No. 14-462

In the Supreme Court Of the United States

DIRECTV, INC., PETITIONER

v.

AMY IMBURGIA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE MICHAEL VACHON IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST

Michael Vachon (hereafter "Amicus"), as amicus curiae, respectfully submits this brief in support of Respondents to bring to the attention of the Court matters not addressed by the parties.[1]

Amicus has an interest in this matter because he is attorney of record for the named plaintiff in a putative class-action lawsuit, the viability of which will likely be determined by the outcome of this case. Specifically, Amicus is attorney for the proposed class representative in Kaghazchi v. Mission Imports, No. 30-2012-00564149 (Cal. Super. filed Apr. 24, 2012). Like this case, the arbitration clause at issue in the Kaghazchi case contains a "poison-pill" clause which is governed by California law and which requires that the entire arbitration section be stricken out of the contract in cases in which the class-action waiver is unenforceable. Since the Court's opinion in this case will likely affect whether the Kaghazchi case is permitted to proceed as a class action, Amicus's duty to Kaghazchi and the putative class members necessitates that he attempt to bring to the Court's attention relevant arguments that the parties herein have not asserted.

II. SUMMARY OF ARGUMENT

Petitioner's argument is premised on the assumption that *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) ruled that the Federal Arbitration

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than Amicus made a monetary contribution to fund the preparation of this brief. All parties have submitted letters to the Clerk granting blanket consent to the filing of amicus curiae briefs in support of either or neither party. *See* S. Ct. R. 37.3(a).

Act (9 U.S.C. § 1 *et seq.*) ("FAA") categorically preempts state laws prohibiting the waiver of class action rights, and therefore that such state laws are a "legal nullity." However, *Concepcion* actually ruled that the FAA preempted California's *Discover Bank* rule[2] because it amounted to an obstacle to the achievement of Congress's objectives. This Court has previously explained that the Constitution displaces state laws only to the extent that they conflict with federal law, and therefore a finding of obstacle preemption does not mean that a state law is a "legal nullity" in all possible contexts; rather, a state law preempted in one case based on obstacle preemption remains enforceable in other cases in which it does not actually interfere with the achievement of Congress's objectives.

Accordingly, one cannot simply presume that *Concepcion* categorically preempts all state laws prohibiting the waiver of class-action rights (hereafter "state anti-class-waiver laws") in all possible contexts. To determine whether *Concepcion* requires a finding of preemption in this instance one must first identify the congressional objective that the *Discover Bank* rule interfered with in *Concepcion*, and then analyze whether – given the facts of this case – the state anti-class-waiver laws at issue here are an obstacle to the achievement of that objective.

In *Concepcion*, this Court explained that Congress intended the FAA to grant parties the freedom to choose the rules, procedures, and conditions applicable to their arbitrations in order to

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[2] "*Discover Bank* rule" refers to the rule announced in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005).

facilitate the creation of streamlined proceedings tailored to parties' particular needs. The *Discover Bank* rule was an obstacle to this objective because, notwithstanding the parties' agreement to the contrary, it conditioned the enforceability of the parties' arbitration agreement on the availability of class-wide arbitration, which lacks the informality that arbitration was intended to provide and imposes prohibitive risks of error on defendants. In reaching this conclusion, the Court took care to point out that if parties actually agree to class-wide arbitration, then the FAA will nonetheless require enforcement of such agreements because the FAA's primary mandate is the enforcement of privately negotiated agreements. In making this latter point, the Court acknowledged the obvious limits of the *Concepcion* obstacle preemption finding: *terms that parties have agreed to include in their arbitration agreements cannot be an obstacle to the objective of allowing parties to determine, by agreement, which terms their arbitration agreements should include.* Enforcing the terms of privately negotiated arbitration agreements, whatever those terms are, is the embodiment of Congress's goals in enacting the FAA, and not an obstacle to them.

