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 California, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review a state Court of Appeal's application of neutral, nondiscriminatory state law principles of contract interpretation in determining whether there exists an agreement to arbitrate?

2. Whether the Court of Appeal erred in finding that the parties could select state law to the exclusion of federal law to determine the enforceability of a class action waiver?

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INTRODUCTION

Review is not warranted here where Petitioner is not seeking review of an important federal question, but review of an intermediate state court decision based on the interpretation of contract language in DirecTV's 2007 Customer Agreement that applies only to Petitioner—language that is unique and uncommon to other market actors and which DirecTV itself has since changed and no longer uses.

Amy Imburgia and Kathy Greiner brought this case as a class action against petitioner DirecTV seeking damages and other relief as a representative action for themselves and other consumers who have been assessed an illegal penalty for early cancellation of their services under California's consumer protection statutes California Civil Code § 1671(d); violation of the Unfair Competition Law ("UCL"), Business and Professions Code § 17200 and the Consumers Legal Remedies Act ("CLRA"), Civil Code § 1750, *et seq.* DirecTV's acts were also the subject of investigation and penalties by the California State Attorney General.

After two and half years of litigation, DirecTV attempted to defend this action by invoking a provision in its arbitration agreement prohibiting class actions and also barring any representative claim. However, DirecTV's customer agreement and arbitration clause contain a unique and uncommon provision that provides such rights are waived only if it does not violate "the law of your state" and in

California, the CLRA entitles consumers to bring actions for unfair business practices (Cal. Civil Code sec. 1780), and to do so as a class (Cal. Civil Code sec. 1781), and prohibits and invalidates any contractual waiver of the right to sue as a class (Cal. Civ. Code sec. 1751). These provisions indisputably remain the law of the State of California and do not specifically target arbitration agreements.

Following denial of its Motion to Compel Arbitration at the trial court level, the Court of Appeal found the "law of your state" contractual provision refers to California state law—including state laws that are otherwise, in this instance, preempted by the FAA—including California's Consumer Legal Remedies Act (CLRA), which guarantees consumers the nonwaivable right to bring an action as a class for specified unfair business practices. Petitioner's Appendix at 8a-9a, and 12a-13a.

DirecTV now brings this writ of certiorari in the hope of obtaining relief from the self-drafted contract provision in its 2007 Customer Agreement. In an effort to dramatize its plea, DirecTV asserts that there exists a "stark" conflict between two judicial decisions which it claims applies to "millions of consumer contracts" and will create a huge problem of forum shopping in California. In a further effort to lure the attention of this Court, DirecTV claims repeatedly that the Court of Appeal's decision flouted this Court's decision in *AT&T Mobility LLC v. Concepcion*, 133 S.Ct. 1740 (2011) by applying the rule stated in *Discover Bank v. Superior Court*, 34 Cal.4th 148, to nullify the parties' arbitration provision. These contentions are incorrect.

REASONS FOR DENYING THE WRIT

First, the California Court of Appeal based its decision on interpretation of specific language in DirecTV's consumer agreement and in no way did it premise its decision on *Discover Bank* in any manner. Therefore, review is inappropriate here because the question of how to interpret language in an arbitration agreement is not a preemption issue, but a matter of state contract law.

Indeed, the Court of Appeal applied the precise rule at the crux of *Concepcion* and the FAA–it enforced the private arbitration agreement according to its terms which, unlike the agreement in *Concepcion*, the agreement here contains a more specific and unique class-waiver provision, stating that the customer may not sue as part of a class, but that the arbitration provision in its entirety is invalid if the class-waiver provision violates "the law of your state." The agreement in *Concepcion* did not include "the law of your state" language.

Thus, the only question is whether California law pertaining to contract interpretation was applied correctly, and not whether a particular statute or doctrine is preempted by the FAA. Ultimately, accepting review of this matter would involve this Court in a determination of whether the California Court of Appeal erred in its application of California state contract law. It is therefore not appropriate for review.

Second, this matter concerns the decision of a state intermediate court of appeal. The California

Supreme Court denied review. The Court should deny review of the issues presented herein until a final judgment and the California Supreme Court has directly addressed them.

