting an unconscionable provision in the contract." Cal. Civ. Code § 1770(a)(19). In other words, it is illegal for a party such as AT&T to propose an unconscionable term as an initial matter – it is illegal to even "insert" such a term into a contract.

AT&T argues that this provision only comes into play after a contract is already formed, because the word "insert" in § 1770(a)(19) supposedly "presupposes the formation of a valid contract." Brief at 34. AT&T misreads the provision. The most natural reading of the language is that if a party drafts a contract with one unconscionable term – i.e. "inserts" that provision into the contract – then the unconscionable term is illegal. As AT&T would read it, drafting a contract with an unconscionable term is not illegal because that is not "inserting" the term into the contract, but amending a contract to add the identical term would be illegal. That makes no sense. Accordingly, if the district court was correct that four provisions of the CSA are unconscionable, then § 1770(a)(19) makes it illegal for AT&T to have inserted those provisions into the contract, and thus those provisions never *formed* a valid contract under California law. And, as the FCC's Order on

Reconsideration makes clear, issues relating to "contract formation" are governed by *state* law and thus are not preempted.

Plaintiffs' claims are also ones of contract because under California's law of contracts, an essential element to the formation of a contract is that there is a "lawful object." Civ. Code § 1550.[7] AT&T argues that the phrase "a lawful object" means that if any single provision of a contract has a lawful object, then the entire contract is validly formed under California law. Under this argument, a contract for the sale of cocaine could be legally formed if the parties inserted an additional agreement to also sell a pizza. This Court should reject this absurd reading of the statute, and recognize – as the district court did – that § 1550 applies to each provision of a contract. Since the unconscionable provisions of the CSA did not have a lawful object under § 1770(a)(19), they did not form part of a legal contract under California law.[8] Accordingly, plaintiffs' unconscionability claims

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[7] The object of a contract must be lawful at the time it was attempted to be formed. Civ. Code § 1596. A contract is not lawful if it is contrary to an express provision of law or to the policy of express law, though not expressly prohibited. Civ. Code § 1667. An unlawful or illegal contract is void. *Kolani v. Gluska*, 64 Cal.App.4th 402, 406-407 (1998).

[8] Although it examined the issue in the context of unconscionability as a legal defense, rather than an affirmative cause of action, the California Supreme Court used this same analysis of the distinction between legal and illegal contract provisions in *Armendariz v. Foundation Health Psychare Servs*, 24 Cal.4th 83, 121-22 (2000).

are not preempted by the FCA. The California Code creates a cause of action for a consumer to have such a provision stricken from a contract, and plaintiffs here brought precisely such a challenge.[9]

AT&T argues that Civil Code § 1599 establishes that illegality is not part of contract formation because courts may sever and invalidate portions of a contract with multiple objects. Brief at 34. The language of § 1599 explicitly states, however, that the illegal provisions of the contract are "void," and thus those provisions were never part of a validly formed contract. As this Court recognized in *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991), "voidness" challenges go to the very existence of a contract provision, and are not merely a defense to a legally formed contract. Section 1599 strongly supports the proposition that an illegal provision never becomes part of a validly

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[9] Any consumer who suffers any damage as a result of any of the acts or practices listed in § 1770(a) may bring an action to recover or obtain injunctive relief. Civ. Code § 1780(a). In interpreting these provisions of the CLRA, it "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Civil Code § 1760. *See also Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066, 1087 (1999); *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 14-15 (2001). Similarly, the UCL entitles consumers to injunctive relief whenever a party engages in an "unfair, unlawful or fraudulent" business act or practice. Bus. & Prof. Code § 17203. *See also Stop Youth Addiction v. Lucky Stores,* 17 Cal.4th 553 (1998).

formed contract under California law, and is voided even if the remainder of the contract is validly formed.

AT&T also suggests that a claim of unconscionability is a defense to a validly formed contract, but not part of contract formation. Brief at 34. In support of this claim, it argues that in *Armendariz*, the California Supreme Court distinguished between contract formation issues and unconscionability. *Armendariz* did not involve a declaratory challenge to a contract provision under the CLRA, however, but rather a statutory provision, Civil Code § 1670.5, that only creates a defense to a contract. California state courts have expressly recognized that under the CLRA, as distinguished from § 1670.5, unconscionability is not merely a defensive doctrine, as AT&T would have it, but rather it goes to the predicate of whether a contract was validly formed in the first place. This point was made clear in *California Grocers Ass'n, Inc. v. Bank of America*, 22 Cal.App.4th 205, 217 (1994):

> The doctrine of unconscionability has historically provided only a defense to enforcement of a contract, and normally cannot be used offensively to obtain mandatory injunctive relief. As embodied in Civil Code section 1670.5, the doctrine is phrased in defensive terms. . . .
> An affirmative cause of action for unconscionability may be provided by statute. This has occurred in the [CLRA] (Civ. Code § 1750 et seq.), which expressly permits a consumer to bring an action for damages and injunctive relief based on insertion of an unconscionable provision in a contract.

In short, the CLRA provides that it is "unlawful" to "insert an unconscionable provision in the contract" and provides for affirmative remedies against someone who has inserted such a provision. Accordingly, the district court was correct when it held that plaintiffs' claims are not preempted by the FCA, because "[n]otwithstanding defendant's assertions to the contrary, the CLRA was intended to allow courts to address the unconscionability of contract terms as an issue of contract formation." ER 918-19. Since the FCC has stated that state laws of contract formation are not preempted by the FCA, plaintiffs' claims here are consistent with the FCC's purposes.

