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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARCUS A. ROBERTS, et al.,

Plaintiffs,

v.

AT&T MOBILITY LLC,

Defendant.

Case No. 15-cv-03418-EMC

**AMENDED ORDER GRANTING
DEFENDANT’S MOTION TO COMPEL
ARBITRATION; AND STAYING
PROCEEDINGS**

Docket No. 25

Plaintiffs Marcus A. Roberts, Kenneth A. Chewey, Ashley M. Chewey, and James Krenn (collectively, “Plaintiffs”) have filed a class action against Defendant AT&T Mobility LLC (“AT&T”), asserting statutory, tort, and warranty claims based on AT&T’s “deceptive and unfair trade practice of marketing its wireless service plans as being ‘unlimited,’ when in fact those plans are subject to a number of limiting conditions [in particular, throttling¹] that either are not disclosed or inadequately disclosed to consumers.” FAC ¶ 1. Currently pending before the Court is AT&T’s motion to compel arbitration. AT&T’s motion relies largely on the fact that the Supreme Court upheld AT&T’s arbitration provision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that arbitration agreement should be enforced under the Federal Arbitration Act (“FAA”); California’s *Discover Bank* rule – which deemed class waivers in consumer arbitration agreements substantively unconscionable – was preempted by the FAA). In response, Plaintiffs argue that the *Concepcion* Court never addressed the specific issues now raised – *i.e.*, that enforcement of the arbitration agreements would violate their rights as protected

¹ Throttling is the intentional slowing of customers’ data speed once they reach certain data usage thresholds. *See* Mot. at 2.

1 by the Petition Clause of the First Amendment.

2 Having considered the parties' briefs and accompanying submissions, as well as the oral
3 argument of counsel, the Court hereby **GRANTS** AT&T's motion to compel arbitration.² The
4 Court further stays this lawsuit pending arbitration. *See* 9 U.S.C. § 3.

5 **I. DISCUSSION**

6 The parties do not dispute that Plaintiffs entered into contracts with AT&T in order to
7 obtain wireless service. The parties also do not dispute that each of the agreements contained an
8 arbitration provision.

9 In its motion, AT&T contends that the Court should enforce the arbitration agreements and
10 compel arbitration. In response, Plaintiffs essentially raise three arguments as to why arbitration
11 should not be compelled: (1) because, if this Court were to compel arbitration, that would be state
12 action that would violate their First Amendment rights – more specifically, the right to petition a
13 court for a redress of grievances³; (2) because, even though the arbitration provision allows a
14 claim to be brought in small claims court, that court is not an adequate forum and therefore their
15 First Amendment rights have still been abridged; and (3) because the FAA must be construed as
16 not applying to consumer actions in order to avoid a constitutional problem (*i.e.*, the constitutional
17 avoidance doctrine).

18 Each of the above arguments turns on the applicability of the First Amendment. But, as
19 both parties recognize, in order for Plaintiffs to have a First Amendment claim, they must first
20 show state action. *See Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259,

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22 _____
23 ² After the Court issued an order granting AT&T's motion to compel arbitration (Docket No. 50),
24 Plaintiffs sought leave to file a motion to reconsider. The Court granted leave (Docket No. 55),
and upon reconsideration, amends the order herein to address matters raised by the additional
briefs.

25 ³ *See* U.S. Const., amend. 1 (providing that "Congress shall make no law respecting an
26 establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of
27 speech, or of the press; or the right of the people peaceably to assemble, and to petition the
28 Government for a redress of grievances"); *see also Borough of Duryea v. Guarnieri*, 131 S. Ct.
2488, 2494 (2011) (stating that "the Petition Clause protects the right of individuals to appeal to
courts and other forums established by the government for resolution of legal disputes[;] '[t]he
right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition
the government'").

1 263 (2d Cir. 2014) (“Because the United States Constitution regulates only the Government, not
2 private parties, a litigant like Grogan who alleges that her constitutional rights have been violated
3 must first establish that the challenged conduct constitutes state action.”) (internal quotation marks
4 omitted)); *cf. Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (“It is, of course, a commonplace that
5 the constitutional guarantee of free speech is a guarantee only against abridgment by government,
6 federal or state.”). Plaintiffs acknowledge that the arbitration agreements are contracts between
7 private actors. Nevertheless, they assert, there would still be state action in the instant case upon
8 this Court’s enforcement of that private agreement.

9 A. Judicial Enforcement

10 As a starting point, the Court finds no merit to Plaintiffs’ assertion that the mere fact of
11 judicial enforcement automatically establishes state action. The Ninth Circuit rejected that
12 position in *Ohno v. Yasuma*, 723 F.3d 984 (9th Cir. 2013). More specifically, in *Ohno*, the Ninth
13 Circuit rejected the defendant’s contention that judicial enforcement of a foreign-country money
14 judgment against it – through application of California’s Uniform Foreign Country Money
15 Judgments Recognition Act – “constitute[d] domestic state action triggering constitutional
16 scrutiny.”⁴ *Id.* at 986. The court stated:

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18 [T]here is no doubt that the district court’s decision in this case
19 applying California’s Uniform Act – legislation that is itself the
20 result of governmental action – constitutes state action for purposes
21 of constitutional scrutiny. But that truism does not resolve our
22 question, which is: Should the *substance* of the underlying Japanese
23 monetary damages judgment, resulting from a lawsuit in Japan
24 between two private parties, be ascribed to the district court’s
25 enforcement of the judgment under the Uniform Act and so
26 subjected to constitutional scrutiny?