Third, the supposed conflict between the decision of the Court of Appeal and the Ninth Circuit's decision in *Murphy v. DirecTV* conflict marginally, if at all, and, to the extent that they do, the conflict comes down to a question concerning the interpretation of seldom-used language in an unnecessary class waiver provision. As shown below, this conflict is not important enough to warrant review by this Court

Fourth, this matter is not one that will affect "millions of consumer contracts" but is instead a one-off case without broad application. This is because the term providing the class action waiver provision is enforceable only if it does not violate "the law of your state" is unique and uncommon to other consumer contracts. Furthermore, consumer agreements are adhesive and always contain provisions stating that the terms of the contract may be changed unilaterally by the drafting party. (See *infra*, n. 2.) Indeed, DirecTV itself has since eliminated from its Customer Agreement the contract language here at issue.

DirecTV has not pointed to any cases where a conflict concerning the language in its class waiver provision has arisen involving any market actor other than itself. This is presumably because class action waivers in general became unnecessary when this Court issued its opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130

S.Ct. 1758 (2010). Since then, there has been no reason for a market actor to include any class action waiver in its consumer agreement, much less one where the waiver's enforceability is determined by "the law of your state" as an exception to the general applicability of the FAA.

In short, DirecTV has not pointed to an important conflict between the opinions of state and federal courts that will affect millions of contracts, but instead simply seeks relief from a contract provision in its 2007 Customer Agreement. Review should therefore be denied.

I. THE COURT OF APPEAL'S INTERPRETATION OF A CONTRACT UNDER CALIFORNIA STATE LAW IS NOT SUBJECT TO REVIEW BY THIS COURT

The question of whether the plaintiffs agreed to arbitrate their claims against DirecTV has little to do with the federal doctrine of preemption and everything to do with state law rules of contract interpretation. For this reason, review by this Court is inappropriate and should be denied.

The interpretation of contracts, including arbitration agreements, is a matter of state law. "States may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), citing to *Mastrobuono v.*

Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 and at n. 9 (1995), and *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475-476 (1989).

This Court does not review matters of state-law contract interpretation, unless the state-court determination denies a party's rights under the Constitution or a federal statute. "[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt* at 474. *See also* 28 U.S.C. § 1257(a) [jurisdiction to grant review exists "where any . . . right . . . is . . . claimed under the Constitution or the treaties or statutes of . . . the United States."]

DirecTV claims that jurisdiction for review exists because the decision of the Court of Appeal violates sections 2 and 4 of the FAA. Petition at 3-5. This is inaccurate, however, because the FAA is not violated by the application of neutral, nondiscriminatory state laws pertaining to the interpretation of contracts. The "central purpose" of the FAA is "to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono* at 53-54. In enacting the FAA, Congress sought to "place such agreements upon the same footing as other contracts." *Volt* at 474. Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Id.* at 479.

Consequently, even in instances where there does exist an agreement to arbitrate (unlike the present case), arbitration still may be denied on the basis of defenses to contract enforcement that do not discriminate against arbitration agreements. The

"savings clause" in Section 2 of the FAA "preserves generally applicable contract defenses," and bars enforcement only of "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 133 S.Ct. 1740 at 1748.

Nor does the interpretation of arbitration agreements in accordance with neutral state-law principles of contract interpretation violate the FAA's policy favoring arbitration. Recently, in *Granite Rock Company v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010), this Court reversed an order compelling arbitration, and stated:

> Local is . . . wrong to suggest that the presumption of arbitrability we sometimes apply takes courts outside of our settled framework for deciding arbitrability. . . . As we have explained, this "policy" is merely an acknowledgment of the FAA's commitment to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Volt*, 489 U.S., at 478. Accordingly, we never held that this policy overrides the principle that a court may submit to arbitration "only those disputes . . . that the parties have agreed to submit." *First Options*, 514 U.S., at 93.; *see also Mastrobuono*, 514 U.S., [at 52]. . . . Nor have we held that courts may use policy considerations as a substitute for party agreement. [Citations.] We have applied the presumption favoring arbitration, in

> FAA and labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that the arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and . . . is legally enforceable and best construed to encompass the dispute. [Citations.]

Id. at 302-303.

The dispute in this case concerns whether or not there exists an agreement to arbitrate. DirecTV's Customer Agreement states generally that the arbitration provision is governed by the FAA, but, more specifically, it states that the agreement to arbitrate does not exist if under "the law of your state" the class action waiver is unenforceable. Petitioner's Appendix at 5a ["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"].