### 2. This Lawsuit Does Not Conflict With Congress's Purposes in Enacting and Amending the FCA.

AT&T's argument that § 201 and § 202 preempt plaintiffs' claims is also counter to Congress' purposes in enacting and amending the FCA. First, AT&T's argument is belied by the legislative intent underlying the Act. AT&T argues that even though the FCC chose to forbear from applying § 203 of the FCA, FCA preemption is equally broad and exclusive under § 201 and § 202 of the Act. As the Counterstatement of Facts makes clear, however, Congress sought to de-emphasize drastically the role and power of the FCC, and frequently expressed concerns for federalism. To treat the 1996 Amendments as having left the FCC's exclusive authority entirely intact is to re-write this history.

In addition, "the Congressional concern in enacting . . . § 202(a) specifically, was to eliminate the use of monopolistic power to stifle competition." *Nat'l Communic. Ass'n, Inc. v. AT&T*, 238 F.3d 124, 131 (2d Cir. 2001) (citations omitted). AT&T offers no explanation of how this purpose is advanced by allowing it to insert contract terms that will deny customers the chance effectively to vindicate their statutory rights.

AT&T nonetheless argues that plaintiffs' claims are preempted by § 202, which prohibits unjust and unreasonable preferences by long distance carriers, because the plaintiffs supposedly sought and the district court supposedly ordered that California citizens receive preferential treatment. *E.g.* Brief at 21. These statements are not true. Plaintiffs never asked for *any* preferential treatment – much less "unjust or unreasonable" preferential treatment – but merely sought to enforce California's laws of contract formation and consumer protection. As the Counterstatement of Facts recites, the district court found that the CSA would prevent consumers from effectively vindicating their legal rights. The language of § 202 permits "just" and "reasonable" variations in service, and does not require absolute uniformity. There is nothing "unjust or unreasonable" about precluding long distance carriers from stripping consumers of their rights under state consumer protection laws, and their ability to effectively vindicate such rights.

Moreover, there is no reason why AT&T cannot comply with the district court's decision throughout the nation, thereby avoiding any variations in service.[10] All AT&T would have to do is to rewrite the CSA to eliminate its unconscionable aspects. If AT&T refuses to do so, then it will have been AT&T's *choice* to continue to treat its customers differently – a choice that is rooted in AT&T's desire to prevent its customers in other states from vindicating their rights. Nothing in the district court's order, or in plaintiffs' claims, requires differential treatment of AT&T customers from one state to another.[11]

AT&T also asserts that the district court's decision conflicts with Congress' purposes in enacting the FCA because complying with California state law will supposedly increase AT&T's costs. First, as the district court noted, AT&T produced no evidence that it would charge lower prices if it complied with state laws. ER 938. AT&T cites testimony from an AT&T executive who simply assumes that the CSA's dispute resolution provisions would reduce its costs. Brief

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[10] Indeed, after the district court's decision AT&T unilaterally re-wrote the limitations on liability and confidentiality provisions in the CSA on a *nationwide* basis. ER 957-58, 967-69.

[11] Moreover, AT&T stipulated to the certification of a California-only class. ER 883.

at 15. Second, the FCC rejected this argument as unfounded. "[R]equiring nondominant interexchange carriers to conduct their businesses as do other businesses in unregulated markets will not substantially increase their costs." 12 FCC Rcd. 15,014 at ¶ 15. Third, when AT&T made this claim to its Consumer Council and it asked for substantiation, AT&T was unable to produce any. ER 893. Finally, it is well established that companies may not refuse to follow consumer protection laws to save money. ER 938.

None of the authority cited by AT&T to support its FCA preemption argument withstands scrutiny. AT&T cites *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), but the holding in *Central Office* is driven and bounded by the principles and rationale of the filed rate doctrine, and does not apply in the detariffed environment. For example, the *Central Office* Court concluded that the plaintiffs' claims there were barred because they related to "privileges not included in the tariff," 524 U.S. at 226, and repeatedly posed as the determinative issue whether the filed rate doctrine applied to the claims at issue. The caselaw applying *Central Office* has made this point very clear. Most recently, in *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151 (2002), the Supreme Court cited *Central Office* for the proposition that § 414 was "defeated by [the] overriding policy of the

filed-rate doctrine."[12]

Accordingly, AT&T's preemption cases are not applicable in a detariffed environment:

> The purposes served by the filed rate doctrine, to preserve the FCC's role in the ratemaking process and to ensure rate uniformity, would serve no purpose in an industry with no uniform, filed rates approved by the FCC. . . . *Cases applying the filed rate doctrine therefore are distinguishable and inapplicable*.

*Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 1377-78 (2001) (emphasis added) (citations omitted). *See also Frontline Comm. Intern., Inc. v. Sprint*, 178 F.Supp.2d 432, 438 (S.D.N.Y. 2001) ("Sprint's contention that the filed tariff doctrine bars plaintiffs' claims after withdrawal of Sprint's tariffs is not persuasive. . . . [These documents are now] subject to the common law rules of contract interpretation.").

