No. _______

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The state action doctrine holds that violations of many constitutional rights can be challenged in court only if the violation is committed by or attributable to the Government. This Court has used two disparate approaches for determining whether state action exists in cases where laws enacted by the Government permit private parties to violate other citizens' constitutional rights. In a facial challenge to the constitutionality of a federal statute that authorized—but did not mandate—alleged private First Amendment violations, the Court held that the statute itself was state action and that whether the private infringers were state actors was irrelevant. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Three years later, without mentioning *Denver Area*, the Court held in a 42 U.S.C. § 1983 civil rights action that a state statute that authorized—but did not mandate—alleged private due process violations was *not* state action and could not be challenged unless the private infringers were state actors. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

Petitioners here directly challenged a federal law that they allege authorizes private entities to violate their First Amendment rights. The lower courts applied *American Manufacturers* rather than *Denver Area* and denied Petitioners' challenge because the private defendant is not a state actor. It is undisputed that those rulings effectively immunize the law at issue from judicial constitutional scrutiny.

The questions presented are:

1. Whether *Denver Area* or *American Manufacturers* governs this case.

2. Whether the state action doctrine should be applied in a way that insulates laws authorizing private constitutional violations from judicial scrutiny.

PARTIES TO THE PROCEEDINGS

Petitioners Marcus A. Roberts, Kenneth A. Chewey, Ashley M. Chewey and James Krenn were the plaintiffs-appellants in the court below. Respondent AT&T Mobility LLC was the defendant-appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Marcus A. Roberts, Kenneth A. Chewey, Ashley M. Chewey and James Krenn, respectfully petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 877 F.3d 833, and reproduced in the appendix hereto ("App.") at App-1. The opinion of the District Court for the Northern District of California is published at 2016 WL 1660049 and 2016 U.S. Dist. LEXIS 56389, and reproduced at App-23.

JURISDICTION

The Ninth Circuit's opinion was entered on December 11, 2017. App-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Petition Clause of the First Amendment to the Constitution provides that "Congress shall make no law … abridging … the right … to petition the Government for a redress of grievances."

INTRODUCTION

Petitioners are among the more than 295 million American consumers who are parties to wireless service plans that fix the terms and conditions for telephone and data usage on their mobile devices.[1] Every American covered by such a plan, whether from Respondent AT&T Mobility LLC ("AT&T") or another domestic mobile network operator, is subject to a non-negotiable arbitration clause that waives their right to sue their wireless service provider in court. No American who uses a mobile device—a necessity of modern life—has the option to seek an alternative provider if they wish to preserve their right to go to court because every domestic carrier has an arbitration clause in its service contracts.[2] In Petitioners' view, the recent shift in the law that has resulted in 295 million Americans losing their rights to sue the entire mobile network industry in court is worthy of some constitutional introspection.

When AT&T moved to compel arbitration in the district court, Petitioners opposed on First

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[1] Today, 95% of the 327 million Americans use cell phones, 77% of which are smartphones. *See* census.gov; www.pewinternet.org/fact-sheet/mobile/.

[2] In 2013, only one small carrier out of the then 14 domestic mobile network operators lacked an arbitration clause in its customer contracts. *See Katz v. Cellco Partnership*, No. 12 CV 9193 (VB), 2013 WL 6621022, 2013 U.S. Dist. LEXIS 176784, at *34 n.6 (S.D.N.Y. Dec. 12, 2013). It is undisputed that the 12 mobile network operators remaining as of the district court's hearing on AT&T's motion to compel all used form arbitration contracts.

Amendment grounds, arguing that the Federal Arbitration Act of 1925 ("FAA"), 9 U.S.C. § 1, *et seq*., as applied to non-negotiable consumer form contracts like AT&T's, violates the Petition Clause. As this Court recently reconfirmed, its 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). Because the FAA as interpreted over the last 20 years enables and authorizes entities like AT&T to use form contracts to take away Petitioners' right to sue in court, and the FAA then mandates the federal and state judiciary to enforce those form contracts, Petitioners sought to challenge the FAA's constitutionality under the Petition Clause.

The courts below declined to reach the merits of Petitioners' constitutional argument, finding as a threshold matter that the state action prerequisite to bringing a First Amendment challenge was not satisfied because AT&T is not a state actor. The lower courts applied *American Manufacturers* and held that because the FAA only permits and does not require AT&T to infringe consumers' First Amendment rights, Petitioners had to prove that AT&T was a state actor under one of the four tests articulated in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The lower courts failed to apply *Denver Area*, where this Court reached the opposite conclusion and did not require proof that the private infringers were state actors in the context of a direct challenge to a statute that, like the FAA, authorized but did not require private First Amendment infringements. Even though *Denver Area* had unanimously reversed a court of appeals decision that employed the same state action analysis the lower courts applied here, the courts below did not follow *Denver Area* and treated it as an aberrant decision that should be limited to its facts. The courts below declined Petitioners' suggestion that this Court's state action precedents can be reconciled by finding that *American Manufacturers* governs when the gravamen of a constitutional claim seeks to impose liability for a private infringement but does not apply to direct challenges to the validity of federal or state laws, which *Denver Area* should control.[3]

The lower courts were also unmoved by Petitioners' argument that applying *American Manufacturers* would immunize the FAA from constitutional scrutiny. Because only private entities draft non-negotiable arbitration clauses in consumer contracts, no consumer aggrieved by such a clause could prove that the private drafter was a state actor. Neither AT&T nor the lower courts disputed the accuracy of this proposition. But the district court eluded the issue, and on interlocutory appeal, the Ninth Circuit viewed the FAA's immunity from constitutional scrutiny as an acceptable consequence of *American Manufacturers'* approach to state action. The circuit court subordinated the Judiciary's duty to ensure the constitutionality of our nation's laws to the state action doctrine's policy of "limiting the reach of … federal judicial power" by preserving the

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[3] The lower courts also rejected Petitioners' alternative argument that AT&T is a state actor under the "encouragement test" for state action. *See*, *e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (describing encouragement test).