The Court of Appeal applied California contract law principles in order to determine that this provision meant no agreement to arbitrate exists. The principles it applied are undeniably neutral, and do not in any way discriminate against arbitration agreements.

First, the California Court of Appeal applied the "'well established principle[] of contract interpretation'" that, "'when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision.'" Petitioner's Appendix at 8a-9a, quoting *Prouty v. Gores Technology Group*, 121 Cal.App.4th 1225, 1235 (2004). The court

determined that, "[t]he specific reference to state law concerning the enforceability of the class action waiver creates a narrow and specific exception to the general provision that the arbitration agreement will be governed by the FAA." Petitioner's Appendix at 12a.

Second, the Court of Appeal observed its "interpretation of the contract finds further support in 'the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it.'" Petitioner's Appendix at 10a-11a, quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, *supra*, 514 U.S. at 62. In *Mastrobuono*, this Court reversed an order denying enforcement of an award in arbitration, stating that, "Respondents drafted an ambiguous document, and cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *Id.* at 63.

Similarly, the Court of Appeal found in the present case that "[a] reasonable reader of the customer agreement would naturally interpret the phrase 'the law of your state' as referring to (nonfederal) state law, and any ambiguity should be construed against the drafter." Petitioner Appendix at 13a.[1]

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[1] In its Petition, DirecTV repeatedly mischaracterizes the Court of Appeal's contract-law analysis, stating that the court construed the "law of your state" provision to apply to "state law immune from the preemptive force of federal law" or "*hypothetical* state law immune from the preemptive force of federal law." Petition at 2, 8, and 10, orig emph. The Court of

In sum, the Court of Appeal properly concluded that under the terms of the contract, there exists no agreement to arbitrate, and it did so by way of a faithful application of the neutral, nondiscriminatory California state law pertaining to the interpretation of contracts. It is this application of state law that this Court would be sitting in review of were it to grant DirecTV's Petition. For this reason, review should be denied.

II. REVIEW SHOULD BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT HAS NOT RULED UPON THE ISSUE IN DISPUTE

As shown above, this matter does not involve a federal question, and there is accordingly no statutory basis for a grant of review. However, even if there were, this matter concerns the decision of a state intermediate court of appeal, not a state supreme court. For this reason as well, review should be denied.

Supreme Court Rule 10(c) states, in pertinent part, that a case warranting review is one in which:

> a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

Appeal did no such thing. It did not find any law to be "immune from preemption," and, of course, there is nothing remotely "hypothetical" about the CLRA.

While it is permissible under this rule for a party to seek review in this Court of a decision of an intermediate state court of appeal, this Court has recognized that the presumption is against granting review in such cases. In *Huber v. New Jersey Department of Environmental Protection*, 131 S.Ct. 1308 (2011), this Court denied review, and four members of the Court joined in a statement which included the following remarks:

> This Court has not suggested that a State, by imposing heavy regulations on the use of privately owned residential property, may escape the Fourth Amendment's warrant requirement. But because this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate. See this Court's Rule 10. It does bear mentioning, however, that "denial of certiorari does not constitute an expression of any opinion on the merits."

Id., emph. added.

In similar fashion, Justice Stevens observed many years ago in a dissenting opinion in *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852 (1984), that, "[I]f we take it upon ourselves to review and correct every incorrect disposition of a federal question by every intermediate state appellate court, we will soon become so busy that we will either be unable to discharge our primary responsibilities effectively, or else be forced to make still another adjustment in the size of our staff in order to process cases effectively." *Id.* at 385.

Finally, in *Parker v. Los Angeles County*, 338 U.S. 327, 70 S.Ct. 161 (1949), this Court declined to reach the constitutional issues argued by the petitioner on the ground that the matter was based upon a decision of the California Court of Appeal that the California Supreme Court had elected not to review, and also concerned state law issues that had not been determined by the California Supreme Court. *Id.* at 329. This Court stated, "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. Decent respect for California and its courts demands that this Court wait until the State courts have spoken with knowledge of the events brought to light for the first time at the bar of this Court." *Id.* at 333.

Based upon these authorities, this Court should deny review of the issues presented herein until such time as they have been ruled upon by the California Supreme Court.