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[12] *See also Access Telecom v. MCI Telecomm. Corp.*, 197 F.3d 694, 711 (5th Cir. 1999) (*Central Office* is a case in which "the Supreme Court expounded on the filed-rate doctrine," and since that doctrine did not apply to the claims at issue in the case those claims were not preempted); *Lovejoy v. AT&T*, 92 Cal.App.4th 85, 99 (2001) (In *Central Office* the Court "elucidated the parameters of the filed rate doctrine"). *Cf. Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029, 1031 (7th Cir. 2000) (*Central Office* established that prior to the deregulation of interstate shipping carriers, the filed rate doctrine controlled contract disputes in that field. In light of the abolition of the "tariff filing requirement and the filed-rate doctrine," however, the Court held that the carrier's continuing reliance on that doctrine was "hard to envisage," given that the doctrine was "defunct.")

In any event, caselaw *prior to* detariffing demonstrates that consumer protection actions such as this would not have been preempted by the FCA even before deregulation. In *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998), for example, the court found in a consumer class action challenging AT&T's advertisements for failing to disclose its practice of billing calls by rounding up to the next full minute that claims for injunctive relief would not be preempted. *Id*. at 62-63. As the *Marcus* court stated:

> The FCA not only does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud, it evidences Congress's intent to allow such claims to proceed under state law.

*Id*. at 54. *See also Stein v. Sprint Corp.*, 22 F.Supp.2d 1210 (D.Kan. 1998) ("Congress, by enacting the FCA's saving clause, intended to allow [consumer protection statutory] claims to proceed under state law.")

AT&T's theory of preemption also conflicts with the structure and language of several other provisions of the FCA. As noted above, the 1996 Amendments added a number of other savings clauses to the Act, evidencing a Congressional desire to preserve a meaningful role for the states in this area. *E.g.* 47 U.S.C. §§ 253(b), 254(i), and 261(c). As the Counterstatement of Facts recites, the district court made findings of fact based on the evidentiary record that the CSA guts California's consumer protection laws. Because the FCA's savings clauses

provide a role for state laws protecting consumers, a decision adopting AT&T's argument that § 201 and § 202 implicitly permit it to adopt contract terms that will effectively vitiate those laws would undermine the overall purposes of the FCA.[13]

Finally, AT&T's implied-conflict preemption argument ignores the fact that, as amended in 1996, the FCA no longer preempts *any* state law merely by implication. Section 152 of the Act, which is located at the outset of the Act and encompasses the entire FCA, contains the following note: "(c) Federal, State, and local law. (1) No implied effect. *This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments*." "History, Ancillary Laws and Directives" to 47 U.S.C. § 152 (emphasis added). Because AT&T's preemption argument is entirely one of implied conflict preemption, it is foreclosed by the plain terms of the FCA.

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[13] As set forth in the Counterstatement of Facts, the district court cited to a statement by Senator Gorton, a leading sponsor of the 1996 Amendments, recognizing the importance of state consumer protection laws. AT&T belittles that cite, pointing out that Senator Gorton was not speaking in the context of detariffing. Brief at 29. AT&T misses the point, however. First, if Congress intended for state consumer protection laws to play a key role in some parts of the 1996 amendments, it must not have intended for other parts of the Act to permit carriers to effectively gut those laws. Second, since Senators were greatly concerned with federalism and preserving state laws in numerous contexts, it is illogical for AT&T to insist that Congress intended to authorize exclusive federal domination in this context.

Before the district court, AT&T argued that § 152, Note (c)(1) does not apply here because it relates only to the provisions of the 1996 Amendments to the FCA and not to the underlying Act itself. SER 158. This argument lacks merit for several reasons. First, Note (c)(1) speaks of "this Act and the Amendments to this Act." The natural reading of this language is that "the Act" is the FCA itself, and "the Amendments to this Act" refers to the 1996 Amendments to the Act. To say, as AT&T does, that the phrase "the Act" refers to the 1996 Amendments, and that the phrase "the Amendments to this Act" refers to some unknowable and unidentified possible future amendments that only apply to the 1996 Amendments is absurd. Second, § 152, Note (c)(1) is codified at the outset of the entire FCA, and there is no indication in the statutory language that this provision is restricted to future amendments to the Act, as AT&T would have it. Thus, AT&T's arguments that plaintiffs' claims are implicitly preempted should be rejected.

### D. Even If the FCA Generally Preempts Some State Contract Laws and Consumer Protection Laws, the FAA's More Specific Savings Clause for State Law Preserves Plaintiffs' Claims Here.

Regardless of what the FCA says, the FAA has a specific savings clause for generally applicable state laws, as they relate to arbitration clauses. Contractual arbitration clauses are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme

Court has declared that the quoted language in § 2 is referring to "state law," *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), and this Court has recognized that federal courts "may enforce [generally applicable state laws relating to contracts] *under the FAA*." *Ticknor v. Choice Hotels Intnat'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001) (emphasis added). As Part V below establishes, AT&T told the district court that it was not challenging plaintiffs' state law claims on the grounds that the FAA preempted them. The FAA, therefore, specifically preserves and authorizes plaintiffs' state law claims. Thus, a decision in AT&T's favor would not only override California's laws of contract formation and consumer protection, but it would also override another federal statute – the FAA.

Under normal principles of statutory construction, the FAA takes precedence over the FCA in this context, because the relevant provision of the FAA addresses the role of state law specifically with respect to arbitration clauses, while the FCA provisions relied upon by AT&T generically that relate to all "terms and conditions" in long distance contracts. *See Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) (history omitted) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *U.S. v. Navarro*, 160 F.3d 1254, 1256 (9th Cir. 1998) ("it is an elementary tenet of statutory construction that '[w]here there is no clear

indication otherwise, a specific statute will not be controlled or nullified by a general one....'") (quotation omitted).