"essential dichotomy between public and private acts". App-5, 14 (citing *Lugar* and *American Manufacturers*) (internal quotations omitted). Although *Denver Area* had struck the opposite balance, and its application here would have avoided immunizing the FAA from constitutional inspection, the lower courts chose to interpret *Denver Area* narrowly.

The different approaches to state action taken three years apart in *Denver Area* and *American Manufacturers* should be reconciled by the Court. Resolving whether the Government or the private infringer is the relevant sate actor when the gravamen of the complaint is a direct constitutional challenge to a statute that makes citizens vulnerable to private infringements is an important question of law. If *Denver Area* controls this case, the decision below conflicts with this Court's governing authority, and its errant analysis shields a potentially unconstitutional law from judicial scrutiny. No law should be immune from constitutional review. Immunizing laws from judicial inspection because they merely authorize rather than compel private constitutional violations would set a precedent that can incite lawmakers to draft unconstitutional laws that could not be tested or invalidated by the courts. This Court's review is clearly warranted.

STATEMENT OF THE CASE

Petitioners' class action complaint alleges that AT&T falsely advertised that certain of its mobile phone plans allow customers to utilize "unlimited" data when, in fact, AT&T regularly "throttles" (*i.e.*, intentionally slows) customers' data speeds once they reach data usage levels as low as between 2GB and

5GB per month, to the point that many of the phones' key capabilities (such as streaming video and music and browsing webpages) are rendered unusable. Petitioners assert claims under Alabama and California consumer protection statutes and seek nationwide relief under common law. The complaint does not assert a First Amendment claim or seek to impose liability on AT&T or the government for a First Amendment violation. Petitioners' Petition Clause challenge arose in response to AT&T's motion to compel arbitration, and it challenges only the FAA's validity as applied to non-negotiable consumer form contracts. Petitioners have not brought a facial constitutional challenge, as they do not argue that the FAA is unconstitutional in all contexts. *See National Endowment for the Arts v. Finley,* 524 U.S. 569, 580, 586-87 (1998) (describing facial challenge); *Compassion in Dying v. Washington*, 79 F.3d 790, 841-42 (9th Cir. 1996) (Beezer, J. dissenting) (describing as applied challenge).

A. THIS COURT'S STATE ACTION PRECEDENTS

1. From *Fuentes* to *Skinner*

This Court's state action analyses are driven by the nature of the plaintiff's claim. "Faithful adherence to the 'state action' requirement … requires careful attention to the gravamen of the plaintiff's complaint." *Blum*, 457 U.S. at 1003. That inquiry is "necessarily fact-bound" and case-specific, *Lugar*, 457 U.S. at 939, and is not amenable to formulaic rules, *see Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295, 301 n.4 (2001). But consistent principles attendant to the inquiry have emerged. Historically, if the source of a plaintiff's claimed constitutional injury flows from a statute or regulation that the plaintiff seeks to challenge directly, state action has often been found to exist, particularly if the plaintiff does not seek money damages. If the gravamen of the complaint is not a facial or as applied challenge to a law but, rather, an effort to obtain damages for a private party's compliance or non-compliance with a law, state action is frequently held to be missing. In direct facial or as applied challenges, whether the law authorizes or mandates private constitutional infringements is not dispositive of the state action issue. State action can exist even if the law merely authorizes a private constitutional deprivation.

Several exemplar cases from this Court during the 1970s and 1980s illustrate the evolution of these distinctions. *Fuentes v. Shevin*, 407 U.S. 67 (1972), was a § 1983 due process challenge against two states' prejudgment replevin statutes. *Id*. at 68-70. Debtors who had their property seized sued both the state and the private creditors who invoked the statutes. The plaintiffs sought only "declaratory and injunctive relief" against the statutes' continued enforcement. *Id.* at 71 & n.3; *see Lugar*, 457 U.S. at 933 (discussing *Fuentes*). This Court proceeded directly to the merits of the due process claim without addressing state action. But the state action implications of *Fuentes* were summarized in *Lugar* ten years later, where the majority stated that *Fuentes* had found "state action as an implicit predicate" to reaching the due process issue, and that "overt, official involvement in the property deprivation" by the state agents conducting the seizures jointly with and for the creditors rendered the private creditor a state actor. 457 U.S. at 927, 931-33. Three dissenting Justices in *Lugar* argued that *Fuentes* had only found state action as to the State, given that "the validity of a state statute" was at issue, but had not ruled on whether the creditor was a state actor because "[n]o damages were sought from the creditor." *Id.* at 952-53 (Powell, J. dissenting, joined by Rehnquist and O'Connor, JJ.) In the *Lugar* dissenters' view, there is a distinction between challenging the validity of a statute—where the State is the relevant state actor and state action exists—and a claim seeking damages from a private party, as to whom state action does not exist unless the private party is a state actor.

