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 OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Professor IMRE S. SZALAI
Counsel of Record
LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW
7214 St. Charles Avenue, Box 901
New Orleans, LA 70118
(504) 861-5589
iszalai@loyno.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose teaching, practice, and scholarship focus on arbitration, dispute resolution, and civil procedure. *Amici* are concerned that the expanding scope of the preemption doctrine under the Federal Arbitration Act (FAA) is destabilizing arbitration law and threatens to undermine party autonomy. *Amici* file this brief to provide context regarding the FAA's enactment and development, with a particular emphasis on the increasing scope of FAA preemption. In light of this background and based on a few core principles of arbitration law set forth below, *amici* respectfully urge the Court to affirm the decision below in favor of the respondents.

SUMMARY OF ARGUMENT

The cardinal rule of arbitration law is that arbitration is simply a matter of contract, and as a result, courts must generally enforce the bargained-for terms of an arbitration agreement as written, including terms that incorporate state law. In accordance with

[1] *Amici* file this brief in their individual capacities, not as representatives of the institutions with which they are affiliated. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation or submission of the brief, except for Loyola University New Orleans College of Law, which provided funds for the printing and filing of this brief. All parties have consented to the filing of this brief, and letters of consent have been filed with the Court. A list of *amici* appears in the appendix.

this cardinal rule, the FAA's preemption analysis does not occur in the abstract and must take into account the parties' agreement, which is the cornerstone of arbitration. Through their agreement to arbitrate, parties may incorporate state law, even if the FAA would normally preempt the state law. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) ("*[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt [a state law prohibiting arbitrators from hearing claims for punitive damages].") (emphasis added). Enforcing the terms of an arbitration agreement as written advances the most critical value of arbitration law, party autonomy.

DirecTV made calculated choices when drafting a sophisticated arbitration clause that incorporated state law to govern different aspects of its agreement, and DirecTV should be held to its side of the bargain. The appellate court found the parties bargained for state law to govern the enforceability of the class waiver provision in the arbitration clause. As explained below, DirecTV probably incorporated a state-by-state analysis to frustrate the possibility of a nationwide class action, and the Court should enforce this bargain to incorporate "the law of [each customer's] state."

DirecTV's core argument, relying heavily on *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), is that the courts below should have enforced the class waiver as a matter of federal law pursuant to the preemption analysis from *Concepcion*, notwithstanding the clause providing that the "law of [each

customer's] state" governs the enforceability of the class waiver. However, *Concepcion* is inapposite and distinguishable. *Concepcion* did not involve a contract where parties specifically incorporated state law to govern the enforceability of the class waiver, and *Concepcion* addressed an unrelated, malleable state rule not at issue in this case.

Finally, disregarding the state court's interpretation of the contractual terms in this case would also raise serious federalism problems. To help promote federalism as well as party autonomy, the Court should affirm the decision below in favor of the respondents and enforce the parties' bargain to incorporate state law.

ARGUMENT

I. The Court Should Affirm The Decision Below Because The Parties Bargained For Application Of State Law, And The FAA's Primary Purpose Is The Enforcement Of Arbitration Agreements According To Their Terms, Including Terms Incorporating State Law

In several cases, the Court has acknowledged the supremacy and sweeping preemptive effect of the FAA. For example, in *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court held the FAA can supersede a state law granting primary jurisdiction to an administrative agency to resolve certain disputes. Similarly, in

Southland Corp. v. Keating, 465 U.S. 1 (1984), the Court held the FAA can override a state statute requiring judicial resolution of franchising disputes. There is no doubt federal arbitration law is supreme when it applies. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (the FAA preempts state law guaranteeing a state judicial forum for personal injury claims against nursing homes).

Alongside several cases recognizing the FAA's broad preemptive reach, this Court has also declared, however, that the FAA does not "reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) (holding the FAA does not preempt the parties' choice of state law permitting a court to stay an arbitration proceeding). State law chosen by the parties co-exists with the FAA's preemption doctrine and can play a critical role in arbitration.

To help understand the relationship between state law and the FAA, it is important to recall two axiomatic arbitration law principles, and a straightforward application of these principles helps resolve this case in favor of the respondents. The first, most fundamental principle of arbitration law is that arbitration is a matter of contract between the parties. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual

rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement. . . .") (citations and internal quotations omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties.") (citations omitted).