23 *Id.* at 994 (emphasis in original).

24 The *Ohno* court further explained:

25
26 *Recognizing and enforcing a foreign-country judgment is distinct
27 from rendering that judgment in the first place. The district court, in*

28 ⁴ The defendant argued that “the Religion Clauses [of the First Amendment] would bar a court in the United States from rendering the same judgment in the first instance.” *Ohno*, 723 F.3d at 992.

1 giving effect to the judgment issued in Japan, *has not participated in*
2 *the action the [defendant] claims is unconstitutional* – namely,
judging the truth or falsity of the [defendant’s] religious teachings or
imposing liability for the consequences of religious expression.

3 *Id.* at 993 (emphasis in original and added). “[T]he source of the alleged constitutional harm is . . .
4 Japanese tort law, created and enforced through Japanese governmental entities,” and so “the
5 claimed constitutional deprivation cannot be traced to a right, privilege, or rule of conduct
6 imposed by a domestic governmental entity or individual.” *Id.* at 994. The act of enforcement of
7 the Japanese judgment by the U.S. court did not constitute state action causing a constitutional
8 deprivation.

9 To the extent Plaintiffs have relied on *Shelley v. Kraemer*, 334 U.S. 1 (1948),⁵ see Mot. at
10 3-4, to support the position that judicial enforcement itself provides the requisite state action
11 necessary to establish a constitutional claim, the Court is not persuaded. In *Ohno*, the Ninth
12 Circuit made clear that “*Shelley*’s attribution of state action to judicial enforcement has generally
13 been confined to the context of discrimination claims under the Equal Protection Clause.” *Id.* at
14 998.

15 Indeed, in discussing the reach of *Shelley*, the *Ohno* court pointed out that, “[i]n the
16 context of First Amendment challenges to speech-restrictive provisions in private agreements or
17 contracts, domestic judicial enforcement of terms that could not be enacted by the government has
18 *not* ordinarily been considered state action.” *Id.* (emphasis added.) In addition, and more on point
19 to the case at bar, the Ninth Circuit stated that, “in the context of judicial confirmation of arbitral
20 awards, . . . [courts have] held that ‘mere confirmation of a private arbitration award by a district
21 court is insufficient state action to trigger the application of the Due Process Clause.’” *Id.* at 999.
22 While the Ninth Circuit did state that it did “not mean to adopt or sanction any of [these] cases,”
23 *id.* at 999 n.17, its reference to the cases – particularly the latter group – is still telling.

24 Furthermore, a Ninth Circuit decision that pre-dates *Ohno* is in strong accord with the

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26 ⁵ In *Shelley*, the Supreme Court noted that racially restrictive covenants applicable to real
27 properties were, in and of themselves, private agreements but that, once the agreements were
28 judicially enforced by state courts, there was the requisite state action to give rise to a
constitutional claim. See *Shelley*, 334 U.S. at 19 (stating that, “but for the active intervention of
the state courts, supported by the full panoply of state power, petitioners would have been free to
occupy the properties in question without restraint”).

1 above cases. More specifically, in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.
2 1998), *overruled on other grounds*, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742
3 (9th Cir. 2003), the plaintiff – a broker-dealer in the securities industry – sued her employer for
4 employment discrimination. The plaintiff had signed a securities industry form that included an
5 arbitration provision. The form also required the plaintiff to abide by the rules of the New York
6 Stock Exchange (“NYSE”) and National Association of Securities Dealers (“NASD”), and each of
7 these organizations had a rule that required arbitration. The plaintiff argued, nevertheless, that she
8 could not be compelled to arbitration because “the arbitration agreement imposes an
9 unconstitutional condition of employment,” requiring her “to forfeit her Fifth Amendment right to
10 due process, her Seventh Amendment right to a jury trial, and her right to an Article III judicial
11 forum.” *Id.* at 1200. According to the district court, “the essential prerequisite of state action was
12 lacking” for the due process claim, and the Ninth Circuit agreed, stating “no state action is present
13 in simply enforcing that agreement.” *Id.* at 1201.

14 Plaintiffs have pointed to no authority holding that judicial enforcement, particularly of an
15 arbitration award, constitutes state action.⁶ In fact, as the *Ohno* court noted, the authority is to the
16 contrary. For example, in *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995), the
17 defendant appealed to the Eleventh Circuit after the district court confirmed the arbitration panel’s
18 award of punitive damages. The defendant argued, *inter alia*, that the punitive damages award
19 violated its due process rights, more specifically, “because arbitration lacks the procedural
20 protections and meaningful judicial review required for the imposition of punitive damages.” *Id.*
21 at 1190. The Eleventh Circuit rejected the argument. It noted first that “the state action element
22 of a due process claim is absent in private arbitration cases” because private arbitration is by itself
23 “a voluntary contractual agreement of the parties.” *Id.* at 1191. As to the defendant’s assertion
24 that the district court’s *confirmation* of the punitive damages award provided the requisite state
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26 ⁶ To the extent Plaintiffs have suggested that enforcement here is the equivalent of or comparable
27 to a court-ordered injunction, the Court does not agree. The enforcement of the arbitration
28 agreements would not “require[] the [C]ourt to take such an active role in, or to exercise sustained
supervision of, the [arbitration agreements or even the arbitrations themselves] that it becomes
appropriate to review the [C]ourt’s activities as governmental actions.” *Ohno*, 723 F.3d at 1000.