When one federal statute provides that a body of state law is preserved from federal preemption, that will often override other federal statutes which would otherwise preempt the state law. By way of analogy, a state statute that specifically targets arbitration clauses in insurance contracts for adverse treatment would be preempted by the FAA if the FAA were the only Federal statute involved. However, the McCarren-Ferguson Act declares that state law has a role to play in the regulation of the business of insurance, much as § 2 of the FAA preserves a role for state law in the enforcement of arbitration clauses. In light of the McCarren-Ferguson Act's provision preserving such state laws, the FAA is "reverse preempted" in that setting and federal courts will enforce the state law. *See, e.g., Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001).

In this case, if it reaches the issue, this Court should hold that the FAA reverse preempts the FCA, and preserves the plaintiffs' claims here. As the district court stated when the interplay of these statutes was addressed by plaintiffs at trial,

SER 12-14, 52-57, the FAA "does throw me back into state law. . . ." SER 52.[14]

## III. THE DISTRICT COURT CORRECTLY HELD THAT THE CSA IS UNCONSCIONABLE

### A. The District Court Correctly Held That the CSA Is Procedurally Unconscionable.

Under California law, if a contract is one of adhesion, it is procedurally unconscionable. *Circuit City v. Adams*, 279 F.3d 889, 893 (9th Cir.), *cert. denied*, 122 S. Ct. 2329 (2002) (a contract is procedurally unconscionable if it is "a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely."); *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 853 (2001) (same); *Mercuro v. Superior Court*, 96 Cal.App.4th 167, 174 (2002), *rev. denied*. In this case, it is undisputed that the CSA was a contract of adhesion.

Two other factors that may add to a showing of procedural unconscionability are "surprise" and "meaningful choice." The district court found that "[t]he CSA also possessed the 'surprise' necessary for a finding of procedural unconscionability."

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[14] While the district court did not decide the FCA preemption issue on this ground, this Court may still do so. *See Kling v. Hallmark Cards Inc.*, 225 F.3d 1030, 1039 (9th Cir. 2000) ("[The Court of Appeals] may affirm a judgment on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground.")

ER 935-36. It also concluded that "the class members' lack of a meaningful choice satisfies the 'oppression' prong of procedural unconscionability." ER 933-34. As the record makes plain, there was ample evidence to support these findings of fact, making a particularly powerful showing of procedural unconscionability. Under California law, where either the showing of procedural or substantive unconscionability is particularly strong, a lesser showing is required for the other prong. *Armendariz*, 24 Cal.4th at 114.

### B. The District Court Correctly Held That the CSA Is Substantively Unconscionable.

AT&T and its *amici* make much of language in some California cases describing the test for unconscionability as being something that "shocks the conscience," as though this makes it unimaginable that any contract could ever be unconscionable. AT&T Brief at 40-41, *Amici* Brief at 4. In fact, California courts also apply an alternative test, not mentioned by AT&T. *See Blake v. Ecker*, 93 Cal.App.4th 728, 742 (2001) (the substantive element of unconscionability "traditionally involves contract terms that are so one-sided as to 'shock the conscience' *or that impose harsh or oppressive terms*.") (emphasis added) (citing *Armendariz*, 24 Cal.4th at 114). As this Court has most recently summarized California law, "[a] determination of substantive unconscionability . . . involves whether the terms of the contract are unduly harsh or oppressive." *Circuit City*, 279 F.3d at 893.

As a threshold matter, we note that AT&T and its *amici* barely attempt to defend two of the provisions of the CSA that the district court held to be unconscionable. As the Counterstatement of Facts recites, the district court found that the CSA sharply limited the remedies consumers could receive in litigation against AT&T. AT&T argues that this provision was intended only to apply to negligence actions, Brief at 14, but given the language of the provision the district court rejected this argument. ER 921-28. Accordingly, the district court held that the provision was illegal under California law, ER at 928-930, and also unconscionable. ER 936. These holdings were plainly correct. *See Circuit City*, 279 F.3d at 895. Similarly, the district court held that the CSA's separate secrecy provision is "rather draconian," ER 939, and substantively unconscionable, ER 941-42. This holding is also correct. Thus, the following discussion focuses on those aspects of the CSA that are the focus of AT&T's challenge – the ban on class actions and the costs of arbitration.

### 1. The District Courts Did Not Abuse Its Discretion In Holding that the CSA's Ban On Class Actions Is Unconscionable Under California Law.

As set forth in the Counterstatement of Facts, and as is reflected in the district

court's opinion, there is an extensive factual record, ER 908-916, supporting the district court's conclusion that "the prohibition on class action litigation functions as an effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, would serve to shield AT&T from liability even in cases where it has violated the law." ER 911.[15]

AT&T and its *amici* urge this Court to review the district court's decision on this subject with reference to cases from other states, most of which involve the question of whether various federal statutes (as opposed to state laws of unconscionability) bar parties from prohibiting class actions, and none of which involves the kind of factual and expert evidence supporting the district court's opinion.

The proper approach, however, is for this Court to review the district court's decision under generally applicable California state law. *See Ticknor v. Choice Hotels Internat'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001). In California, the law is clear that no contract – whether involving arbitration or not – may prohibit consumers from pursuing claims on a class action basis. In *Keating v. Superior Court*, 31 Cal.3d 584 (1982), *rev'd on other grounds sub nom.*, *Southland Corp. v.*

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[15] As the Counterstatement of Facts recites, most of the evidence was either stipulated to by AT&T or not refuted.

