# APPENDIX

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*Appendix A*

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

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No. 16-16915
D.C. No. 3:15-cv-03418-EMC

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

*Plaintiffs-Appellants*,

v.

AT&T MOBILITY LLC,

*Defendant-Appellee*.

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Appeal from the United States District Court
For the Northern District of California
Edward M. Chen, District Judge, Presiding

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Argued and Submitted October 17, 2017
San Francisco, California
Filed December 11, 2017

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Before: Michael Daly Hawkins, William A. Fletcher, and Richard C. Tallman, Circuit Judges

Opinion by Judge Tallman

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## OPINION

TALLMAN, Circuit Judge:

Marcus Roberts, Ashley and Kenneth Chewey, and James Krenn ("Plaintiffs") appeal an order compelling arbitration of their putative class action claims against AT&T Mobility LLC ("AT&T"). Plaintiffs allege that AT&T falsely advertised their mobile service plans as "unlimited" when in fact it intentionally slowed data at certain usage levels. AT&T moved to compel arbitration, and Plaintiffs opposed on First Amendment grounds. The district court compelled arbitration, holding as a threshold matter that there was no state action.

On appeal, Plaintiffs raise two arguments. First, they claim there is state action whenever a party asserts a direct constitutional challenge to a permissive law under *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Second, Plaintiffs contend that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, including judicial interpretations of the statute, "encourages" arbitration such that AT&T's actions are attributable to the state. We find there is no state action under either theory and affirm.

### I

Plaintiffs—AT&T customers and putative class representatives—contracted with AT&T for wireless

data service plans. Their contracts included arbitration agreements. Plaintiffs allege AT&T falsely advertised that its mobile service customers could use "unlimited data," but actually "throttled"—intentionally slowed down— customers' data speeds once reaching "secret data usage caps" between two and five gigabytes. Plaintiffs claim a phone's key functions, such as streaming video or browsing webpages, are useless at "throttled" speeds.

Plaintiffs filed a putative class action, alleging statutory and common law consumer protection and false advertising claims under California and Alabama law. AT&T moved to compel arbitration in light of the Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), "that the FAA preempts state law deeming AT&T's arbitration provision to be unconscionable." Plaintiffs opposed the motion on First Amendment grounds. They argued that an order forcing arbitration would violate the Petition Clause, as they "did not knowingly and voluntarily give up their right to have a court adjudicate their claims," and could not "bring their claims in small claims court."

The district court granted AT&T's motion to compel arbitration. It held, as a threshold matter, that there was no state action and did not reach Plaintiffs' constitutional challenge. The court agreed to reconsider, but again held there was no state action. It rejected Plaintiffs' three main arguments, concluding that (1) judicial enforcement alone does not automatically establish state action; (2) *Denver Area* did not hold that state action categorically exists whenever there is a direct challenge to a permissive

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