Six years after *Fuentes*, the Court decided *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). There an evicted tenant brought a § 1983 action against a private warehouse that sought to sell her property on short notice under a New York lien law. *Id.* at 151-54. While the plaintiff contended that the lien law violated due process, *id.* at 153-54, the gravamen of her complaint was to obtain damages from the private warehouse and enjoin its sale of her property. The gravamen was not a direct challenge to the constitutionality of the lien law. In that context, the plaintiff had to prove the warehouse was a state actor, which the Court held she failed to do under either the "public function" or "encouragement" tests. The Court stated that under the latter test, neither the State's "mere acquiescence in a private action" nor its enactment of the lien law were sufficient "'authorization'" or "'encouragement'" to make the private warehouse liable for damages or subject to an injunction under § 1983. *Id.* at 164-66. Three dissenters argued that "the distinctions between 'permission' and 'compulsion' … cannot be determinative" in a state action analysis, even in a § 1983 action, because there "is no great chasm between" those terms and "many intervening levels of state involvement in private conduct" do not fall neatly into "one or the other definitional camp." *Id.* at 170-71 (Stevens, J., dissenting).

Blum, decided four years later, was a Fourteenth Amendment due process case filed by Medicaid patients seeking injunctive relief and damages against state officials who had reduced the plaintiffs' benefits after their private nursing homes decided the plaintiffs no longer needed the high levels of medical care they had been receiving. 457 U.S. at 993-96. The Court found no state action because the gravamen of the plaintiffs' objection was their involuntary transfer to lower care facilities by the private nursing homes. *Id.* at 1003. The fact that the state was obligated by law to respond to the nursing homes' decisions by reducing benefits did not make the state responsible for those private decisions. *Id.* at 1005. Under these facts, the State's "[m]ere approval of or acquiescence in the initiatives of a private party" did not rise to state action. *Id.* at 1004. The Court noted that the plaintiffs were "not challenging particular state regulations or procedures," *id.* at 1003, suggesting the result may have been different had a direct challenge been lodged.

Lugar, issued the same day as *Blum*, was a § 1983 due process action by a debtor seeking damages against a private creditor who obtained an improvidently granted prejudgment attachment. The complaint was construed to have challenged Virginia's attachment statute as well, but the gravamen of the lawsuit was that the statue had been improperly applied, not that it was invalid. *See* 457 U.S. at 924-25 & n.4, 940-41. *Lugar* set forth a two-part test for whether a private person can be charged with "conduct allegedly causing the deprivation of a federal right." *Id*. at 937. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor" such as "a state official", a private person or entity that "has acted together with or has obtained significant aid from state officials," or because the private party's conduct "is otherwise chargeable to the State." *Id.*

Lugar explained that when the plaintiff charges both the Government and a private party with conduct causing constitutional harm, it "is essential to the proper disposition" of the state action inquiry to determine whether the plaintiff's "ultimate claim of unconstitutional deprivation was directed at the statute itself or only at its erroneous application" to the plaintiff. *Id*. at 940. If the ultimate claim is that the deprivation flows from "the procedural scheme created by the statute," then "obviously" the statute "is the product of state action" and may be remedied in a § 1983 action if the party charged with causing the harm is a state actor. *Id*. at 941. That the state actor causing harm through a statutory scheme can be the State that enacted the statute is well within the contemplation of *Lugar's* formulation of the state action test. *Lugar* did not reach that question, however, because the statute's validity was not ultimately at issue. Rather, the gravamen of the claim charged the private creditor with working jointly with the State to obtain an improper attachment under the statute. The Court held that state action existed as to both because Virginia officials executed the levy. *Id.* at 926, 933-34.

The three *Lugar* dissenters objected to the majority's due process violation finding against the creditor, "who had every reason to believe he was acting in strict accordance with law" when he attached the debtor's property under longstanding state procedures. *Id.* at 944. "It is plainly unjust," they argued, that a private citizen "who … could have had no notion that his filing of a petition in state court, in the effort to secure payment of a private debt, made him a 'state actor' liable in damages for allegedly unconstitutional action by the [State]." *Id.* at 945-46. As previously noted, the dissent distinguished earlier cases where state prejudgment remedy procedures were held to violate due process by noting that "none involved a claim for damages against the creditor," and it asserted that state action existed as against the State (but not the private defendant) in *Fuentes* because "the only question before this Court was the validity of a state statute" under the Constitution. *Lugar*, 457 U.S. at 952-53.

In 1989, the Court decided *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), which involved a direct due process challenge to Federal Railroad Administration regulations that (i) mandated private railroad operators to conduct blood and urine tests for railroad employees involved in specific types of train accidents, and (ii) authorized the railroads to conduct breath and urine tests for employees who violated safety rules or appeared to be impaired by drugs or alcohol, the latter of which the Court referred to as a "permissive" rule. *Id*. at 606, 609, 611. Organizations representing railway executives and workers sued the Government to enjoin the regulations as unreasonable searches and seizures and privacy invasions that violated the Fourth Amendment. *Id.*at 612-14. The Court found state action existed as to both the regulations' mandatory and permissive provisions. The private railroads' compliance with the mandatory rules was state action attributable to the Government because the mandatory drug tests were performed "by compulsion of sovereign authority." *Id*. at 614. As to the permissive drug testing, the Court, applying the encouragement test, ruled that "[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Id*. at 615. Because "the Government did more than adopt a passive position toward the underlying private conduct," and in fact had "removed all legal barriers to the testing authorized by" the regulations, "made plain … its strong preference for testing" and "mandated that the railroads not bargain away the authority to perform tests granted by" the regulations, there were sufficient "indices of the Government's encouragement, endorsement, and participation" in the railroads' permissive testing to render it state action. *Id*. at 615-16.