1 action, the court disagreed. The Eleventh Circuit echoed the Ninth Circuit’s analysis in *Ohno* that
2 the defendant was offering a “*Shelley v. Kraemer* theory that a court’s enforcement of a private
3 contract constitutes state action” but “[t]he holding of *Shelley* . . . has not been extended beyond
4 the context of race discrimination.” *Id.* See also *Katz v. Cellco P’ship*, No. 12 CV 9193 (VB),
5 2013 U.S. Dist. LEXIS 176784, at *10, 17 (S.D.N.Y. Dec. 12, 2013) (in a case where plaintiff
6 argued that “application of the FAA to his state law claims violates Article III of the Constitution
7 – both the structural protections of our tripartite system of government (i.e., separation of powers)
8 and his personal right to have his claims adjudicated before an independent Article III judge,”
9 agreeing with defendant that “there is insufficient state action for plaintiff to maintain an action
10 under Article III”; stating that “the fact that Verizon sought a court order compelling arbitration
11 does not transform enforcement of the parties’ arbitration agreement into state action”), *vacated in*
12 *part on other grounds*, No. 14-138, 2015 U.S. App. LEXIS 13055 (2d Cir. July 28, 2015); *Smith v.*
13 *Argenbright, Inc.*, No. 99 C 7368, 1999 U.S. Dist. LEXIS 19827, at *8 (N.D. Ill. Dec. 27, 1999)
14 (stating that “[w]e do not believe that our limited power to conduct an after-the-fact review of an
15 arbitration panel for bias constitutes the requisite governmental action to implicate *Batson*”);
16 *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1468 (N.D. Ill. 1997)
17 (rejecting contention that defendant was “using a government official, i.e., this Court, to enforce
18 the arbitration rules that will inevitably deprive her of due process”; “refus[ing] to hold that every
19 time a Court enforces a private arrangement it potentially violates one party’s constitutional
20 rights”); *United States v. Am. Soc’y of Composers, Authors & Publ’rs*, 708 F. Supp. 95, 97
21 (S.D.N.Y. 1989) (stating that “[t]he mere approval by this Court of the use of arbitration did not
22 create any state action[;] [i]ndeed, under [party’s] strained interpretation . . . , all arbitrations could
23 be subject to due process limitations through the simple act of appealing the arbitrator’s decisions
24 to the court system”). At bottom, “[government] permission of a private choice cannot support a
25 finding of state action.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999).

26 Finally, the Court takes note that, in many private contracts, there are provisions that
27 arguably affect access to the courts or otherwise implicate significant rights, such as choice-of-
28 venue, choice-of-law, statute-of-limitations, and limitations-on-damages provisions. Although

1 these provisions may be subject to restrictions imposed by statutory and/or common law (*e.g.*, the
2 doctrine of unconscionability, violation of public policy), courts have not held that judicial
3 enforcement of these provisions, particularly as found in contracts between private parties, raises
4 constitutional claims. *See, e.g., Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1045 (9th Cir.
5 2001) (holding that a six-month statute-of-limitations provision was enforceable); *Severn Peanut*
6 *Co. v. Indus. Fumigant Co.*, 807 F.3d 88, 92 (4th Cir. 2015) (rejecting assertion that consequential
7 damages exclusion in contract was not enforceable).

8 B. The FAA and Its Interpretation

9 In their papers, Plaintiffs argued that, nevertheless, there is state action based on
10 Congress’s enactment of the FAA. *See* Opp’n at 4. This argument is similar to that rejected by
11 the Ninth Circuit in *Duffield*. There, the plaintiff argued that “state action is present because
12 ‘federal law requires all broker-dealers to register with a national securities exchange (i.e., the
13 NYSE or NASD), and to abide by the rules of that exchange – including its mandatory arbitration
14 rules – as a condition of their continued employment.’” *Id.* at 1200. The Ninth Circuit rejected
15 the argument, stating that

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17 [t]he rules of NASD and the NYSE are not fairly attributable to the
18 government unless they carry the force of federal law. *And prior to*
19 *1993*, no federal statute or regulation required [the plaintiff] to
20 register with the securities exchanges, much less to sign Form U-4
or to arbitrate employment disputes. Thus, when [the plaintiff]
signed her Form U-4 *in 1988* and thereby waived her rights to
litigate employment-related disputes in a judicial forum, she did not
do so because of any state action.

21 *Id.* at 1201 (emphasis added).

