No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, *et al.*,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices.

EEAC member companies, most of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC's members thus have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based arbitration.

The California Court of Appeal below refused to enforce a consumer arbitration agreement governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, because it contained a class action waiver provision,

which it construed to be unenforceable under California state law. Although arising in the consumer context, the issues in this case also impact uniform use of mandatory arbitration agreements generally, and class action waivers specifically, in the employment arbitration context.

EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court.[2] EEAC thus is familiar with the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner DIRECTV, Inc. (DIRECTV) is a provider of digital satellite television programming and services. J.A. 60. The relationship between DIRECTV and each of its customers is governed by a Consumer Agreement (Agreement), which requires that any consumer-related dispute regarding programming, service, or the Agreement itself be submitted to

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[2] *See, e.g.*, *CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *14 Penn Plaza LLC. v. Pyett*, 556 U.S. 247 (2009); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.- Ala. v. Randolph*, 531 U.S. 79 (2000); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

binding arbitration. Pet. App. 4a. Section 9 of the Agreement further provides:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

Pet. App. 5a.

The Agreement also contains a choice of law provision in Section 10(b), which provides:

> Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. *Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act*.

Id. (emphasis added). Finally, Section 10(d) of the Agreement states:

> [I]f any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable.

J.A. 129.

Respondents Amy Imburgia and Kathy Grenier brought an action in the California Superior Court for Los Angeles County on behalf of themselves and a class of similarly situated consumers alleging that they improperly were assessed early contract termination fees in violation of various California laws. Pet. App. 17a. They moved for class certification, and on April 20, 2011, the trial court granted the motion in part. Pet. App. 18a.

On May 17, 2011, DIRECTV moved to stay or dismiss the action, decertify the class, and compel arbitration of the claims in light of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which this Court decided on April 27, 2011. Pet. App. 4a. In its motion, DIRECTV contended that it had not moved to compel arbitration earlier because, in an unrelated case decided several years before the instant action was filed, the California Court of Appeal had held that the arbitration provision contained in DIRECTV's Agreement was unenforceable under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *overruled by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Pet App. 4a. *See Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Cal. Ct. App. 2006), *overruled by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Discover Bank* held that class waivers in consumer contracts generally are unconscionable and thus unenforceable. Pet. App. 4a. Until *Concepcion* was decided, DIRECTV had believed that any motion to compel arbitration under its Agreement in California would have been futile. *Id.*

The California trial court denied DIRECTV's motion to compel arbitration, holding the arbitration agreement unenforceable under *Brown v. Ralphs Grocery*

Co., 197 Cal. App. 4th 489 (Cal. Ct. App. 2011), a case involving labor-related representative actions under California's Private Attorney General Act of 2004 (PAGA). Pet. App. 19a. In *Brown*, the California Court of Appeal held, in part, that the FAA did not preempt state law invalidating a contractual waiver of an employee's right to pursue a representative action under the PAGA. 197 Cal. App. 4th at 494.

Following DIRECTV's appeal, the California Court of Appeal affirmed the trial court's decision on different grounds, focusing on the clause in the Agreement providing that "if the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." Pet. App. 15a. Relying on principles of contract interpretation, the court reasoned that "the law of your state" meant California state law without regard to the preemptive effect of the FAA. *Id.* The court then determined that the state law of California rendered the class action waiver unenforceable. Pet. App. 6a. It concluded that because "[t]he class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable." Pet. App. 15a.

In doing so, the Court of Appeal expressly acknowledged that its decision conflicts with *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013), in which the Ninth Circuit held that the very same language in the same arbitration agreement "'is enforceable under *Concepcion*,' which preempts any state law to the contrary." Pet. App. 13-14 (quoting *Murphy*, 724 F.3d at 1228).

DIRECTV unsuccessfully petitioned the California Supreme Court for review. Pet. App. 1a. DIRECTV

thereafter filed a petition for a writ of certiorari, which this Court granted on March 23, 2015.