That the gravamen of the complaint in *Skinner* was a direct challenge to the regulations also factored into the Court's analysis. The Court summarized its holding by stating: "We are unwilling to conclude, in the context of this facial challenge, that breath and urine tests required by private railroads in reliance on [the permissive regulations] will not implicate the Fourth Amendment." *Id*. at 614.

The foregoing cases reveal several general state action principles: The "gravamen of the plaintiff's complaint" drives the "necessarily fact-bound" and case-specific state action inquiry. *Blum*, 457 U.S. at 1003; *Lugar*, 457 U.S. at 939. If the gravamen is a claim for damages arising from a private constitutional infringement, the private infringer must be a state actor, and the State's "mere acquiescence" in the private action is insufficient to establish state action. *Flagg Bros.*, 436 U.S. at 164-66. When the gravamen of a claim alleges a constitutional injury arising from a "procedural scheme created by [a] statute," the statute "is the product of state action" and may be remedied, even in a damages action, if the party causing the injury is a state actor, which can be "a state official". *Lugar*, 457 U.S. at 937, 941.

Where the gravamen of a complaint seeks to challenge "the validity of a … statute" or a declaration against a law's continued enforcement, the state can be the relevant state actor. *Lugar*, 457 U.S. at 940-41; *Blum*, 457 U.S. at 1003; *see Fuentes,* 407 U.S. at 71 & n.3. If a complaint asserts only such a direct challenge without seeking damages, it favors finding state action. *See Skinner*, 489 U.S. at 615; *Lugar*, 457 U.S. at 952-53 (dissenting opinion). In a direct challenge case, "[t]he fact that the Government has not compelled a private party to perform [an act] does not, by itself, establish that the [act] is a private one", and a law that authorizes private infringements can qualify as state action. *See Skinner*, 489 U.S. at 615; *Flagg Bros.*, 436 U.S. at

170-71 (dissenting opinion) ("the distinctions between 'permission' and 'compulsion' … cannot be determinative" in state action analysis). Each of these principles applicable to direct constitutional challenges was confirmed in *Denver Area*, to which we now turn.

2. *Denver Area*

Denver Area involved a First Amendment challenge to three sections of the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1460, including two sections that permitted (but did not require) private cable system operators to censor "patently offensive" sexual-related content from their cable programming. 518 U.S. at 732-36. The D.C. Circuit had concluded that if Congress had banned such programs outright instead of permitting private entities to do so, the government "would be hard put to defend the constitutionality of" the statute. *Alliance for Comm'ty Media v. FCC*, 56 F.3d 105, 113 (D.C. Cir. 1995) (*en banc*). But because two sections of the statute merely permitted and did not compel private censorship, the circuit court found no state action as to those provisions and refused to allow the plaintiffs to challenge them. The court of appeals rejected the notion that state action always exists when a direct challenge against an act of Congress is at issue. Employing the encouragement test, and relying largely on *Blum* and *Flagg Bros.*, the court held that only statutes that command private actors to infringe others' free speech constitute state action while laws that simply authorize private First Amendment violations do not. *Id.* at 113; *see id.* at 116-23.

Judge Wald dissented. Focusing on the gravamen of the plaintiffs' complaint, the dissent noted that the plaintiffs in *Blum* had sought "to hold … private decisionmakers to due process standards applicable to state actors" and "did 'not challenge particular state regulations or procedures.'" *Alliance for Comm'ty Media*, 56 F.3d at 132 (Wald, J., dissenting in part) (quoting *Blum*, 457 U.S. at 1003). The *Denver Area* petitioners, by contrast, did "not seek to apply First Amendment standards" to private decisionmakers but, instead, brought "a direct facial challenge to a federal statute and [its] implementing regulations." *Id.* In such a case, asking whether a private party is a state actor is simply "the wrong question." *Id.* Proving "whether the cable operators' private decisions implicate state action" was unnecessary because "we have state action in the government's own ban-or-block scheme, which is what is at issue here." *Id.* The dissent reasoned:

> [I]t simply does not follow that, if the cable operators' decisions are *not* state action, then the statute itself is not state action, and is exempt from constitutional scrutiny. Indeed, it … [is] wholly untenable … that a statute duly enacted by … Congress … could be anything other than state action.

Id. at 132 n.4 (emphasis in original). Judge Wald's dissent criticized the majority's approach because it "would immunize the *statute itself* from constitutional scrutiny on grounds that cable operators' decisions … are not state action." *Id.* (emphasis in original). *Denver Area*, thus, squarely presented the issue whether the Government is the relevant state actor in a direct challenge case where, absent making that finding, a government-issued law would escape judicial constitutional inspection.

On review, this Court unanimously agreed with Judge Wald that state action existed. *Denver Area* produced five separate opinions because the Court was fractured on the merits of the First Amendment issues, but the entire Court reached and addressed those merits without requiring proof that the private cable system operators were state actors. None of the five opinions adopted the D.C. Circuit majority's holding that state action was absent as to the permissive sections of the statute because the cable operators were private entities. Whether the private entities were state actors was irrelevant to all nine members of this Court. The *Denver Area* Court's state action holding, thus, was unequivocal: the petitioners' direct challenge to the constitutionality of a law that authorized private infringements of First Amendment rights did not require proof that the private infringers exercising that government-granted authority were state actors.