22 The court acknowledged that, in 1993 – two years before the plaintiff’s employer actually
23 invoked the arbitration agreement – the Securities and Exchange Commission (“SEC”) had
24 “adopted a regulation that required all broker-dealers to be registered with at least one of the
25 securities organizations of which [the plaintiff’s employer] was a member – i.e., the NASD and
26 the NYSE – before effecting any securities transaction.” *Id.* That “current requirement that new
27 employees register with a national securities exchange ‘constitutes government action of the purest
28 sort.’” *Id.* Nevertheless, the Ninth Circuit was not persuaded by the plaintiff’s argument that this

1 new regulation provided the requisite state action. The court noted:

2
3 State action can be present . . . only to the extent that there is “a
4 sufficiently *close nexus* between the State and the *challenged*
5 *action*”; the action that [the plaintiff] challenges in her constitutional
6 claims is the requirement that she waive her right to litigate
7 employment-related disputes. Since agreements to arbitrate are
8 “valid, *irrevocable*, and enforceable” to the same extent as any other
9 contract, it is immaterial that years after [the plaintiff] signed her
10 Form U-4 containing the arbitration provision, federal law required
11 other employees like her to register with securities exchanges or
12 even that it compelled her to remain registered. No federal law
13 required [the plaintiff] to waive her right to litigate employment-
14 related disputes by signing the Form U-4 in 1988, *and no state*
15 *action is present in simply enforcing that agreement*. Insofar as [the
16 plaintiff] argues that the “challenged action” is the requirement that
17 she actually arbitrate her lawsuit, that requirement is found in her
18 private contract, not in federal law.

19 *Id.* at 1201 (emphasis in original and added).

20 The instant case is similar to *Duffield* in that, here, while Congress did enact the FAA, the
21 mere enactment of the statute did not *cause* the deprivation of their constitutional rights. *See id.*
22 (noting that “[s]tate action can be present . . . only to the extent that there is ‘a sufficiently close
23 nexus between the State and the *challenged action*’”) (emphasis in original).

24 Plaintiffs rely still on *Denver Area Educational Telecommunications Consortium, Inc. v.*
25 *Federal Communications Commission*, 518 U.S. 727 (1996), in arguing that a congressional
26 statute or a court’s interpretation thereof “that enables private action to restrict citizens’ First
27 Amendment rights constitutes a state action.” Opp’n at 4.⁷ In *Denver Area*, the plaintiffs sued,

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29 ⁷ This argument briefly alluded to in their initial brief is developed more thoroughly in Plaintiffs’
30 motion for reconsideration. *See* Docket No. 54 (motion to reconsider). AT&T argues, in its
31 opposition to the motion to reconsider, that reconsideration should be denied because Plaintiffs’
32 “*Denver Area* argument was not adequately ‘presented to the Court.’” Docket No. 59 (Opp’n at
33 6). AT&T points out that Plaintiffs’ purported best case (so identified at the hearing on the motion
34 to compel arbitration) was embedded in one out of 132 footnotes in their opposition brief. AT&T
35 also argues that Plaintiffs’ fleshing out of *Denver Area* during the hearing on the motion to compel
36 arbitration was improper. *See King v. Hausfeld*, No. C-13-0237, 2013 U.S. Dist. LEXIS 51116, at
37 *17 (N.D. Cal. Apr. 9, 2013) (finding that plaintiff waived an argument because he raised the
38 argument “for the first time in a supplemental filing submitted the day before the hearing and
39 without leave of court” and he “offer[ed] no explanation for failing to raise the argument”). The
40 Court agrees with AT&T that it would well be within its rights in deeming the *Denver Area*
41 argument waived. Although, in their opposition brief, Plaintiffs cited *Denver Area* in support of
42 the above proposition, they certainly did not address the issue as it was argued at the hearing nor
43 did they brief the issue as it has now been briefed in the motion for reconsideration. The twenty-
44 five page limitation for the opposition brief, *see* Docket No. 54 (Mot. at 5 n.5), is no excuse.

1 *inter alia*, the FCC, claiming that three provisions of the Cable Television Consumer Protection
2 and Competition Act of 1992 – which sought to regulate the broadcasting of “patently offensive”
3 sex-related material on cable television – violated their First Amendment rights. The provisions at
4 issue applied to programs broadcast over cable on what are known as “leased access channels” and
5 “public, educational, or governmental channels.” “A ‘leased channel’ is a channel that federal law
6 requires a cable system operator to reserve for commercial lease by unaffiliated third parties.” *Id.*
7 at 734. Public access channels “are channels that, over the years, local governments have required
8 cable system operators to set aside for public, educational, or governmental purposes as part of the
9 consideration an operator gives in return for permission to install cables under city streets and to
10 use public rights-of-way.” *Id.* “Between 1984 and 1992, federal law (as had much pre-1984 state
11 law, in respect to public access channels) prohibited cable system operators from exercising *any*
12 editorial control over the content of any program broadcast over either leased or public access
13 channels.” *Id.* (emphasis in original).