SUMMARY OF ARGUMENT

This Court consistently has held that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, establishes a "liberal federal policy favoring arbitration agreements …." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (superseded by statute on other grounds), and "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

"A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results[.]'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (citation omitted). To that end, the FAA affords parties the discretion to design their own arbitration processes tailored to the particular type of dispute at issue, including "limit[ing] *with whom* a party will arbitrate its disputes …." *Id.* (citation omitted). In furtherance of that "prime objective," this Court has made clear that class arbitration procedures properly can be waived in a valid arbitration agreement governed by the FAA, in part because "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751.

Disregarding the well-established principle that disputes related to arbitrability should be construed in favor of arbitration, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), the California Court of Appeal held that the reference to state law in

the Arbitration Agreement mandated the application of anti-class waiver state law otherwise preempted by the FAA, even though the Agreement itself expressly provided that the arbitration provision was to be governed by the FAA. As a result, the court determined that the arbitration agreement was unenforceable.

The lower court's decision simply cannot be reconciled with the well-established "federal substantive law of arbitrability," which governs "any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. In particular, it conflicts with the principle outlined by this Court in *Concepcion* that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

As the Ninth Circuit properly reasoned in construing the very same provisions from the same Agreement, "[a] contract cannot be unenforceable under state law if federal law requires its enforcement, because federal law is 'the supreme Law of the Land' …." *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013) (quoting U.S. Const. art. VI, cl.2.). Thus, "Section 9 of the Customer Agreement provides only that the arbitration agreement will be unenforceable if the 'law of your state' disallows class waivers, which California law does not – and could not – under the FAA as interpreted in *Concepcion*." *Id.*

Although arising in the consumer context, the decision below easily could be construed by a California court also to apply in the employment arbitration context. Compelling class procedures where the parties have not so agreed and despite an express class action waiver in an arbitration agreement imposes

the very cost burdens and procedural complexities that both employers and employees, by agreeing to arbitrate, seek to avoid. Moreover, allowing the lower court's decision to stand would undermine the uniform application of multistate employers' ADR procedures, subjecting employers to the prospect of having to litigate, from court to court, the enforceability of arbitration agreements containing class action waiver provisions that reference state law, a common practice. And for the substantial number of employers operating in California, the conflict between the Court of Appeal and the Ninth Circuit raises the very real concern that enforceability of their arbitration agreements containing class action waivers in California will depend on whether a state or federal court considers the issue.

ARGUMENT

I. THE DECISION BELOW IMPERMISSIBLY CONFLICTS WITH THE FAA AS CONSTRUED BY THIS COURT IN *CONCEPCION*

A. The Strong Federal Policy Favoring Arbitration Requires That Agreements To Arbitrate Be Enforced In Accordance With Their Terms, And Doubts Concerning Arbitrability Should Be Resolved In Favor Of Arbitration

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490

U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). This Court repeatedly has reaffirmed the federal policy favoring arbitration, recognizing that the FAA was enacted in an effort to curb "widespread judicial hostility to arbitration agreements," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011), and "to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

Indeed, "the overarching purpose of the FAA … is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. Section 2 of the FAA is the "primary substantive provision of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (superseded by statute on other grounds). This section has been described as "reflecting both a 'liberal federal policy favoring arbitration,'" *Concepcion*, 131 S. Ct. at 1745 (citation omitted), and the "'fundamental principle that arbitration is a matter of contract.'" *Id.* (citation omitted); *see also Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

Among the FAA's foundational principles is "that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (citation omitted). Because "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties

had entered,' [courts must] 'rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1984) (citation omitted). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted).

To that end, this Court has made clear that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of wavier, delay, or a like defense to arbitrability." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995) (citation omitted); *see also Gilmer*, 500 U.S. at 26 ("'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration'") (citation omitted).

Indeed, the sole exception to the general rule favoring arbitration is that the FAA allows an arbitration agreement to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court recognized in *Concepcion*, "This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." 131 S. Ct. at 1746 (citations omitted). Moreover, "[a]lthough § 2's saving clause preserves generally applicable

contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id*. at 1748.

B. An Arbitration Agreement Containing A Class Action Waiver Is Enforceable Under The FAA, And The FAA Preempts State Requirements To The Contrary

Parties to arbitration agreements often agree to streamlined procedural mechanisms. They may agree to "limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." *Concepcion*, 131 S. Ct. at 1748-49 (citations omitted). As this Court observed in *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted); *see also Stolt-Nielsen*, 559 U.S. at 685 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," noting that "the relative benefits of class-action arbitration are much less assured …."); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-66 (2009) ("The decision to resolve … claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace … discrimination; it waives only the right to seek relief from a court in the first instance").