Justice Breyer's four-member plurality opinion expressly agreed with Judge Wald that state action existed because a statute was being directly challenged. The plurality assumed, in fact, that the D.C. Circuit majority, which "said that it found no 'state action,' 56 F. 3d at 113 … could not have meant that phrase literally, for, of course, petitioners attack … a congressional statute—which, by definition is an Act of 'Congress.'" 518 U.S. at 737. The plurality noted that the First Amendment ordinarily does not apply to private decisions to permit or restrict speech, "even where those [private] decisions take place within the framework of a regulatory regime such as broadcasting." *Denver Area*, 518 U.S. at 737. But it emphasized that the First Amendment warrants special protection such that "Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required." *Id.* at 740. Echoing concerns about applying a rigid distinction between permissive and mandatory laws that the Court expressed in *Skinner*, the plurality acknowledged the force of the petitioners' argument that "Congress' 'permissive' law, *in actuality*, will 'abridge' their free speech." *Id.* at 739 (emphasis in original). In other words, that by permitting private censorship, Congress was indirectly restricting indecent programming that Congress could not overtly censor itself without violating the First Amendment.[4]

Justice Kennedy, joined by Justice Ginsburg, concurred in the plurality's state action finding. They commended the plurality for "avoiding the mistake made by the Court of Appeals" majority and for finding that state action exists when "Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise possible." 518 U.S. at 782 (Kennedy, J., concurring in part, concurring in

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[4] The legally significant circumstances here are the same as in *Denver Area*: a law stating that "AT&T's customers cannot sue AT&T in court" would overtly violate the Petition Clause. But the FAA, as applied to non-negotiable consumer contracts, "in actuality," abridges Petitioners' rights to sue AT&T in court just as pervasively because it authorizes AT&T to infringe its customers' rights to sue in court and mandates enforcement of AT&T's private infringements.

the judgment in part, and dissenting in part). The concurring opinion stated further that

> State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State.

Id. at 782 (citing *Hunter v. Erickson*, 393 U.S. 385, 389-90 (1969) (ordinance that was not itself discriminatory, but which suspended existing laws barring race discrimination in private residential housing, was state action)).

Denver Area's plurality and concurring opinions together presented a six-member majority rationale for the Court's unanimous holding that the Government was the relevant state actor in that direct constitutional challenge case.[5] Although the Court did not specifically address Judge Wald's point that ruling otherwise would immunize the statute at issue from constitutional review, the Court's holding obviated that problem. The entire Court reached the merits of whether the statute's permissive provisions violated the First Amendment by authorizing private entities to infringe the petitioners' rights. The infringers' purely private status did not prevent scrutiny of the statute.

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[5] The other three Justices did not discuss state action, but finding it existed was "an implicit predicate" to their reaching the First Amendment issues. *See Lugar*, 457 U.S. at 927

3. *American Manufacturers*

American Manufacturers was a § 1983 due process suit seeking damages and injunctive relief against defendants that included private insurance companies and state officials. The facts are close to those in *Blum*. A state workers' compensation regime was amended to permit insurers to withhold paying employees' medical bills pending a private organization's review of the reasonableness and necessity of the employees' treatment. The State reviewed the insurers' one-page form submissions requesting the private reviews for completeness and randomly selected the private reviewers, but it played no role in either the reviewers' assessments or an insurer's decision to withhold payment. *Am. Mfrs.*, 526 U.S. at 43-49, 54. The state officials were concededly state actors, so the Court's analysis focused on the private insurers. The Court found that the gravamen of the claim asserted constitutional harm flowing from the insurers' private decision to withhold paying medical claims. *Id.* at 51. The Court ruled that the petitioners, who sought to impose liability for the insurers' decisions, could not avoid having to prove the insurers were state actors by characterizing "their claim as a 'facial' or 'direct' challenge" to the statute. *Id.* at 50. The Court stated that the Government's "mere approval or acquiescence" in a private decision is not state action. *Id.* at 52. Applying the encouragement test, the Court ruled that the state's having amended the statute to restore what had been the insurers' common law option to withhold payments "can just as easily be seen as state inaction", *id.* at 53-54, or "subtle encouragement … no more significant than that which inheres in the State's creation or modification of any legal remedy." *Id*. at 53.

American Manufacturers did not overrule *Denver Area*, or even cite it, and the Court in *American Manufacturers* did not address the situation presented in *Denver Area*, where the gravamen of the claim was a direct constitutional challenge seeking to obtain judicial inspection of a law that otherwise would escape constitutional scrutiny. *American Manufacturers*, in fact, reached the due process issue presented because the state officials remained in the case. *See id*. at 58-59. *American Manufacturers* did not involve the First Amendment, to which the Court applies "close judicial scrutiny" with a "degree of care" not "elsewhere required." *Denver Area*, 518 U.S. at 740 (plurality op.).

B. The Petitioners' Direct As Applied Challenge

The gravamen of Petitioners' challenge is against the validity of the FAA as applied to non-negotiable form consumer contracts. Petitioners do not seek to charge AT&T with liability for using an arbitration clause that infringes consumers' Petition Clause rights. They seek constitutional inspection of the law that empowered AT&T to take away consumers' Petition Clause rights in the first place. Petitioners' "ultimate claim of unconstitutional deprivation was directed at the statute itself" not to "its erroneous application" to them. *Lugar*, 457 U.S. at 940.

By its terms, the FAA regulates private conduct by authorizing entities like AT&T to impose non-negotiable terms that preclude consumers from suing in court. Today 295 million Americans cannot exercise their First Amendment right to sue their wireless carriers in court. Consumers also cannot bring many entities in other industries to court. That was not always the case. Citizens have only recently lost their rights to sue in court because the law has recently changed to empower AT&T and other entities to use form contracts that infringe Americans' First Amendment rights.