*Keating*, 465 U.S. 1 (1984), the California Supreme Court held that clauses banning class actions "effectively foreclos[e] many individual claims," and thus "may well be oppressive and may defeat the expectations of the nondrafting party." 31 Cal.3d at 608. As a result, the Court held that, "[i]f the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial." *Id.* These principles were re-affirmed in *Blue Cross v. Superior Court*, 67 Cal. App.4th 42 (1998). *See also Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1100-01 (2002) (arbitration clause that prohibited class actions was unconscionable).

AT&T and its *amici* nonetheless argue that it cannot be unconscionable for a contract to prohibit class actions, as a number of courts have enforced such contracts. First, most of those cases involved the interpretation of the terms and legislative history of the Truth in Lending Act, rather than California law of unconscionability. *E.g., Randolph v. Green Tree*, 244 F.3d 814 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S.

1145 (2001). AT&T Brief at 45-46; *Amici* Brief at 5.[16]

Second, contrary to AT&T's suggestion, there is no consensus in the law on this point. In fact, in addition to the *Keating* and *Szetela* cases in California, courts in several other jurisdictions have also held that clauses banning class actions are unconscionable under state law. *See West Virginia ex rel. Dunlap v. Berger*, 2002 WL 1305726 (W.Va. June 14, 2002) (prohibition on class action relief "clearly unconscionable"); *Powertel v. Bexley*, 743 So. 2d 570, 576 (Fla.App. 1Dist. 1999) (arbitration clause's prohibition on class actions one factor in finding it unconscionable); *In re Knepp*, 229 B.R. 821, 827 (N.D. Ala. 1999) (same).

Third, AT&T and its *amici* ignore the factual record here. Seeking to turn the empirical question of whether a market exists for consumer attorneys to handle a certain type of claim into a legal question, AT&T and its *amici* rely heavily upon speculation in *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), that consumers can obtain lawyers to handle small claims on an individual basis in arbitration due to the existence of fee shifting statutes. As the factual

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[16] AT&T and its *amici* do not mention other case law rejecting their position. *See Lozada v. Dale Baker Oldsmobile*, 91 F.Supp.2d 1087 (W.D.Mich. 2000) (TILA does prohibit contracts that waive the right to proceed on a class action basis); *Bailey v. Ameriquest Mort. Co.*, 2002 WL 100391 (D.Minn. Jan. 23, 2002) (arbitration clause unenforceable where, among other things, it barred plaintiffs from proceeding collectively with their FLSA claims).

record in this case establishes, however, no consumer attorneys could have been located to handle any of a number of successful class actions that have been previously brought against AT&T and other long-distance carriers. SER 132-134, 137-141, 146. The district court did not abuse its discretion in making its factual finding, based on this record and testimony, that AT&T's ban on class actions barred consumers from effectively vindicating their statutory rights.[17]

AT&T argues that it was not unconscionable to ban class actions, because there may never be class actions in arbitration and it has a right to require consumers to submit to arbitration. Brief at 41-43. To support the premise that class actions are inherently impossible in arbitration, AT&T cites several cases from various other jurisdictions. California law is to the contrary, however, and class actions may proceed in arbitration in this state. *Blue Cross*, 67 Cal.App.4th 42.[18] California

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[17] The *Snowden* case is also distinguishable because it involves an application of Maryland law on contractual waivers of class actions, which is very different from California law. *Compare Gilman v. Wheat, First Securities*, 692 A.2d 454 (1997) (enforcing forum selection clause employing Virginia law, which does not permit class actions) with *America Online,* 90 Cal.App.4th at 8 (same type of forum selection clause unconscionable).

[18] *Blue Cross* involved a contract that did not prohibit class actions, and thus that court did not have an opportunity to consider whether such a provision is unconscionable under California law. Its sole relevance to this case is to disprove conclusively AT&T's claim that it was essentially "forced" to ban class actions by the innate nature of arbitration.

courts regularly enter orders providing for class-wide arbitration where it is appropriate. *See Lewis v. Prudential-Bache Securities, Inc.*, 179 Cal.App.3d 935 (1986) (ordering trial court to make class certification and notice determinations, select arbitrators); *Gainey v. Occidental Land Research*, 186 Cal.App.3d 1051 (1986) (restoring members to plaintiff class that trial court had excluded before ordering arbitration). Notwithstanding the arguments of AT&T and its *amici* to the contrary, California is not the only jurisdiction to have such a rule. *E.g. Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa.Super. 1991); *Eastman v. Conseco Fin. Serv. Corp.*, 2002 WL 1061856 (Wis.App. May 29, 2002) ("we question the authority of an arbitrator to entertain class actions. Again, other state and federal jurisdictions have come to opposite conclusions.").