14 Congress enacted the three challenged provisions “in an effort to control sexually explicit
15 programming over access channels.” *Id.* The first provision, which concerned leased channels,
16 *permitted* a cable operator to enforce a policy of prohibiting programming that the operator
17 reasonably believed described or depicted sex-related material in a patently offensive manner. *See*
18 *id.* The second provision, which also concerned leased channels, *required* cable operators to
19 segregate and block similar programming if they decided to permit its broadcast rather than
20 prohibit it. *See id.* at 735. Finally, the third provision was similar to the first provision but applied
21 to public access channels. *See id.*

22 A plurality of the Supreme Court held that the first provision was constitutional. In
23 addressing the existence of state action, the plurality took note of the lower appellate court’s
24 analysis that there was no First Amendment violation

25
26 because the First Amendment prohibits only “Congress” . . . , not
private individuals, from “abridging the freedom of speech.”

27
28 Nevertheless, given the importance of the issues herein, the Court addresses the merits of
Plaintiffs’ *Denver Area* argument.

1 Although the court said that it found no “state action,” it could not
2 have meant that phrase literally for, of course, petitioners attack (as
3 “abridging . . . speech”) a congressional statute – which, by
4 definition, is an Act of “Congress.” More likely, the court viewed
5 this statute’s “permissive” provisions as not themselves restricting
6 speech, but, rather, as simply reaffirming the authority to pick and
7 choose programming that a private entity, say, a private broadcaster,
8 would have had in the absence of intervention by any federal, or
9 local, governmental entity.

6 *Id.* at 737.

7 The plurality acknowledged “the First Amendment, the terms of which apply to
8 governmental action, ordinarily does not itself throw into constitutional doubt the decisions of
9 private citizens to permit, or to restrict, speech – and this is so *ordinarily* even where those
10 decisions take place within the framework of a regulatory regime such as broadcasting.” *Id.*
11 (emphasis in original). But apparently, the plurality assumed there was state action because the
12 plaintiffs were challenging an act of Congress, *i.e.*, its enactment of the provision, which in turn
13 was being carried out by the FCC. *See also* Docket No. 59 (Opp’n at 3) (AT&T arguing that “the
14 FCC was the party ‘charged with the deprivation’ of the plaintiffs’ First Amendment rights, [and
15 thus] the enactment of the statute alone was sufficient state action to trigger constitutional
16 protections under *Lugar*”). That being said, the plurality provided no clear analysis as to why
17 congressional action permitting private conduct amounted to state action in that particular
18 instance.

19 All that is clear is that the plurality refused to adopt the state action analysis suggested by
20 other Supreme Court Justices – *e.g.*, Justice Kennedy’s take that “leased access channels are like a
21 common carrier.” *Denver Area*, 518 U.S. at 739-40. The plurality also rejected Justice Thomas’s
22 reasoning that “the case is simply because the cable operator who owns the system over which
23 access channels are broadcast, like a bookstore owner with respect to what it displays on the
24 shelves, has a predominant First Amendment interest.” *Id.* at 740. According to the plurality,
25 “[b]oth categorical approaches suffer from the same flaws: They import law developed in very
26 different contexts into a new and changing environment, and they lack the flexibility necessary to
27 allow government to respond to very serious practical problems without sacrificing the free
28 exchange of ideas the First Amendment is designed to protect.” *Id.*; *see also id.* at 741-42 (stating

1 that “no definitive choice among competing analogies (broadcast, common carrier, bookstore)
2 allows us to declare a rigid single standard, good for now and for all future media and purposes”).
3 The plurality concluded that, “aware as we are of the changes taking place in the law, the
4 technology, and the industrial structure related to telecommunications, we believe it unwise and
5 unnecessary definitively to pick one analogy or one specific set of words now.” *Id.* at 742.

6
7 Rather than decide [such] issues, we can decide these cases more
8 narrowly, by closely scrutinizing [the provision] to assure that it
9 properly addresses an extremely important problem, without
10 imposing, in light of the relevant interests, an unnecessary great
11 restriction on speech. The importance of the interest at stake here –
12 protecting children from exposure to patently offensive depictions of
13 sex; the accommodation of the interests of programmers in
14 maintaining access channels and of cable operators in editing the
15 contents of their channels; the similarity of the problem and its
16 solution to those at issue in *Pacifica*, and the flexibility inherent in
17 an approach that *permits* cable operators to make editorial decisions,
18 lead us to conclude that [the provision is a sufficiently tailored
19 response to an extraordinarily important problem.

20 *Id.* at 743 (emphasis in original).

21 As indicated by the above, while the majority of the Justices assumed that the challenged
22 Act’s grant of authority to cable operators permitting them to prohibit or limit certain programs
23 based on content constituted state action, *Denver Area* does not establish the broad
24 pronouncement Plaintiffs assert. The plurality did not overturn (nor could it), *e.g.*, *Flagg Bros.,*
25 *Inc. v. Brooks*, 436 U.S. 149 (1978), where the Supreme Court addressed “whether a
26 warehouseman’s proposed sale of goods entrusted to him for storage, *as permitted by New York*
27 *Uniform Commercial Code § 7-210*, is an action properly attributable to the State of New York,”
28 and concluded that there was no state action because “a State’s mere acquiescence in a private
action [does not] convert[] that action into that of the State” – even taking into account that “the
State has embodied its decision not to act in statutory form.” *Id.* at 164-65 (emphasis added).
Subsequent to *Denver Area*, the Court has continued to adhere to the general proposition that a
law permitting private conduct does not constitute state action. *See Am. Mfrs. Mut. Ins. Co. v.*
Sullivan, 526 U.S. 40, 53-54 (1999) (stating that, while “the State’s decision to provide insurers
the option of deferring payment for unnecessary and unreasonable treatment pending review can

1 in some sense be seen as encouraging them to do just that[,] . . . this kind of subtle encouragement
2 is no more significant than that which inheres in the State’s creation or modification of any legal
3 remedy”; adding that “our cases will not tolerate the imposition of Fourteenth Amendment
4 restraints on private action by the simple device of characterizing the State’s inaction as
5 authorization or encouragement”) (internal quotation marks omitted).