In this case, the parties expressly agreed that: (1) their arbitration agreement should contain a "poison-pill" clause; (2) the poison-pill clause should be triggered when the class-action waiver is unenforceable; and (3) California's laws determine whether or not the class-action waiver is enforceable. Because the parties agreed to all of these terms, enforcing each of them is consistent with the FAA's objectives. Accordingly, obstacle preemption does not arise in this case, and the decision of the court below should be affirmed.

III. ARGUMENT

A. *Concepcion* Did Not Rule That The FAA Categorically Preempts State Anti-Class-Waiver Laws In All Contexts

1. The *Discover Bank* Rule Was Preempted Based On Obstacle Preemption

In *Concepcion*, this Court ruled that the FAA preempted the *Discover Bank* rule because it was an obstacle to the achievement of Congress's objectives in enacting the FAA. *Concepcion*, 131 S. Ct. at 1753 ("Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' [citation] California's *Discover Bank* rule is preempted by the FAA.").

2. Obstacle Preemption Displaces State Laws Only To The Extent That They Interfere With Congress's Objectives

Federal statutes preempt state laws only to the extent that they are actually in conflict. *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996). Accordingly, a judicial finding of obstacle preemption does not necessarily amount to a finding that the preempted state law is a "legal nullity" for all purposes and in all contexts; rather, state laws that are an obstacle in one case remain enforceable in other cases in which they do not actually interfere with the achievement of congressional objectives. *Id.* (affirming finding of obstacle preemption, but reversing injunction against enforcement of the state law because it remains enforceable in cases in which it does not interfere with congressional objectives). Thus, the finding of obstacle preemption in *Concepcion* does not equate to a ruling that the FAA categorically

preempts all state anti-class-waiver laws in all possible contexts.

To determine whether *Concepcion* requires a finding of preemption in this case it is necessary to identify the congressional objective that the *Discover Bank* rule interfered with in *Concepcion*, and then analyze whether, under the circumstances present here, California's anti-class-waiver laws are an obstacle to the achievement of that objective.

3. The *Discover Bank* Rule Interfered With The Goal Of Granting Parties The Freedom To Select The Rules Applicable To Their Arbitrations

In *Concepcion*, the Court explained that "[t]he 'principal purpose' of the FAA is to 'ensure that private arbitration agreements are enforced according to their terms.' " *Concepcion*, 131 S. Ct. at 1748. Under the FAA, parties enjoy the freedom "to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes." *Id.* at 1748-1749 (citations omitted). "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.*

In explaining why the *Discover Bank* rule was an obstacle to this objective, the Court took notice of the fact that the California rule effectively conditioned the availability of arbitration on parties agreeing to permit class-wide arbitration. *Concepcion*, 131 S. Ct. at 1744. This is important because class-wide arbitration is fundamentally different from bilateral arbitration. *Concepcion*, 131 S. Ct. at 1749-1752. Class-wide arbitration sacrifices the informality of bilateral arbitration,

requires procedural formality, and exponentially increases the risk of error, making it an unacceptable alternative for defendants. *Id.* Because of these fundamental changes, the Court concluded that permitting state laws to impose class-wide arbitration on parties without their consent is inconsistent with Congress's objectives in enacting the FAA. *Id.* at 1751 ("The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.").

The Court was careful to point out, however, that if parties actually agree to class-wide arbitration, the FAA will nonetheless require enforcement of such agreements. *Concepcion*, 131 S. Ct. at 1752-1753. Thus, even though class-wide arbitration is inconsistent with the type of arbitration envisioned by Congress, it is incompatible with the FAA only if it is imposed on parties by state law without the parties' consent:

> Parties could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. [citation] But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

Id.