III. REVIEW SHOULD BE DENIED BECAUSE THE CONFLICT BETWEEN THE OPINION HERE AT ISSUE AND *MURPHY* IS INSIGNIFICANT AND DOES NOT WARRANT THE ATTENTION OF THIS COURT

DirecTV's Petition is based on the supposed conflict between the decision of the Court of Appeal and the Ninth Circuit's decision in *Murphy v. DirecTV*. However, the opinions only marginally conflict, and to the extent they do, the conflict is far less important than DirecTV contends.

Both opinions concern a highly unique, one-off provision in a consumer contract which market

actors seldom use—indeed, DirecTV itself has revised its own contract and deleted the "law of your state" provision—and which they need not use, because it is unnecessary to accomplish its supposed purpose of preventing class arbitration. The conflict between *Murphy* and the opinion here at issue has not and will never result in the "forum shopping" problem that DirecTV envisions in its Petition. DirecTV's Petition should accordingly be denied.

A. *Murphy* and the Opinion of the Court of Appeal Conflict Marginally, If at All

Petitioner DirecTV points to a supposed conflict between the Ninth Circuit and the California Court of Appeal that it claims is "about as stark as they come." Petition at 9. This is a plain overstatement, based upon a misreading of the purportedly conflicting authorities.

Murphy concerned the rule of unconscionability stated in *Discover Bank v. Superior Court*, 34 Cal.4th 148 (2005). The parties in *Murphy* agreed the *Discover Bank* rule was no longer valid, having been found by this Court to be preempted by the FAA, however the plaintiffs therein contended that the rule should apply anyway, because the parties had entered into their contract at a time when the *Discover Bank* rule was understood to have been good law. *Murphy* at 1225. The *Murphy* court rejected this contention and affirmed the lower court's order compelling arbitration, holding this Court's finding of preemption meant that the *Discover Bank* rule had never been valid at any time, and thus could not govern the contract between the parties. *Id.* at 1225-1226.

The present case involves the same contract that was at issue in *Murphy*. And, in an effort to dramatize the conflict between *Murphy* and the opinion of the California Court of Appeal, DirecTV claims repeatedly that the Court of Appeal's opinion is based upon an application of the rule in *Discover Bank*. *See* Petition at 3 [the opinion "resurrect[s] the *Discover Bank* rule"]; at 8 [the court "appli[ed] . . . the *Discover Bank* rule to nullify the parties' arbitration provision"]; at 8 [the court "[a]ppl[ied] the preempted *Discover Bank* rule"]; and at 16 [the court "refus[ed] to enforce the FAA-governed arbitration agreement . . . and resurrect[ed] the *Discover Bank* rule"].

The problem is that this claim, fundamental though it may be to DirecTV's Petition, is plainly inaccurate. Nowhere does the Court of Appeal base its decision on *Discover Bank*. The court does observe that "*Discover Bank* held that under certain circumstances, class action waivers in arbitration agreements are unconscionable and hence unenforceable." Petitioner's Appendix at 4a. However, the court does not find the *Discover Bank* rule would defeat arbitration in the present case, even if it were applicable. It simply states that DirecTV assumed the *Discover Bank* rule applied and therefore did not move to compel arbitration until after this Court found it to be preempted by the FAA. Petitioner's Appendix at 4a.

Instead of relying on the *Discover Bank* rule, the Court of Appeal relies on the CLRA, at California Civil Code section 1750 et seq. *See* Petitioner's Appendix at 6a, 9a, and 15a, n. 5. For example, the

court states, "If we apply state law alone (for example, the antiwaiver provision of the CLRA) to the class action waiver, then the waiver is unenforceable." Petitioner's Appendix at 9a. Elsewhere, the court states, "DirecTV argues that if the class action waiver is unenforceable as to plaintiffs' CLRA claims, then, at most, the arbitration agreement would be unenforceable as to those claims, and the motion to compel arbitration should have been granted as to the remainder of plaintiff' claims. We disagree." Appendix at 15a, n. 5. DirecTV ignores this entirely. Just as it did in its Petition for Review before the California Supreme Court, DirecTV fails in its Petition before this Court even to mention the CLRA.