6 The plurality’s assumption of state action in *Denver Area* must be seen in its proper
7 context. The issue before the Court concerned regulatory legislation particular to cable operators
8 who are often given unique monopolistic power over a single cable system linking broadcasters
9 with the community, and who are “unusually involved” with the government via, *e.g.*, given rights
10 of way and access to governmental facilities. *Denver Area*, 518 U.S. at 739. Such operators are
11 arguably more like common carriers such as telephone companies rather than editors such as
12 newspapers. While the plurality portion of the Court’s opinion (in contrast to the opinion of
13 Justice Kennedy concurring in part and dissenting in part) did not commit to any clear rationale as
14 to why there is sufficient state action allowing application of the First Amendment, the plurality
15 opinion was driven by the particular context of the case, informed in part by technology and “the
16 industrial structural related to telecommunications,” *id.* at 741, a structure which conferred
17 monopolistic-like power and involved a close interrelationship with governmental regulation.
18 Again, as noted above, the plurality opinion recognize that “the First Amendment, the terms of
19 which apply to governmental action, ordinarily does not itself throw into constitutional doubt the
20 decisions of private citizens to permit, or to restrict, speech – and this is so *ordinarily* even where
21 those decisions take place within the framework of a regulatory regime such as broadcasting.” *Id.*
22 at 737 (emphasis in original).

23 In any event, no clear state action analysis commanded the votes of a majority of the
24 Justices. Thus, *Denver Area* did not establish a categorical rule that a statute which permits
25 private parties to restrict the speech or other rights of private citizens constitutes as a general
26 matter state action.⁸

27 _____
28 ⁸ AT&T argues *Denver Area* is distinguishable because the defendant was the FCC – the
government itself – charged with enforcement of the challenged law, not a private business as in

1 At the hearing, Plaintiffs conceded that they did actually not have a problem with passage
2 of the FAA per se. Rather, Plaintiffs took the position that it was judicial interpretation of the
3 FAA that provided the requisite state action.⁹ In particular, Plaintiffs argued that, if this Court
4 were to compel arbitration, it would be interpreting the FAA as applying to consumer adhesion
5 contracts (and not just contracts between businessmen or merchants), and this interpretation would
6 be the source of Plaintiffs’ constitutional injury. But this asserted constitutional injury is
7 predicated on the contract being one of adhesion – *i.e.*, where the consumer did not knowingly
8 and/or voluntarily agree to arbitration and forfeits access to the courts. Thus, the source of the
9 alleged constitutional deprivation when a consumer is involved is not the judicial interpretation of
10 the FAA; rather, the source is AT&T’s private conduct in purportedly forcing arbitration on an
11 unwitting consumer. *See Am. Mfrs.*, 526 U.S. at 50 (asking whether “the allegedly
12 unconstitutional conduct [is] fairly attributable to the State”) (emphasis omitted). As the court
13 held in *Ohno*, a court giving effect to a private contract does not constitutionalize the contract. *See*
14 *Ohno*, 723 F.3d at 993 (stating that “[t]he district court, in giving effect to the judgment issued in
15 Japan, has not participated in the action the [defendant] claims is unconstitutional – namely,
16 judging the truth or falsity of the [defendant’s] religious teachings or imposing liability for the
17 consequences of religious expression”).

18 At the hearing, Plaintiffs also argued that, if the Court were to compel arbitration, then it
19 would be interpreting the FAA as heavily favoring arbitration and encouraging private parties to
20 employ pre-dispute arbitration clauses, and this interpretation would also be the source of
21

22 the instant case. This distinction, however, does not fully explain why governmental permission
23 of private conduct constituted state action.

24 ⁹ The Court acknowledges that, at the hearing, Plaintiffs emphasized that the enactment of the
25 FAA by Congress was significant in that, prior to that time, arbitration agreements were typically
26 not enforced, not only with respect to consumer contracts but also with respect to commercial
27 contracts. *Cf. Concepcion*, 563 U.S. at 339 (noting that “[t]he FAA was enacted in 1925 in
28 response to widespread judicial hostility to arbitration agreements”). However, the Court does not
understand Plaintiffs to be taking the position that the enactment of the FAA, in and of itself, is a
constitutional problem. Furthermore, it would be inconsistent for Plaintiffs to take that position
given that, as discussed below, Plaintiffs’ main contention is that the FAA should be considered
unconstitutional only with respect to its application vis-à-vis consumer contracts, and not, *e.g.*,
commercial contracts.