The second principle, which flows from the first, is that parties can choose state law to govern their arbitration agreements, even if the FAA would normally override the state law. *Hall Street Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 590 (2008) (parties to an arbitration agreement "may contemplate enforcement under state statutory or common law"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) ("*[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt [a state law prohibiting arbitrators from hearing claims for punitive damages].") (emphasis added); *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) (the FAA does not preempt state law staying the enforcement of an arbitration clause "where, as here, the parties have agreed to arbitrate in accordance with California law").

About one month after holding in *Preston v. Ferrer*, 552 U.S. 346 (2008), that the FAA's broad preemptive power can displace a state's carefully-designed administrative scheme, the Court again acknowledged the critical role of state law in arbitration

in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The *Mattel* case addressed whether parties can draft arbitration agreements providing for enhanced judicial review of arbitral awards beyond the FAA's limited grounds for vacatur or modification. The Court held that §§ 10 and 11 of the FAA provide the exclusive grounds for vacating or modifying an award under the FAA. *Id.* at 584. The Court, however, emphasized that the FAA is not the only law governing arbitration. The Court explained that parties to an arbitration agreement, if they desire, "may contemplate enforcement under state statutory or common law. . . ." *Id.* at 590. Therefore, if state statutory or common law provides for judicial vacatur of arbitral awards on grounds differing from the FAA, and if parties bargained for application of such state law, the FAA would not preempt application of state law under these circumstances. *See, e.g.*, *Raymond James Fin. Servs., Inc. v. Honea*, 55 So. 3d 1161 (Ala. 2010) (given *Mattel*, parties may agree under state common law for *de novo* judicial review of arbitral awards, which is not allowed under the FAA); *Cable Connection, Inc. v. DirecTV, Inc.*, 190 P.3d 586, 599 (Cal. 2008) ("[A] reading of the [California Arbitration Act] that permits the enforcement of agreements for merits review is fully consistent with the FAA 'policy guaranteeing the enforcement of private contractual arrangements.' ") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95, 100-01 (N.Y. 1995) (because the FAA's "overriding policy" is "the enforcement of arbitration

agreements according to their terms," and because the parties explicitly chose state law to govern their arbitration clause, the FAA does not preempt vacatur of an award on state law grounds of irrationality and public policy, grounds not available under the FAA).[2] In sum, the FAA's core objective is the enforcement of arbitration agreements as written, and the FAA allows parties to bargain for application of state law as part of their arbitration agreement, even if the FAA, absent party choice, would normally preempt the state law. As explained below, the parties in this case bargained for "the law of [each customer's] state" to govern the enforceability of the class waiver, and courts should respect this choice. *Cf. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001) ("By selecting Oklahoma law ('the law of the place where the Project is located') to govern the contract, the parties have effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration Act.").

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court also addressed the relationship between the FAA and state law. The state law at issue was New York's *Garrity* rule, which prohibited arbitral awards of punitive damages. *Id.* at

[2] Taking advantage of state law, DirecTV drafted its arbitration clause to provide for *de novo* judicial review of mere "errors of law" in an arbitral award. *See* Customer Agreement § 9(c), Joint Appendix (JA) 128.

55 (citing *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976)). The Court emphasized that the "FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties," the foundation of all arbitration. 514 U.S. at 57. As succinctly stated by the Court in *Mastrobuono*, "*in the absence of contractual intent to the contrary*, the FAA would preempt the *Garrity* rule." *Id.* at 59 (emphasis added). Thus, if contractual intent exists showing that the parties bargained for state law to govern, as they did here, state law would control even if the FAA would normally override that state law.

In *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989), the Court addressed the FAA's preemption doctrine where the parties had bargained for state law to govern the arbitration agreement. In a similar posture to the case at hand, a California appellate court in *Volt* interpreted the parties' arbitration agreement to incorporate state law. *Volt*, 489 U.S. at 472. Under this state law, if pending litigation existed between a party to the arbitration agreement and a non-party, a court could stay arbitration so that the related litigation could resolve common questions, or the court could go even further and "refuse to enforce the arbitration agreement" and direct all the parties to litigate in one proceeding. *Id.* at 471 & n.3. However, under the FAA, courts must compel arbitration when there is a valid arbitration agreement, even if related litigation is pending. *See, e.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (the FAA "leaves