AT&T next argues that the ban on class actions is reasonable because its customer service representatives can solve most problems. Brief at 46. Essentially, this argument is that there is no need for consumers to be able to effectively vindicate their legal rights in court or arbitration, because AT&T promises to treat people fairly. The record here shows that in AT&T's own litigation history, however, many thousands of its customers only received justice after successful class actions were brought against AT&T. ER 908-910

AT&T next argues that the ban on class actions is reasonable because the FCC

will adequately protect consumer's rights. Brief at 46-47. The FCC, however, tells consumers that it is *not* their exclusive remedy: "If you are not satisfied with the carrier's response to your complaint, the Commission's rules allow you the opportunity to either file a formal complaint or seek relief through civil court." ER 719. Moreover, extensive testimony and evidence was produced for and against this claim, the district court found that "the FCC is not a forum before which a class member can effectively vindicate her rights to recover damages from AT&T in a variety of contexts." ER 915. In support of this finding, the court noted, among other things, that the FCC generally does not "concern itself with obtaining individual relief for complainants,"[19] and it was undisputed that it took 17 years for the agency to respond effectively to complaints about "slamming," or the unauthorized and improper switching of a consumer from one carrier to another without her consent. ER 912-13. Testimony at trial demonstrated that when the FCC receives consumer complaints, it merely returns them to the carriers "by the boxes." SER 92-93. In light of these facts, the district court did not abuse its discretion in finding that the FCC fails to enable consumers to effectively vindicate

[19] Evidence was filed that for the years 1996, 1999 and 2000, only 16 consumer complaints were listed in the FCC Record out of a total of 9,226 cases. SER 152-55.

their rights.

AT&T's *amici* argue that a ban on class actions is reasonable because arbitration is so inexpensive, Brief at 10-14, an argument that the California Supreme Court rejected in the *Keating* case: "it is at least doubtful that such advantages could compensate for the unfairness inherent in forcing hundreds or perhaps thousands, of individuals asserting claims involving common issues of fact and law to litigate them in separate proceedings against a party with vastly superior resources." 31 Cal.3d. at 609. There is also no evidentiary support in the record for these assertions about the supposed costs of arbitration, and substantial evidence to support the district court's finding of fact that AT&T's ban on class actions would prevent many consumers from effectively vindicating their rights.

Finally, AT&T's *amici* assert that class actions are an unjust device, forcing innocent corporations to settle meritless claims. Brief at 14, n.8. California law strongly favors class actions, however, and flatly rejects this argument. *E.g. Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 434-35 (2000).

### 2. The District Court Did Not Abuse Its Discretion In Holding that the Costs of Arbitration Under the CSA

**Would Be Prohibitive for Many Consumers.**

The district court traced a detailed factual record demonstrating that the costs of arbitration would be prohibitive for many consumers with claims under AAA's consumer rules. ER 97-100, 904-08, 944-46, SER 18-27, 31-40, 116. AT&T first argues that the district court improperly adopted the standard for judging the unconscionability of arbitration fees set forth by the California Supreme Court in the *Armendariz* case (that employers may not require employees to split the fees of arbitration), on the ground that this standard is preempted by the FAA. Brief at 49-50. As set forth in Part IV below, AT&T waived its FAA preemption argument in the district court. In addition, this Court recently employed the same standard that AT&T criticizes in *Armendariz*. *Circuit City*, 279 F.3d at 893. In addition, the district court's holding would meet a more demanding standard, as the court made a specific finding of fact that many consumers would be unable to effectively vindicate their rights.

AT&T next argues that the district court ignored costs unique to litigation. Brief at 51-52. AT&T introduced no evidence of such costs before the district court, however, and points to no such costs in its brief. The trial court's conclusions about the costs of AAA arbitration were based upon stipulated evidence and sworn testimony that AAA arbitrators (unlike judges, who are employed by the state or

federal governments) charge very significant hourly sums for their work, and that AAA's filing fees greatly exceed court filing fees. ER 97-100, SER 18-27, 31-40, 116.

AT&T argues that the costs of AAA's Commercial Rules are irrelevant, because "the only sort of arbitration that consumers might want or need [is] arbitration involving claims under $1,000." Brief at 52. In fact, the district court correctly found from the evidentiary record that it is likely that quite a few consumers will face these large fees. ER 944-46.

First, any consumer who wishes to have an in-person arbitration hearing – to actually appear before the person who will decide their case – may not do so under the AAA's Consumer Rules, and is necessarily forced into the Commercial Rules. ER 98. The opportunity to appear before a decisionmaker is an essential component of due process, however, and a great many consumers may wish this opportunity as part of a fair dispute resolution process.

Second, AT&T's own submissions to the district court demonstrate that there will be a number of claims that exceed the ceiling for small claims court. In the year 2000, AT&T was sued in 59 consumer long distance cases in courts other than small claims courts, and in 2001 it was sued in 38 long distance consumer cases in courts other than small claims courts. SER 6-7. It should be noted that these cases

(just under 100 in two years) were brought in the period preceding detariffing, when the filed rate doctrine defeated many consumer claims and deterred experienced consumer counsel from undertaking many cases.

Third, caselaw includes a number of illustrations of serious claims that have been brought against AT&T in courts of general jurisdiction. *E.g., Singer v. AT&T Corp.*, 185 F.R.D. 681 (S.D.Fla. 1998) (named plaintiff in RICO double billing case had claim for $3,000 in single damages, plus attorneys' fees; 30,000 other class members had similar double billing claims); *Peters v. AT&T Corp.*, 43 F.Supp.2d 926 (N.D.Ill. 1999) (Fair Debt Collection Practices Act claim of misleading debt collection scheme, the debt collector at issue "sends approximately 30,000 AT&T letters per month"); *Bauchelle v. AT&T Corp.*, 989 F.Supp. 636 (D.N.J. 1997) (plaintiff alleged that AT&T "regularly and systematically falsely" made representations to customers about a particular calling plan); *Zekman v. Direct American Marketers, Inc., AT&T Co., et al.*, 675 N.E.2d 994 (Ill.App. 1Dist. 1997) (claimed violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and common law fraud against AT&T, involving alleged knowing acceptance of the benefits of a fraud).