The distinction between *Discover Bank* and the CLRA is an important one. In *Concepcion*, *supra*, 133 S.Ct. 1740, this Court invalidated altogether the *Discover Bank* rule, such that it was thereafter in no possible sense the law of the State of California. *Id.* at 1753. However, the same cannot be said of the CLRA, or the provisions therein which entitle consumers to bring actions for unfair business practices (Cal. Civil Code sec. 1780), and to do so as a class (Cal. Civil Code sec. 1781), and which invalidate any contractual waiver of the right to sue as a class (Cal. Civ. Code sec. 1751). These provisions indisputably remain the law of the State of California. The CLRA's non-waivable right to sue as a class may be preempted as to arbitration agreements governed by the FAA, but this does not affect its validity as a general matter—it still applies in cases where there is no arbitration agreement.

It may well be that under the law of preemption, the CLRA's non-waivable right to bring a class action is "'nullified to the extent that it actually conflicts with federal law.'" *Murphy* at 1226, quoting *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982), orig. emph. But this is not the end of the analysis from a contract interpretation standpoint. It is one thing to say that a valid state consumer protection statute is "nullified" to the extent it is preempted. However, it is something else entirely to say the parties to a contract cannot choose to be governed by the very same consumer protection statute when they agree that "the law of your state" applies to the contract's class waiver provision, as an exception to the general applicability of the FAA. Whether this is the proper reading of the contract cannot be determined on the basis of federal preemption. It must be determined on the basis of state contract law, which (as discussed above) is precisely what the Court of Appeal did.

Accordingly, if a district court in the Ninth Circuit were to confront precisely the issue that was before the California Court of Appeal in the present case, then it could find, reasonably, that the holding in *Murphy* does not extend beyond its application to the *Discover Bank* rule. The district court could find, just as the Court of Appeal did, that the CLRA is "the law of your state"—because it is incontestably the valid, statutory law of California—and the contract therefore calls for its application in determining the enforceability of the class waiver provision in the arbitration agreement.

For this reason, the two opinions conflict only marginally. And, to the extent that they do, the conflict comes down to a question concerning the interpretation of seldom-used language in an unnecessary class waiver provision. As shown below, this conflict does not merit review by this Court.

B. The Federal Question Raised by DirecTV's Petition Is Not Important Enough to Warrant Review by This Court

Under this Court's Rule 10(c), review is warranted only if "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." This standard is unmet in the present case, because, to the extent that there is a "question of federal law" that the Court of Appeal has decided differently from the Ninth Circuit, the question is not remotely important enough to merit review by this Court.

If indeed there is a federal question before this Court arising from the conflict between *Murphy* and the decision of the Court of Appeal, then it is this: whether the doctrine of preemption is sufficient all on its own to compel the conclusion that the phrase "the law of your state" in the contract between DirecTV and the plaintiffs cannot possibly be understood to refer to valid state consumer protection statutes as an exception to the general applicability of the FAA.

DirecTV claims this question must be resolved because "'non-severability' clauses of the type here at issue are found in millions of individual consumer arbitration agreements in [California] and

elsewhere," thus giving rise to a "problem" of forum-shopping that is "truly monumental." Petition at 2. This claim is entirely unsubstantiated, and is disconnected from reality.

In support of its claim, DirecTV points this Court to a total of four form consumer agreements drafted by other market actors. Petition at 15-16. In fact, these agreements demonstrate the absence of any compelling reason for this Court to grant review.

First, two of the four consumer agreements that DirecTV discusses in its Petition contain a general "law of your state" provision that pertains to the entire contract, and not just to the arbitration agreement. *See* Petition at 15-16. This is true of both the Time Warner Cable Residential Services Subscriber Agreement at section 20(a), pp. 15-16 (http://help.twcable.com/RSSA_English.pdf), and the T-Mobile Terms & Conditions (http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions), at section 27, final sentence. For example, the T-Mobile provision states, "If any provision of the Agreement is invalid under the law of a particular jurisdiction, that provision will not apply in that jurisdiction."

The problem is that general severability provisions such as this are not relevant to DirecTV's Petition. This is because, inasmuch as such provisions pertain to the agreement as a whole, they do not state a specific exception to any general provision stating the arbitration agreement is governed by the FAA. Consequently, the rule of construction used by the Court of Appeal—that specific terms govern over more general ones—does

not apply to these provisions. This is clear from the Court of Appeal's discussion of this issue:

> [P]laintiffs contend that the reference to "the law of your state" in section 9 of the 2007 customer agreement operates as "a specific exception to the arbitration agreement's general adoption of the FAA" in section 10. That is, although the agreement provides that in general section 9 is governed by the FAA, section 9 itself provides that the specific issue of the enforceability of the class action waiver shall be governed by "the law of your state."