Enacted in 1925, the FAA was meant "to replace" widespread "judicial indisposition" to specifically enforcing private arbitration contracts—even those negotiated by businesspeople with equal bargaining power. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). The FAA replaced that judicial hostility with a "'liberal federal policy favoring arbitration'" and mandated courts to specifically enforce arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 345-46 (2011) (citations omitted). The FAA "is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements'" that were not previously enforced. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (citation omitted). This Court first applied the FAA to consumer form contracts in 1995. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995). "It has become routine" since then, "in a large part due to this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers … no-class-action arbitration clauses". *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting). The result has been a "proliferation" of a "'soaring number'" of such contracts. *Id.* at 477 & n.4

(citations omitted). As the district court found, the evidence "suggest[s] that evolution of recent [FAA] jurisprudence … has in fact led to increasing use of arbitration to displace judicial remedies, particularly in the field of consumer rights." App-46.

Because applying the FAA to consumer form contracts has changed the law in a way that has greatly reduced citizens' ability to sue in court, Petitioners argue that this case is governed by *Denver Area's* state action holding. There, as Justice Kennedy's opinion confirms, the Court ruled that state action exists when a law makes a First Amendment right "vulnerab[le] to private" infringement in a context where the Government could not itself infringe that right. *Denver Area*, 518 U.S. at 782. Congress could not enact a statute barring AT&T's customers from "suing AT&T in court" without violating the Petition Clause. Congress also cannot violate the Petition Clause indirectly by writing a less overt law that has the same impact. *See United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("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."). That includes permissive laws that, "*in actuality*, will 'abridge'" the First Amendment. *Denver Area*, 518 U.S. at 739 (plurality op.) (emphasis in original).

Petitioners argue that because the Government cannot itself ban consumers from exercising their First Amendment right to sue AT&T in court, the FAA as applied makes consumers "vulnerable to private" bans by AT&T that in actuality abridge their rights to sue.[6]

Petitioners urged the courts below not to apply *American Manufacturers'* distinction between permissive and mandatory statutes given that this Court had unanimously rejected the D.C. Circuit's use of that analysis in *Denver Area*, which, as here, involved a direct challenge to a statute that would have escaped judicial review if *American Manufacturers* had been applied. Petitioners asked the lower courts to reconcile this Court's state action decisions to avoid that result, by holding that the State is the relevant state actor in such direct challenges (and certainly if First Amendment rights are being infringed).

C. The Lower Courts' Decisions

Notwithstanding that this case parallels *Denver Area's* procedural and factual posture, the lower courts applied *American Manufacturers*. The district court recognized that *Denver Area* had unanimously allowed a First Amendment statutory challenge to proceed even though the private cable operators were not state actors, and it acknowledged that a majority of this Court had found (or "assum[ed]," as the district court put it) that state action existed solely because the government had permitted private

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[6] Although *Denver Area* involved free speech, its analysis applies equally to laws that permit private parties to infringe the Petition Clause. The Court has long recognized that the right of petition is "inseparable" from the freedoms of speech, press and assembly and is one of four "cognate rights … united in the First [Amendment's] assurance." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

content-based speech restrictions. App-41, App-42 n.8. Nevertheless, the district court read *Denver Area* narrowly, limiting the decision to its telecommunications-regulatory context. App-41-42. The district court did not explicitly address Petitioners' concern that the FAA would be exempt from scrutiny if they were required to prove AT&T is a state actor but could not do so.

The Ninth Circuit affirmed, likewise relying on *American Manufacturers*. The court ruled that "AT&T's conduct must be fairly attributable to the state" even in facial or as applied statutory challenges and that *Denver Area* does not stand for the principle that "the government is the relevant state actor" in such cases. App-5. The circuit court determined that *American Manufacturers* had "already rejected" Petitioners' argument that the state was the relevant state actor in a direct challenge case. App-7. While Petitioners characterized the gravamen of their claim as challenging the validity of the statute that caused their constitutional injury, the court of appeals accepted AT&T's characterization that Petitioners' injury flowed from AT&T's private decision to use an arbitration clause rather than from the statute. App-7-8.

The court read *Denver Area* "very narrowly." App-11. The court referred to *Denver Area* as "the epitome of a splintered opinion," *id.* (citation and internal quotations omitted), without noting that the Court had fragmented only on the First Amendment issues and had unanimously rejected the very state action analysis the Ninth Circuit was employing. Applying the "common denominator" approach to split opinions—which applies when "'no single rationale explaining the result enjoys the assent of five Justices,'" App-11-12 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977))—the court found that Justice Kennedy's concurrence stated the "narrowest grounds" for this Court's ruling, namely, that "state action exists when 'Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted.'" App-13 (quoting *Denver Area*, 518 U.S. at 782). While the Ninth Circuit correctly stated *Denver Area's* state action holding, it concluded the holding was not intended to pronounce a broadly applicable principle of law. Rather, the court found that its "narrow reading" justified limiting *Denver Area* to its facts, stating its reading "accounts for *Denver Area's* unique context, where cable operators were empowered by statute to censor speech on public television, and as a result were 'unusually involved' with the government given their monopolistic-like power over cable systems." App-13 (citing *Denver Area*, 518 U.S. at 739 (plurality op.), 782 (Kennedy, J., op.)).