Under California law, there is also a significant likelihood that some AT&T customers will assert claims under state statutes providing for significant injunctive

relief that could not be obtained through AAA's Consumer Rules or in small claims court. *See, e.g., Day v. AT&T*, 63 Cal.App.4th 325 (1998) (holders of AT&T phone cards sued as private attorneys general to challenge unfair and deceptive business acts and advertising; AT&T's assertion of the filed-rate doctrine did not bar claims for injunctive relief).

AT&T argues that the district court's analysis is speculative, and that there are several possible ways that the AAA's Commercial Rules might not prove to be too costly to consumers in some circumstances. Brief at 53. In fact, based on the factual record before it, ER 99, SER 18-27, 31-40, 116, the district court addressed many of the issues that AT&T raises such as pro bono arbitrators and the possibility of waivers or deferrals of fees. ER 904-08, 944-46. Moreover, the district court's conclusions with respect to AAA's Commercial Rules are entirely consistent with the decisions of a host of other federal courts. *See Camacho v. Holiday Homes, Inc.*, 167 F.Supp.2d 892 (W.D.Va. 2001) (arbitration clause precluded consumer from effectively vindicating her statutory rights because the fees under AAA's Rules were financially prohibitive); *Popovich v. McDonald's Corp.*, 2002 WL 47965 (N.D.Ill. Jan. 14, 2002) (refusing to enforce an arbitration clause on the grounds that under the AAA's Commercial Rules, "the costs of arbitration are likely to be staggering"); *Phillips v. Associates Home Equity*

*Services*, 179 F.Supp.2d 840 (N.D.Ill. 2001) (arbitration clause not enforced in Truth in Lending Act suit because the costs of arbitration under AAA's Commercial Rules are prohibitive); *Giordano v. Pep Boys – Manny, Moe & Jack, Inc.*, 2001 WL 484360 (E.D.Pa. Mar. 29, 2001) (fees under AAA rules would deter plaintiff's vindication of claims in arbitration).

## IV. THE DISTRICT COURT CORRECTLY HELD THAT PROVISIONS OF THE CSA VIOLATE THE CLRA

Aside from its holdings relating to unconscionability, the district court also held that the CSA's imposition of a two year limitations period and its ban on class actions violated the CLRA. ER 929-930. The district court also correctly noted that the UCL "borrows" violations of other laws and treats such violations as independently actionable and subject to the UCL's own remedies. ER 919-920. AT&T's only response to these holdings is to suggest that the CLRA is preempted by the FAA, an issue dealt with in Part V below.

AT&T's *amici*, however, contest the district court's holding that the CSA's ban on class actions violates the CLRA. *Amici* Brief at 15-30.[20] First, the *amici* argue that the district court turned the CLRA's provision that consumers "may" bring a

[20] Importantly, AT&T's *amici* do not attempt to defend the CSA's provision shortening the limitations period, and explicitly distance themselves from all provisions of the CSA except for the ban on class actions. Brief at 2.

class action into "shall." Brief at 15. This argument mis-states the issue. The CSA provides that consumers "may not" bring a class action, necessarily violating the CLRA, which provides that they "may" bring such an action. The district court's decision does not provide that consumers "must" bring class actions against AT&T, it simply enforces California's law that consumers may not be denied this right.

The *amici* next argue that only contract terms that are "substantive" may violate the CLRA, citing to *Armendariz*, and then argue that the ban on class actions is procedural. Brief at 15-21. This argument is plainly wrong. The *Armendariz* court noted that the reason parties must abide by the terms of statutes is that otherwise parties "would not be able to fully vindicate" their statutory rights. 24 Cal.4th at 101. That language is taken from U.S. Supreme Court cases that require that arbitration permit parties to "*effectively* vindicate" their rights. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (emphasis added). If the *amici*'s interpretation of the CLRA were adopted, and corporations could impose upon consumers, in fine print adhesion contracts, any contract provision that can be characterized as "procedural," the CLRA would readily be eviscerated. Provisions requiring individuals to arbitrate their claims in impossibly inconvenient forums, or to pay prohibitive fees, could be termed "procedural,"

while denying consumers the ability to "effectively vindicate" their rights. A number of courts have held that such provisions are illegal, however, and refused to enforce them despite their supposed procedural character. *E.g., Patterson v. ITT Consumer Fin. Corp.*, 14 Cal.App.4th 1659 (1993) (refusing to enforce arbitration clause that imposed excessive costs upon California consumers and required them to arbitrate their claims in Minnesota). In this case, there is an extensive factual record undergirding the district court's finding of fact that the ban on class actions would shield AT&T from liability even where it had broken the law. ER 908-916.

## V. THE FAA DOES NOT PREEMPT ANY OF PLAINTIFFS' CLAIMS HERE

AT&T and its *amici* argue that both the district court's decision and California law, particularly with respect to the CSA's ban on class actions, are preempted by the FAA. *E.g.* AT&T Brief at 36-38, 42-44; *Amici* Brief at 8-9; 22-30. This argument is clearly waived. Counsel for AT&T expressly and unequivocally stated in open court on the eve of trial that AT&T would not be pursuing these arguments in this case. In the pretrial conference, the following colloquy took place:

> **The Court:** How do you deal, then, with cases like – I just pulled one out as I was walking in here – Doctor's Associates, where the Supreme Court says:
>
> > "The state may regulate contracts, including arbitration clauses, under general contract law principles, and they may invalidate an arbitration clause

> upon such grounds as exist at law or in equity for the revocation of any contract"?
>
> Is it **solely** that you claim that this rule, which the Supreme Court has recognized in many cases, does not apply in this case because you think everything has been preempted by the Federal Communications Act?
>
> **Mr. Haddad:** ***That's correct. We're not claiming preemption under the Federal Arbitration Act***.