This Court has made clear that the ability to bring a class action is one of the procedural mechanisms that properly can be waived by the parties to a valid arbitration agreement under the FAA. In *Concepcion*, the Court held that California's *Discover Bank* rule,

which conditioned the enforceability of an arbitration agreement on the availability of classwide arbitration procedures, was "preempted by the FAA," 131 S. Ct. at 1753, "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citation omitted). It reasoned that "[r]equiring the availability of classwide arbitration … creates a scheme inconsistent with the FAA," *id.* at 1748, because it "interferes with fundamental attributes of arbitration." *Id.* "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* at 1749. In contrast, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751.

Building on the principles established in *Concepcion*, the Court in *Italian Colors* held that a party's agreement to forgo class arbitration must be enforced, even if the parties would incur prohibitive costs if compelled to arbitrate on an individual basis. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). The Second Circuit had refused to enforce a commercial arbitration agreement containing a class waiver clause, concluding that the plaintiff presented sufficient evidence that the "*only economically feasible* means [of pursuing their antitrust claims] is *via a class action*." *Id.* at 2311 n.4. In so holding, the Second Circuit found *Concepcion* inapplicable, as it never reached the specific question "whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory

rights." *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 212 (2d Cir. 2012), *rev'd sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

Reversing the Second Circuit, this Court declared that its decision in *Concepcion* "all but resolves this case." *Italian Colors*, 133 S. Ct. at 2312. Relying on *Concepcion*'s determination that a law conditioning enforcement of arbitration on the availability of class procedure "interfere[s] with fundamental attributes of arbitration" in violation of the FAA, *id.* (quoting *Concepcion*, 131 S. Ct. at 1748), the Court reasoned:

> The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

Id. at 2312.[3]

[3] Last term, this Court vacated a ruling of the California Court of Appeal that refused to enforce an arbitration agreement that contained a provision requiring employees to arbitrate disputes individually rather than on a class basis, remanding for reconsideration in light of *Italian Colors*. *See CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2014).

Thus, as this Court made clear in *Concepcion* and *Italian Colors*, a state law rule making an otherwise valid arbitration agreement unenforceable simply because it contains a waiver of classwide arbitration is incompatible with the FAA.

C. The Decision Below Improperly Requires That Enforceability Questions Be Governed By State Law, Rather Than The FAA

This Court long has held that no state may hold private agreements to arbitrate to a higher standard of enforceability than generally is applicable to other private contracts without running afoul of the FAA. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 [of the FAA]"); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (state law that imposed a special notice requirement for all contracts subject to arbitration is "inconsonant with, and is therefore preempted by, the [FAA]"); *Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"). Whether statutorily or judicially created, a state law that imposes greater burdens on the enforceability of mandatory agreements to arbitrate than apply to other types of contracts thus is incompatible with, and therefore preempted by, the FAA.

It also is well established that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. In *Nitro-Lift Technologies, L.L.C. v. Howard*, this Court noted that state, as opposed to federal, courts are more frequently called upon to apply the federal substantive law of the FAA, "including the Act's national policy favoring arbitration [, and, therefore, i]t is a matter of great importance … that state supreme courts adhere to a correct interpretation of the legislation." 133 S. Ct. 500, 501 (2012) (*per curiam*).

In *Nitro-Lift*, this Court reversed the Oklahoma Supreme Court's determination that notwithstanding the "'[U.S.] Supreme Court cases on which the employers rely,' the 'existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement.'" *Id.* at 502 (citation omitted). In doing so, the Court observed:

> The Oklahoma Supreme Court's decision disregards this Court's precedents on the FAA. That Act, which "declare[s] a national policy favoring arbitration," provides that a "written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *It is well settled that "the substantive law the Act created [is] applicable in state and federal courts."*
>
> ***

> [T]he Oklahoma Supreme Court *must abide by the FAA, which is "the supreme Law of the Land," U.S. Const., Art. VI, cl.2, and by the opinions of this Court interpreting that law.* It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. Our cases hold that the FAA forecloses precisely this type of "judicial hostility towards arbitration."