As to Petitioners' concern that the FAA and similar laws would be immune from challenge if *American Manufacturers'* restrictive view of state action is applied in direct challenge cases, the court concluded, without analysis, that "[t]his policy argument does not and cannot alter the existing state action doctrine under which the private party's status *is* relevant and serves to preserve 'the essential dichotomy between public and private acts that our cases have consistently recognized.'" App-14-15 (quoting *Am. Mfrs.*, 526 U.S. at 53) (emphasis in original). Implicit in the Ninth Circuit's conclusion is that the state action doctrine's objective of "limiting the reach of … federal judicial power", App-5, outweighs the Judiciary's obligation to ensure the constitutionality of the nation's laws.[7]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision should be reviewed by this Court because it immunizes not only the FAA but potentially many other laws enabling private constitutional deprivations from judicial scrutiny, and because the lower court misapplied this Court's governing precedent.

I. THE COURT SHOULD RECONCILE ITS STATE ACTION DECISIONS TO CLARIFY THAT LAWS THAT MAKE CITIZENS VULNERABLE TO PRIVATE CONSTITUTIONAL INFRINGEMENT ARE NOT IMMUNE FROM SCRUTINY

Requiring Petitioners to prove that AT&T is a state actor would insulate the FAA from constitutional scrutiny because no aggrieved consumer subject to a form arbitration contract could meet the state action requirement. Private entities draft non-negotiable arbitration clauses, not governments. Requiring consumers to prove private drafters are state actors erects an insurmountable obstacle to judicial review. But the change in the law

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[7] The court also suggested that the FAA does not "violate[] citizens' constitutional rights," citing *Concepcion*, but made plain it was not reaching "the merits of Plaintiffs' Petition Clause argument." App-15, App-22 n.8. *Concepcion* did not consider the FAA's First Amendment implications.

that has enabled and engendered private First Amendment deprivations in a context where they had not previously occurred—consumer form contracts—should not escape challenge by aggrieved litigants in a court of law. This Court confronted this type of situation only once before, in *Denver Area*, and it unanimously determined that enacting a law that authorized private infringements of First Amendment rights that previously were not permitted was state action, even if the private infringers were not state actors. *Denver Area* should control here so that the FAA does not evade constitutional review.

The Court's § 1983 state action decisions on which the lower courts relied are readily reconciled with *Denver Area* on the ground that the gravamen of the § 1983 complaints sought to hold parties liable for damages caused by the private constitutional violations. There is no logical basis for requiring plaintiffs to show that a private infringer is a state actor when only the constitutionality of a law is at issue and damages against the private infringers are not pursued. Legislatures and courts are definitive state actors. If the gravamen of a complaint asserts that a lawmaker has crafted a law that has caused constitutional injury by enabling private infringements, whether the private infringers that the lawmaker empowered are also state actors is an unnecessary inquiry. *Alliance for Comm'ty Media*, 56 F.3d at 132 (Wald, J., dissenting in part). *Lugar's* two requirements are satisfied in such a direct challenge because laws are state actions and lawmakers are state actors. Requiring proof that private infringers are also state actors when both *Lugar* prongs are already satisfied is redundant and can only work to immunize permissive statutes from judicial inspection. *Id.* at 132 n.4.

Justice Jackson wrote for the Court in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), that "[t]here are village tyrants, as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution." *Id.* at 638. The lower courts' rulings here suggest a dangerous, illogical exception to this rule: Congress and courts—ordinarily paradigm state actors—can be beyond the Constitution's reach when they issue laws that authorize, rather than compel, private parties to violate other citizens' fundamental rights. If Congress compelled AT&T to ban its customers from court, Petitioners undeniably could test that law under the First Amendment even though AT&T is a private actor. Under the rulings below, however, Petitioners are foreclosed from testing the FAA's constitutionality altogether simply because the law authorizes rather than compels AT&T to ban its customers from court (and notwithstanding that the FAA compels courts to enforce AT&T's ban, subject to the few viable exceptions under the FAA's savings clause, *see* 9 U.S.C. § 2). Consequently, the FAA is *de facto* exempt from the Constitution's reach, and no consumer, either before or after engaging in arbitration, could ever challenge its constitutionality.

Laws should not be permitted to escape judicial review. Ensuring that the nation's laws do not unconstitutionally impair citizens' civil rights is a lynchpin of our democracy that should take precedence over the state action doctrine's policy of preserving the public-private dichotomy in cases where the two interests collide. Immunizing any permissive law from constitutional review is antithetical both to the Supremacy Clause and the Constitution's system of checks and balances. Otherwise lawmakers who know they cannot directly violate constitutional rights by infringing them outright or by compelling a private party to infringe them could write a variety of laws that authorize private infringements and compel courts to enforce the private deprivations. If private parties empowered by these permissive laws have incentives to take advantage of them, such permissive laws could impair citizens' rights just as pervasively as laws compelling private infringements. Putting these permissive laws beyond the Constitution' reach would effectively make them superior to the Constitution. Immunizing the FAA from scrutiny simply because it is not mandatory, therefore, has troubling implications beyond the arbitration context and for statutes other than the FAA.

Plausible illustrations are not difficult to conceive. If Congress wanted to protect a domestic industry by preventing consumers of its goods from publicly disparaging the products' quality in town squares, on the internet or in the media, Congress could not do so directly without violating the Free Speech Clause. But if Congress wrote a law authorizing the industry to include non-disparagement clauses in consumer sale agreements and compelling federal and state courts to enforce those clauses, the chilling of consumers' free speech against the industry would be just as substantial as if Congress banned the disparagement outright. Under the rulings below, citizens who lost their First Amendment rights could not challenge Congress' permissive law because the companies drafting the anti-disparagement clauses would be private actors.