The Court's reasoning in *Concepcion* leads to two inescapable conclusions. First, the objective to

which the *Discover Bank* rule was an obstacle was Congress's goal of granting parties the freedom to determine which terms should be included in their arbitration agreements, in order to facilitate the creation of streamlined proceedings tailored to parties' particular needs. *See Concepcion*, 131 S. Ct. at 1748-1749. Second, the *Discover Bank* rule was an obstacle to this objective – not merely because it imposed procedures inconsistent with the type of arbitration envisioned by Congress – but because it did so without the parties' consent. *Concepcion*, 131 S. Ct. at 1751 (emphasis added) ("class arbitration, *to the extent* it is manufactured by *Discover Bank rather than consensual*, is inconsistent with the FAA").

B. Enforcing Agreed-Upon Terms Does Not Interfere With The Achievement Of Congress's Objectives

In this case, state law is not imposing any arbitration rules, procedures, or conditions on the parties to which they did not expressly agree. The fact that the arbitration agreement contains a poison-pill clause is solely the result of the parties' agreed-upon bargain. Joint Appendix ("JA"), 128-129, § 9(c). Similarly, it is the parties' agreement (and not state law) that specifies when the poison-pill clause should be triggered and which laws must be applied to determine whether it will be triggered. *Id.* ("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.").

In analyzing whether California's anti-class-waiver laws are an obstacle to the achievement of Congress's objectives in this case, it is imperative to

remember that when parties actually agree that specific rules and procedures should apply to their arbitrations, the parties' agreement disposes of the issue of whether such rules and procedures interfere with the FAA's goals. *Concepcion*, 131 S. Ct. at 1752-1753 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."); *see Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 470, 477-479 (1989) (parties' agreement that entire contract governed by California law rendered moot the issue of whether a state law requiring the denial of a petition to compel arbitration conflicted with the FAA). Or, to put it another way: terms that parties have agreed to include in their arbitration agreements cannot be an obstacle to the objective of allowing parties to determine, by agreement, which terms their arbitration agreements should include.

Since the parties in this case expressly agreed that California's laws govern the determination of whether the class-action waiver is enforceable, the application of California law, in the manner and to the extent that the parties agreed that it should apply, does not interfere in even the slightest degree with the achievement of Congress's goals in enacting the FAA. As a result, obstacle preemption does not arise in this case.

C. The Agreement Must Be Interpreted To Mean What A Reasonable Consumer Would Think That It Means

Petitioner also argues that the arbitration clause at issue here supposedly "reflects an unmistakable intent to arbitrate disputes unless state law would force the parties into class

arbitration."[3] Brief for Petitioner, 10. However, that is not how the California Court of Appeal interpreted the agreement (*see Imburgia v. DIRECTV, Inc.*, 225 Cal.App.4th 338, 343-347 (2014)), and this Court generally does not review state courts' interpretations of private contracts. *Volt*, 489 U.S. at 474; *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 60 n.4 (1995).

Moreover, Petitioner's argument is materially identical to the arguments that were asserted – and rejected – in the wake of this Court's opinion in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which reversed the prior ruling in *Wilko v. Swan*, 346 U.S. 427 (1953). Specifically, in *Wilko* the Court ruled that the Securities Act of 1933 (15 U.S.C. § 77a *et seq.*) (the "Securities Act") prohibited and declared void agreements to arbitrate claims arising under the Securities Act. *Wilko*, 346 U.S. at 433-438. As a result, after *Wilko*, many arbitration agreements contained clauses stating that, notwithstanding the general agreement to arbitrate, the parties were not agreeing to arbitrate Securities Act claims. *See* e.g., *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d

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[3] It is worth noting that Petitioner's arbitration agreement plainly does not require arbitration of all disputes between the parties. JA, 129, § 9(d) (list of claims that may only be adjudicated by a court). Further, even if the agreement required arbitration of all disputes (which it does not), the fact that the poison-pill clause appears in a subsection titled "Special Rules" (*Id.* at 128-129, § 9(c)) demonstrates that the parties intended it to be an exception to the agreement's general rules. *See* OXFORD UNIV. PRESS, NEW OXFORD AMERICAN DICTIONARY 1675 (Angus Stevenson & Christine A. Lindberg eds., 3rd ed. 2010) (emphasis added) ("special" means "better, greater, or *otherwise different from what is usual*").