Petitioner's Appendix at 9a, orig. emph.

> And, later:
>
> The specific reference to state law concerning the enforceability of the class action waiver creates a narrow and specific exception to the general provision that the arbitration provision will be governed by the FAA.

Petitioner's Appendix at 12a.

Accordingly, whatever conflict exists between *Murphy* and the opinion of the Court of Appeal will in no way bear upon judicial interpretations of agreements with the type of general severability provisions found in the T-Mobile and Time Warner Cable contracts. The language in these contracts is not governed by the decision of the California Court of Appeal, and thus the Court of Appeal's decision would provide a potential litigant with little reason to forum-shop.

Second, it is true that in the other two agreements cited by DirecTV, the "law of your state" language pertains specifically to the enforceability of the class waiver. *See* Petition at 15-16, citing to contracts of H&R Block and MovieTickets.com, at www.movietickets.com/privacy.asp#.U3ZdB50pDMo. These provisions are roughly similar to the one at issue in the present case. For example, the relevant provision in the MovieTickets.com Privacy Statement states, "If . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire paragraph (Class Action Waiver) is unenforceable."

However, as a general matter, it is not necessary for a market actor like MovieTickets.com even to put a class waiver in its arbitration provision.[2] This is because in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684,

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[2] Notably, each of the consumer agreements that DirecTV refers to in its Petition contain provisions stating that they are subject to change, unilaterally, by the drafting party. For example, the movietickets.com agreement states at its final sentence that, "MovieTickets.com reserves the right to change this Privacy Statement at any time. When we do, we will post the change(s) on the Site. If we change the Privacy Statement in a material way, we will provide appropriate online notice to you." *See also* T-Mobile Terms & Conditions, section 6 ["WE CAN CHANGE ANY TERMS IN THE AGREEMENT AT ANY TIME"], and Time Warner Residential Services Subscriber Agreement, section 8(a) ["We may change our Customer Agreements by amending the online version of the relevant document."]

orig. emph. And while there is the conceivable risk that an arbitrator will unexpectedly find that an agreement to submit to class arbitration is somehow implied in the contract (see *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013)), this risk is no doubt remote.

More importantly, however, if such a market actor wishes to avoid this risk altogether, it can still include a class action waiver. However, it must not do so in a way that makes the waiver's enforceability dependent on "the law of your state," as a specific exception to a more general provision stating that the agreement is governed by the FAA.

Indeed, DirecTV knows this as well as anyone. Section 10 of its current Customer Agreement still contains a provision stating that "Section 9 shall be governed by the Federal Arbitration Act." *See* DirecTV Customer Agreement, at section 10(b), at http://www.directv.com/ DTVAPP/ content/legal/customer_agreement, effective June 24, 2014. However, the arbitration agreement at section 9 now states the following, in pertinent part:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claims 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. A court may sever any portion of Section 9 that it finds to be unenforceable, except for

> the prohibition on class, representative and private attorney general arbitration.

See current DirecTV Customer Agreement at section 9(c)(ii).

This provision prevents class arbitration. And, there is no reason why DirecTV could not have used this same provision in its 2007 agreement. Prior to this Court's decision in *Concepcion*, this provision would have accomplished the goal of preventing class arbitration, except in instances where the waiver was outlawed by *Discover Bank*. But instead, DirecTV used a provision that a reasonable consumer would believe gives him or her the benefit of California's consumer protection statutes. Both in 2007 and at the present time, if the only goal was to prevent class arbitration, then it made no sense for a market actor in DirecTV's position to base its class waiver's enforceability on "the law of your state," as an exception to the general applicability of the FAA.

Ultimately, there is no reason to infer a substantial number of market actors are in the same situation as DirecTV—having used a class waiver provision in the past that needlessly accords the full panoply of state statutory rights to any plaintiff looking to defeat the class waiver. Thus, review is not warranted here where Petitioner is not seeking review of an important federal question, but only correction of a perceived error made by an intermediate state court based on contract interpretation of language (not currently used by Petitioner) previously drafted by DirecTV.

CONCLUSION

Based upon the foregoing, Respondents respectfully ask that this Court deny DirecTV's Petition for Writ of Certiorari.

Respectfully Submitted,

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