Id. at 503-04 (emphasis added) (citations omitted).

1. The California Court of Appeal erred in disregarding *Concepcion* and applying preempted state law to invalidate an arbitration agreement governed by the FAA

The arbitration provision set forth in the Agreement here provides that "[i]f … the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable." Pet. App. 5a. At the same time, it also expressly provides that the Section 9 arbitration provision "*shall be governed by the Federal Arbitration Act*." *Id.* (emphasis added).

In determining that the arbitration agreement was unenforceable because it contained a class action waiver, the California Court of Appeal relied upon a now-discredited state rule that class action arbitration waivers are unenforceable – the very rule that this Court in *Concepcion* held was "preempted by the FAA," 131 S. Ct. at 1753, "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citation omitted). *See also id.* at 1748 ("Although § 2's

saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives"). The lower court's decision thus directly conflicts with the substantive federal law created by the FAA, as interpreted by this Court in *Concepcion*.

As this Court recognized in *Concepcion*, "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Id*. at 1752 (citation omitted). The parties here mutually agreed that the FAA governs their arbitration agreement, and the agreement should have been enforced in accordance with its terms, as required by the FAA and *Concepcion*.

2. Applying *Concepcion*, the Ninth Circuit has construed the identical agreement to be valid and enforceable, notwithstanding its class waiver provision

The Ninth Circuit had occasion to construe the very same arbitration agreement at issue here in *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013). There, in opposing a motion to compel individual arbitration, the plaintiffs contended that because the contract became effective prior to this Court's decision in *Concepcion*, "the law of [California] would [have found] this agreement to dispense with class arbitration procedures unenforceable." *Id.* at 1225.

In rejecting the plaintiffs' contention, the Ninth Circuit aptly observed that:

> Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements

> that ban class procedures, *is* the law of California and of every other state. The Customer Agreement's reference to state law "does not signify the inapplicability of federal law, for 'a fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'" *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 (1982). …
>
> It follows that, under the doctrine of preemption, the *Discover Rule* is not, and indeed never was, California law. Simply put, "state law is *nullified* to the extent that it actually conflicts with federal law." *de la Cuesta*, 458 U.S. at 153 (emphasis added). Thus, Plaintiff's contention that the parties intended for state law to govern the enforceability of [DIRECTV's] arbitration clause, even if the state law in question contravened federal law, is nonsensical. A contract cannot be unenforceable under state law if federal law requires its enforcement, because federal law is "the supreme Law of the Land …, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2. Section 9 of the Customer Agreement provides only that the arbitration agreement will be unenforceable if the "law of your state" disallows class waivers, which California law does not – and could not – under the FAA as interpreted in *Concepcion.*

Id. at 1226 (footnote omitted).

The Ninth Circuit properly construed the Agreement in accordance with the FAA, whereas the California Court of Appeal did not. As a result, Petitioner has been placed in an untenable situation

in which the same FAA-governed arbitration agreement referencing state law and containing a class action waiver will be interpreted two different ways, depending on whether the agreement is challenged in California state or federal court.

Like the state rule invalidated in *Concepcion*, the Court of Appeal's interpretation of the Agreement in this case is contrary to the FAA and this Court's FAA jurisprudence. Accordingly, the decision below should be reversed.

II. PERMITTING STATE COURTS TO CIRCUMVENT SUPREME COURT PRECEDENT HOLDING THAT ARBITRATION AGREEMENTS, INCLUDING THOSE CONTAINING CLASS ACTION WAIVERS, MUST BE ENFORCED ACCORDING TO THEIR TERMS UNDERMINES UNIFORM ARBITRATION PROGRAMS, PARTICULARLY IN THE EMPLOYMENT CONTEXT

A. Imposing Class Action Procedures Even Where The Underlying Agreement Precludes Such Procedures Fundamentally Would Alter The Expectations Of Both Employers And Employees By Imposing The Very Costs And Burdens Sought To Be Avoided