729, 734 (3d Cir. 1989) (arbitration agreement included clause stating "I am aware that this arbitration provision is not binding upon me in any dispute or controversy that arises under the federal securities laws."). When the Court issued its decision in *Rodriguez*, reversing *Wilko* and ruling that the FAA can require the arbitration of Securities Act claims (*Rodriguez*, 490 U.S. at 479-484), the federal courts encountered a series of cases in which one of the parties argued that, in spite of a clause excluding Securities Act claims from the agreement to arbitrate, the reversal of *Wilko* meant that parties could now compel arbitration of such claims. *See* e.g., *Ballay*, 878 F.2d at 734; *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419-1420 (11th Cir. 1990); *Gooding v. Shearson Lehman Bros., Inc.*, 878 F.2d 281, 283-284 (9th Cir. 1989). In these cases, the proponents of arbitration argued (as Petitioner attempts to do here) that their arbitration agreements supposedly evidenced the parties' intentions to arbitrate all disputes. *Id.* With regard to the clauses excluding Securities Act claims, it was argued that such clauses were simply an acknowledgment that the parties did not intend to contravene any limits imposed by applicable law. *Id*. However, the federal appellate courts uniformly rejected such arguments, ruling instead that exclusionary language in arbitration clauses must be interpreted and enforced in an ordinary manner. *Id.* In particular, the meaning of exclusionary clauses must be determined based on how consumers reading such clauses would interpret them – not based on the drafters' unilateral reasons for including them in their arbitration agreements in the first place. *Ballay*, 878 F.2d at 734 ("A customer reading the exclusionary language could not be expected to be aware of the regulatory

background or to understand that the language may become meaningless with the winds of change in the law."); *Goldberg*, 912 F.2d at 1419 ("Regardless of the reason for the inclusion of the language … the parties are bound by what they agreed to do."); *Gooding*, 878 F.2d at 284 ("The undisclosed intentions of the parties are ... immaterial ... the outward manifestation or expression of assent is controlling.").

Thus, Petitioner's motives for including a poison-pill clause in its arbitration agreement, and its characterization of the supposed intent of that clause, do not determine how it should be construed. Instead, it must be construed to mean what a reasonable consumer reading it would think that it means. *Ballay*, 878 F.2d at 734; *Goldberg*, 912 F.2d at 1419; *Gooding*, 878 F.2d at 284. Generally applicable California contract law (which governs the construction of the arbitration agreement at issue here)[4] is in accord. Under California law, contract terms must be construed based on an objective assessment of what the promisee reasonably understood them to mean. Cal. Civ. Code § 1649; *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264-1265 (1992).

In this case, any consumer reading the arbitration agreement in Petitioner's adhesion contract would not be aware of Petitioner's motives

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[4] *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A court may not … in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law"); *Volt*, 489 U.S. at 475-476 (general state-law contract interpretation principles apply to arbitration agreements).

for including the poison-pill clause. Consumers would interpret the poison-pill clause to mean just what it says: that neither party is entitled to compel arbitration in cases in which the class-action waiver is unenforceable under any of California's laws. JA, 128-129, § 9(c) ("If … the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable."). Because this is how consumers would interpret the poison-pill clause, this is the agreement by which Respondents are bound. Cal. Civ. Code § 1649; *Bank of the West*, 2 Cal.4th at 1264-1265; *Ballay*, 878 F.2d at 734; *Goldberg*, 912 F.2d at 1419; *Gooding*, 878 F.2d at 284.

IV. CONCLUSION

For the reasons stated herein, Amicus respectfully submits that the Court should affirm the ruling of the California Court of Appeal.

Amicus humbly thanks the Court for its time and consideration.

July 23, 2015

Respectfully submitted,

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