1 Plaintiffs’ constitutional injury. Because this specific argument was not raised in Plaintiffs’
2 papers, the Court could disregard it as waived.

3 However, this argument for state action presents a plausible theory and should be
4 examined. Plaintiffs’ argument rests on authority holding that

5
6 “[a] State normally can be held responsible for a private decision
7 only when it has exercised coercive power or has provided such
8 significant encouragement, either overt or covert, that the choice
9 must be deemed that of the State.’ Mere approval or acquiescence
10 in the initiatives or a private party is not sufficient to justify holding
11 the State responsible for these initiatives.”

12 *Duffield*, 144 F.3d at 1200 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)¹⁰).

13 In *Duffield* itself, the court held that the SEC did not sufficiently influence private conduct
14 because it had not:

15 moved beyond mere approval of private action into the realm of
16 “encouragement, endorsement, and participation” of that action . . .
17 with regard to the NASD’s and NYSE’s compulsory arbitration
18 requirements. “To begin with the obvious, there is nothing in the
19 [Securities Exchange Act of 1934] and there is no Commission rule
20 or regulation that specifies arbitration as the favored means of
21 resolving employer-employee disputes.” . . . This puts the role of the
22 SEC in a critically different light than that of the Federal Railroad
23 Administration in *Skinner*, which drafted regulations making plain
24 its “strong preference for [drug] testing,” explicitly conferred on
25 railroads the authority to conduct such tests, *required* railroads and
26 employees to perform such tests, and codified its right to receive
27 certain biological samples.

28 *Id.* at 1202 (emphasis added).¹¹

Plaintiffs’ position in the instant case is not without force – factually, there is a stronger

¹⁰ *Lugar* identifies two additional state action tests, *i.e.*, as to whether the actions of private entities are fairly attributable to the state. *See Duffield*, 144 F.3d at 1200. Plaintiffs have not invoked either of these tests, relying instead only on the encouragement test.

¹¹ In *Duffield*, the plaintiff also invoked state action based on a completely different test – *i.e.*, “the private party has exercised powers that are traditionally the exclusive prerogative of the State.” *Duffield*, 144 F.3d at 1200. The Ninth Circuit explained that argument lacked merit because “[w]e have long held that, since dispute resolution is not an ‘exclusive’ governmental function, neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action.” *Id.* Plaintiffs have not invoked the government function state action test in the instant case.

1 case for encouragement here compared to, *e.g.*, *Duffield*, 114 F.3d at 1202 (there was no SEC rule
2 or regulation that “specifies arbitration *as the favored means* of resolving employer-employee
3 disputes”) (emphasis added). Here, as discussed below, the Supreme Court has held that the FAA
4 embodies a policy favoring arbitration. And Plaintiffs have cited evidence suggesting that
5 evolution of recent jurisprudence in this area has in fact led to increasing use of arbitration to
6 displace judicial remedies, particularly in the field of consumer rights. *See* Opp’n at 9 (noting,
7 *e.g.*, that the AAA’s “statistics on consumer arbitrations filed after January 1, 2003 . . . lists only
8 1,335 total consumer-initiated arbitrations against AT&T,” and 86% of “those arbitrations were
9 initiated by clients of the law firm Bursor & Fisher, who were attempting to prevent a proposed
10 merger between AT&T and T-Mobile”).

11 Nonetheless, Plaintiffs have not established the requisite degree of government coercion or
12 encouragement sufficient under existing case law to establish state action. First, the FAA on its
13 face indicates that an arbitration agreement – like any other agreement – may be challenged on
14 “such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. It
15 purports to put arbitration agreements on equal, not more favorable, ground with other contracts.

16 Second, the Supreme Court’s interpretation of the FAA, while acknowledging a general
17 policy favoring of arbitration, is expressly predicated on the stated purpose of putting arbitration
18 agreements on equal footing with all other contracts and preventing the disfavorable treatment of
19 such agreements. As explained by the Supreme Court in *Concepcion*:

20
21 The FAA was enacted in 1925 in response to widespread judicial
22 hostility to arbitration agreements. Section 2, the “primary
substantive provision of the Act,” provides, in relevant part, as
follows:

23 “A written provision in any maritime transaction or a
24 contract evidencing a transaction involving
commerce to settle by arbitration a controversy
25 thereafter arising out of such contract or transaction .
26 . . . shall be valid, irrevocable, and enforceable, save
upon such grounds as exist at law or in equity for the
revocation of any contract.”

27 We have described this provision as reflecting both a “liberal federal
28 policy favoring arbitration,” and the “fundamental principle that
arbitration is a matter of contract.” In line with these principles,

1 courts must place arbitration agreements on an *equal footing* with
2 other contracts, and enforce them according to their terms.

3 *Concepcion*, 563 U.S. at 339 (emphasis added); *see also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552
4 U.S. 576, 581 (2008) (stating that “Congress enacted the FAA to replace judicial indisposition to
5 arbitration with a ‘national policy favoring [it] and plac[ing] arbitration agreements *on equal*
6 *footing* with all other contracts”) (emphasis added); *EEOC v. Waffle House, Inc.*, 534 U.S. 279,
7 294 (2002) (stating that, “[b]ecause the FAA is ‘at bottom a policy guaranteeing the enforcement
8 of private contractual arrangements,’ we look first to whether the parties agreed to arbitrate a
9 dispute, not to general policy goals, to determine the scope of the agreement”).