"[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. The outmoded hostility to arbitration agreements generally, and those containing class action waivers

specifically, is particularly misplaced in the employment context, where individual arbitration offers significant advantages to employers and employees alike. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

As this Court observed in *Circuit City*, there are "real benefits to the enforcement of arbitration provisions … [in] the employment context." *Id.* In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.* at 123. *See generally Concepcion*, 131 S. Ct. at 1751 ("'In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes'") (citation omitted). Imposing class action procedures on parties who expressly agreed to waive such procedures in favor of bilateral arbitration fundamentally changes the nature of dispute resolution to such a degree that it becomes a serious burden on the parties, rather than a means of resolving their dispute efficiently and in a less costly manner.

The advantages of arbitration, and bilateral arbitration in particular, are considerable in the employment context. Arbitration offers lower-level employees an opportunity to bring claims that would not be economically viable to pursue in court. "The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims." Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility:*

Empirical Evidence, 41 U. Mich. J.L. Reform 813, 840 (2008). As one commentator has observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003). Indeed, parties generally favor arbitration precisely because of the economics of the dispute resolution. *See 14 Penn Plaza*, 556 U.S. at 257.

The relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle:

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is

> able to engage an attorney on a contingency fee basis … the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* 153-54 (Cornell Univ. Press 1997). Similarly:

> The vast majority of ordinary, lower-and middle-income employees (essentially, those making less than $60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

Theodore J. St. Antoine*, Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 810 (2008). As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales, *supra*, at 159 (footnote omitted); *see Concepcion*, 131 S. Ct. at 1749 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. … And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution") (citations omitted).

The significant benefits that employees derive from arbitration would be lost if they are forced instead to submit to complex, class action litigation (or risk

having their rights adjudicated in their absence) despite having agreed to waive both the judicial forum and class action procedures. Unlike the typical two-party arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend, especially where each class member is entitled to substantial individual damages, including compensatory and punitive damages. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Indeed, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties … thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purposes to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation ….

Id. (citations omitted).

Furthermore, the significantly higher costs and exposure posed by class actions place enormous pressure on defendants to settle rather than run even a small risk of catastrophic loss. It is what this Court in

Concepcion described as "the risk of 'in terrorem' settlements …." 131 S. Ct. at 1752, and lower courts have called "judicial blackmail;" *i.e.*, "the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000) (emphasis added); *see also Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund (LOCAL 66)*, 579 F.3d 401, 406 (5th Cir. 2009) (referring to the pressure on defendants to settle class actions as "'judicial blackmail'") (citation and footnote omitted). Invalidating an arbitration agreement simply because it precludes class arbitration would defeat one of the most mutually advantageous purposes of arbitration – lower-cost resolution of disputes. *Concepcion*, 131 S. Ct. at 1751. The decision below does just that, creating a strong disincentive against the adoption of employment arbitration programs.

B. State Rules That Place Greater Restrictions On Agreements To Arbitrate Than Exist For Other Contracts Undermine Employers' Efforts To Develop And Enforce Uniform ADR Procedures

As illustrated here, California courts continue to subject mandatory arbitration agreements generally – and those containing class action waivers specifically – to higher enforceability standards than are imposed upon other types of contracts. In the instant case, the California Court of Appeal capitalized on the state law provision in the Agreement to impose its policy preference for class arbitration, in complete disregard of governing substantive federal law.

Arbitration agreements often include reference to the application of the state law of a particular jurisdiction. Should such a reference trump federal substantive law, the FAA's preemptive effect would be nullified.

As a consequence of the decision below, multistate employers now are faced with the real possibility that their alternative dispute resolution programs containing class action waivers will not be enforced uniformly for all of their employees. Not only does the potential exist for uneven enforcement of an arbitration program *between* states, but also within the state of California itself. In particular, in California – a large and populous state with a significant business presence – whether or not a class action waiver in an FAA-governed arbitration agreement that incorporates California law is enforceable now will depend on whether a federal or a state court is asked to consider its enforceability. *Compare Murphy*, 724 F.3d at 1226-28 *with Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 198 (Cal. Ct. App. 2014).

The prospect of having to litigate, from court to court, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeal below should be reversed.

Respectfully submitted,

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