SER 46 (emphasis added).

AT&T acted consistently with this categorical disavowal of any intention to argue FAA preemption, and "solely" argued FCA preemption through the remainder of the case's pendency in the trial court. AT&T did not argue that the FAA preempted any of plaintiffs' claims at any point in the trial; it did not raise the issue in either of its two lengthy post-trial briefs; and it did not raise the issue in the final closing argument before the trial court on December 6, 2001.

AT&T's waiver of the FAA preemption argument below is the end of the matter on this appeal. The law is clear in this Court that where a party raises an issue but abandons it at the trial court, the issue cannot be revisited upon appeal. *See Bankamerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000) (citations omitted). "A party abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue," *id.*, as AT&T plainly did at the pre-trial conference and at the trial in this case, "and instead chooses a

position that removes the issue from the case," *id.*, as AT&T's counsel did at the pretrial conference.

Even if the issue were validly before this Court, however, the district court's application of California law is not preempted by the FAA. California's law of unconscionability applies "to contracts generally and does not single out arbitration agreements for special scrutiny," and therefore "it is also a valid reason not to enforce an arbitration agreement under the FAA." *Circuit City*, 279 F.3d at 895. California's law as to contractual bans on class actions does not single out arbitration for special scrutiny. In a recent opinion addressing a choice-of-law clause that did not involve arbitration, but still would have had the effect of barring class actions, a California Court of Appeals stated "we cannot accept AOL's assertion that the elimination of class actions for consumer remedies if the forum selection clause is enforced is a matter of insubstantial moment. The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the TOS forum selection clause." *America Online,* 90 Cal.App.4th at 8.

Similarly, as the district court below explained, its decision was not aimed at arbitration. ER 954-55. AT&T could have easily required mandatory arbitration for all of its customers, it just could not shorten limitations periods, or ban class

actions, or otherwise eliminate its customers' rights.

AT&T nowhere states what provision of the FAA preempts state law prohibiting contractual bans on class actions. Since the FAA only preempts state laws that conflict with its underlying purposes, *see Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 477 (1989), and since the FAA contains no provision regarding class actions, California law on this point cannot possibly be preempted. *See Sanders v. Kinko's, Inc.*, 2002 WL 139513 at * 1 (Cal.App. 4Dist. June 28, 2002) (holding that FAA does not preclude state court from deciding class certification issues before deciding motion to compel arbitration).

AT&T also claims that the district court's holding that the ban on class actions is unconscionable is preempted by the FAA because having a class action proceed in arbitration requires some court involvement in the arbitration process. Brief at 43. This argument cannot succeed, however, as courts are often involved in aspects of arbitration without running afoul of the FAA. All arbitration awards must be confirmed by a court before they may be enforced, for example, and courts routinely become involved in arbitration where there are disputes as to who the arbitrator should be. *E.g., In re First Merit Bank*, 52 S.W.3d 749 (Tex. 2001) (§ 5 of the FAA permits a court to "choose an alternative set of arbitrators" if the one specified in a contract is not acceptable under the law). Based on a few lines of

argument raised for the first time during this appeal, AT&T and its *amici* ask this Court to hold that the long established practice of California law permitting arbitration in class actions is preempted by the FAA. This Court should reject this waived argument.

Finally, AT&T argues that the CLRA is preempted as it applies to the CSA, because it is not applicable to all contracts, citing *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001). Brief at 36-38.[21] Even if AT&T had not explicitly abandoned this FAA preemption argument, it is not applicable here. In *Bradley*, this Court was considering a very narrow California code provision that applied only to forum selection clauses involving franchise agreements. *Id.* at 890. The CLRA, by contrast, has an exceptionally broad scope and is applicable to virtually *all* contracts in which consumers may become involved. *Cf. Mitchell v. American Fair Credit Ass'n*, 2002 WL 1472085 (Cal.App. 1Dist. July 10, 2002) (distinguishing *Bradley* and holding that a statutory signature requirement is not preempted by the FAA because it does not discriminate against arbitration and "is

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[21] This preemption argument would single out the arbitration clause from the rest of the consumer contract for exemption from the CLRA. Rather than being on the "same footing" as other contract provisions, AT&T and its *amici* call for one set of rules for consumer arbitration clauses and a different set for all other consumer contracts. This is counter to the Supreme Court's instructions on this issue. *E.g., EEOC v. Waffle House*, 534 U.S. 279, 122 S.Ct. 754, 764 (2002).

imposed on a wide range of contracts . . . .")

In addition, this Court held in *Bradley* that its decision was not inconsistent with its decision in the *Ticknor* case, because the doctrine of unconscionability is a "generally applicable contract defense," and plaintiffs here also rely upon the CLRA as it incorporates the doctrine of unconscionability. Plaintiffs here also rely upon the UCL, which, as noted above, has independent force from the CLRA, and which is applicable to all commercial contracts, including those between businesses. *Cel-Tech Commun. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 179 (1999) (UCL "governs 'anti-competitive business practices' as well as injuries to consumers"). AT&T's FAA preemption argument, therefore, must fail.

## CONCLUSION

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

DATED: July 15, 2002 Respectfully Submitted,

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