10 The problem as identified in *Concepcion* was that arbitration agreements were being
11 singled out simply because arbitration was the subject matter of the agreement. *See Concepcion*,
12 563 U.S. at 339 (stating that the “savings clause” in § 2 of the FAA “permits agreements to
13 arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or
14 unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning
15 from the fact that an agreement to arbitrate is at issue”). While it may be argued (as Plaintiffs
16 have here) that, in safeguarding the enforceability of arbitration clauses against even well-
17 established defenses based, *e.g.*, on unconscionability and countervailing policy concerns
18 embodied in other laws and statutes (*see, e.g., id.* at 357 (Breyer, J., dissenting); *Am. Express Co.*
19 *v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting)), the Supreme Court’s
20 interpretation of the FAA has swung the pendulum to the point of actually encouraging businesses
21 to impose pre-dispute arbitration clauses (and Plaintiffs have cited some empirical evidence so
22 indicating), no court has yet to hold or suggest there is sufficient encouragement or coercion by
23 virtue of the FAA to implicate state action under *Lugar*.¹² Whatever encouragement the FAA
24 gives to the implementation of pre-dispute arbitration clauses, it falls short of government conduct
25 in cases where state action has been found. *See Brentwood Acad. v. Tenn. Secondary Sch. Ath.*
26 *Ass’n*, 531 U.S. 288, 296 (2001) (stating that “a challenged activity may be state action when it

27 _____
28 ¹² Moreover, it is worth noting that Plaintiffs’ argument here would apply not just to consumer
contracts but commercial contracts as well. Accordingly, Plaintiffs’ sweeping argument would
constitutionalize enforcement of all arbitration agreements made possible by the FAA.

1 results from the State’s exercise of ‘coercive power,’ when the State provides ‘significant
2 encouragement, either overt or covert,’ or when a private actor operates as a ‘willful participant in
3 joint activity with the State or its agents’”); *Flagg Bros.*, 436 U.S. at 164 (stating that “‘a State is
4 responsible for the . . . act of a private party when the State, by its law, has compelled the fact’”
5 but “a State’s mere acquiescence in a private action [does not] convert[] that action into that of the
6 State”; adding that “[i]t is quite immaterial [when] a State has embodied its decision not to act in
7 statutory form”); *see also Grapentine v. Pawtucket Credit Union*, 755 F.3d 29, 33 (1st Cir. 2014)
8 (taking note of “the principle set out in *Flagg Brothers* . . . that mere legislative sanction of a
9 private remedy does not constitute state action”); *Apao v. Bank of N.Y.*, 324 F.3d 1091, 1094 (9th
10 Cir. 2003) (stating that, in *Flagg Brothers*, “the state’s statutory authorization of self-help
11 provisions [was held insufficient] to convert private conduct into state action[;] [t]he statute
12 neither encourages nor compels the procedure, but merely recognizes its legal effect”). *Cf.*
13 *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 615 (1989) (concluding that state
14 action for purposes of the Fourth Amendment was present because the “specific features of the
15 regulations [imposed by the Federal Railroad Administration] did more than adopt a passive
16 position toward the underlying private conduct”; “[t]he Government has removed all legal barriers
17 to the [drug] testing authorized by Subpart D, . . . has made plain not only its strong preference for
18 testing, but also its desire to share the fruits of such intrusions[,] . . . and has mandated that the
19 railroads not bargain away the authority to perform tests granted by Subpart D”); *Howerton v.*
20 *Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) (noting that “‘[t]here may be a deprivation within the
21 meaning of § 1983 not only when there has been an actual “taking” of property by a police officer,
22 but also when the officer assists in effectuating a repossession over the objection of a debtor or so
23 intimidates a debtor as to cause him to refrain from exercising his legal right to resist a
24 repossession’”). As noted above, no court has found that judicial enforcement of a private
25 arbitration clause constitutes state action for purposes of stating a federal constitutional claim.¹³

26
27 ¹³ The Eleventh Circuit relied on, *inter alia*, *Flagg Bros.* in holding that, “[i]n light of this narrow
28 interpretation of state action, courts considering the issue have rejected the argument that the
limited state action inherent in the confirmation of private arbitration awards mandates compliance
with the Due Process Clause.” *Davis*, 59 F.3d at 1192.


1 **II. CONCLUSION**

2 Because under the current state of the law, there is no state action in the instant case,
3 Plaintiffs lack a viable First Amendment challenge to the arbitration agreements. As Plaintiffs
4 have not challenged the arbitration agreements on any other bases, the Court grants AT&T's
5 motion to compel arbitration. Furthermore, as requested by AT&T, the Court stays this action
6 pending the resolution of the arbitration. *See* 9 U.S.C. § 3.

7 This order disposes of Docket No. 25.

8
9 **IT IS SO ORDERED.**

10
11 Dated: April 27, 2016

12 
13 _____
14 EDWARD M. CHEN
15 United States District Judge