A state that wanted to ban guns near shopping areas could similarly immunize itself from a Second Amendment challenge through a law that permitted private retail store owners to compel their employees to confiscate guns within a prescribed distance outside their store entrances. Gun owners would want to test the law under the Second Amendment, just as they would a law that banned firearms outright. But under the lower courts' reasoning, the state action requirement would prevent the gun owners' challenge, even though the state legislature enacted the law and even if it commanded the state's judicial machinery to enforce the private gun bans. Gun owners who could not prove that private store owners were state actors would be unable to contest either the law or court orders enforcing the store owners' private bans. If many or most store owners exercised the permitted gun ban, the law would be immune from constitutional review even though it created indirectly a pervasive gun control regime that the State could not have enacted directly.

A state seeking to absolve some of its leading citizens' debts to foreign or out-of-state banks could not pass a law cancelling those debts without running afoul of the Contract Clause. But following the reasoning of the courts below, the state could draft a law that permits its citizens to unilaterally amend their financial agreements to cancel the debts and compels the state's courts to enforce those unilateral actions. Under the decisions below, the affected creditors could not challenge the law because private individuals are not state actors.

The decisions below could lead a court to interpret the FAA as permitting AT&T to use form arbitration clauses that bar its customers from petitioning Congress or the President (as well as the Judiciary) to post a grievance and seek redress against AT&T. If AT&T were to add such a provision to its standard wireless service contract, its customers would be unable to petition any of the three branches of government. But the lower courts' interpretation of the state action requirement would prevent a First Amendment challenge by any customer who wanted to petition even the legislative or executive branches, and the customer would be compelled into private arbitration instead.

Each of these examples is outside "*Denver Area's* unique context," App-13, but the factors that led to *Denver Area's* result are equally present—the laws are permissive on their face, but they would operate in actuality to infringe constitutional freedoms in the same manner as a mandatory law. The state action doctrine's policy to preserve the government and private sector dichotomy should not become an instrument whereby lawmakers can freely trample on individual freedoms by drafting permissive laws that they know cannot be challenged in court. The policy of "limiting the reach of … federal judicial power", App-5, must itself have limits. Otherwise the courts can yield too much power to legislatures and disrupt the Constitution's carefully drawn balances among the branches of government and between the Government and the people.

The FAA, as construed to apply to consumer form contracts, operates just like a mandatory ban against suing in court. The FAA does not overtly revoke mobile phone subscribers' First Amendment rights to sue in court, but it has the identical effect. Because the Government could not expressly ban AT&T's customers from suing in court, it should not be able to implement that ban with immunity from judicial review by authorizing AT&T to impose the ban and guaranteeing that AT&T's ban will be enforced in government courts. Both laws work equally to deprive AT&T's customers of their First Amendment rights, so both laws should be equally subject to judicial constitutional scrutiny. There should be no exception to *Barnette*'s admonishment that no one acting "under color of law is beyond reach of the Constitution," 319 U.S. at 638, certainly not Congress or the courts.

II. *DENVER AREA* REQUIRES FINDING STATE ACTION

The courts below failed to apply this Court's governing *Denver Area* precedent, which unanimously rejected the D.C. Circuit's holding that a private entity must be a state actor in a direct challenge to a permissive law that enabled private First Amendment violations. The same outcome should obtain in this similarly postured case. *Denver Area* is neither aberrational nor properly limited to its facts. This Court's ruling that the Government is the relevant state actor when the validity of a permissive law that enables private constitutional deprivations is at issue is consistent with and foreshadowed in the Court's earlier decisions. *See Lugar*, 457 U.S. at 940-41 (statutes are state action and state officials can be state actors); *Blum*, 457 U.S. at 1003 (challenging a statute directly is different than seeking to hold private infringers liable); *see Fuentes,* 407 U.S. at 71 & n.3 (not addressing whether private party was state actor in facial statutory challenge); *cf. Skinner*, 489 U.S. at 615 (relaxing state action requirement under the encouragement test in facial challenge case).

Petitioners do not seek to hold AT&T liable for violating their Petition Clause rights. Petitioners seek only judicial examination of the constitutionality of the law that granted AT&T the authority to violate their rights. Synthesizing the Court's § 1983 due process decisions with *Denver Area* distills a sensible and workable rule of law: the Government is the relevant state actor when a law compelling *or* authorizing private First Amendment infringements is directly challenged, but plaintiffs must show that a private infringer is a state actor to hold the private infringer liable. If a directly challenged law makes a First Amendment right "vulnerable" to private infringement in a context where the Government could not itself infringe that right, *Denver Area*, 518 U.S. at 782, then *Denver Area* rather than *American Manufacturers* should control.

Petitioners' direct challenge satisfies *Denver Area*. The FAA as applied to consumer form contracts makes consumers vulnerable to private Petition Clause violations because it removed defenses to consumer arbitration clauses that were "well-established" under prior law. *See* App-49. The FAA and court decisions interpreting it, therefore, are state actions "regardless of whether the private acts are attributable to the State." *Denver Area*, 518 U.S. at 782. Because "the only question before this Court [i]s the validity of a … statute", *Lugar*, 457

U.S. at 953, state action exists here just as it did in *Denver Area* and in *Fuentes*. The lower courts should not have applied *American Manufacturers*.

The only time this Court confronted a defendant's effort to use the state action requirement as a shield to immunize a statute from constitutional scrutiny was in *Denver Area*, which like this case presenting the same situation was a First Amendment case. For that reason, and because statutes and court decisions that are alleged to authorize private infringements of the Constitution should never be allowed to escape judicial review, *Denver Area* rather than *American Manufacturers* governs this case and should have been applied by the courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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