no place for the exercise of discretion by a district court" and requires courts to enforce arbitration agreements, even if there is the possibility of inefficient, separate proceedings involving related claims). In reconciling this strong conflict between the FAA and state law, the Court in *Volt* held that the FAA would not preempt the state law because the terms of the parties' agreement, as interpreted by the state court, had incorporated that state law. *Volt*, 489 U.S. at 477-79. In holding that state law controlled, the Court emphasized the "FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479. *See also Mastrobuono*, 514 U.S. at 65 (Thomas, J., dissenting) ("We concluded [in *Volt*] that even if the FAA pre-empted the state statute as applied to other parties, the choice-of-law clause in the contract at issue demonstrated that the parties had agreed to be governed by the statute.").

A. The FAA's Preemption Doctrine Does Not Operate Without Consideration Of The Parties' Agreement, The Foundation Of All Arbitration

At first glance, it seems there is tension between the Court's cases like *Preston* and *Southland*, on the one hand, which set forth a sweeping, expansive preemption doctrine under the FAA, and cases like *Mattel*, *Mastrobuono*, and *Volt*, on the other, which acknowledge that state law can apply to arbitration agreements, even if the FAA would normally override the state law. However, any such apparent tension

vanishes when one recognizes that the FAA's preemption doctrine does not operate in the abstract and without consideration of the parties' agreement, which is the foundation for all arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties.") (citations and internal quotations omitted). If a contract or transaction involves interstate commerce, the FAA generally applies by default to an arbitration agreement involving such a contract or transaction. But as demonstrated by *Mattel*, *Mastrobuono*, and *Volt*, the FAA allows parties to incorporate state law to govern their agreement, even if the FAA would otherwise supersede or conflict with the state law in the absence of party choice.

Because FAA preemption cannot occur without reference to a particular agreement of the parties, the Court's FAA preemption cases cannot be divorced from the particular arbitration agreements in those cases. For example, in *Preston v. Ferrer*, 552 U.S. 346 (2008) – a highwater mark for FAA preemption where the Court held the FAA can displace a carefully-designed state administrative scheme, the Court cautioned its holding was limited to situations where the parties had a broad arbitration agreement. The Court emphasized that the "dispositive issue" is "*not* whether the FAA preempts [state law] wholesale" because in the abstract, the "FAA plainly has no such

destructive aim or effect." *Preston*, 552 U.S. at 353 (emphasis added). Instead, it was critical for the Court to examine the parties' agreement, the bedrock of arbitration, and the Court found that "when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 359. The contract at issue in *Preston*, with its broad terms, made a critical difference in the Court's analysis. In *Preston*, the parties had not agreed to an applicable state law as they have done in this case.

In light of the core principle that the parties' agreement is the foundation for all arbitration, consider the following hypotheticals involving *Preston*, as well as *Southland v. Keating*, 465 U.S. 1 (1984), and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Suppose that the contract between the artist and entertainment lawyer in *Preston* were rewritten to contain the following terms:

> Any claim arising out of this agreement shall be settled by arbitration. However, if the law of your state requires that such claims be heard in a judicial or administrative forum, this arbitration agreement is not enforceable.

It seems clear that if the artist's state required an administrative hearing for the dispute at issue in *Preston*, this hypothetical arbitration agreement would be unenforceable due to the bargained-for terms of the parties' agreement. In *Preston*, if the arbitration agreement had incorporated such a state

law requiring an administrative hearing, then the wholesale displacement of state law in *Preston* would not have occurred.

In *Southland*, the Court held that the FAA can preempt a state law requiring judicial resolution of franchising disputes when the parties had bargained for a broad arbitration clause requiring all disputes to be arbitrated. 465 U.S. at 16. However, suppose that the franchisor and franchisee in *Southland* had bargained for a different, narrower clause in their franchise agreement as follows:

> Any claim arising out of this agreement shall be settled by arbitration. However, if the law of your state prohibits the arbitration of such claims between a franchisee and franchisor, this arbitration agreement is not enforceable.

It seems apparent that if the law of a franchisee's state prohibited arbitration of claims between franchisees and franchisors, then the arbitration clause would be unenforceable in that state due to the bargained-for terms of the arbitration agreement – *even though the FAA would typically displace such a state law under the* Southland *ruling in connection with a broad clause*. However, in other states that did not ban the arbitration of franchise disputes, the hypothetical arbitration clause would be fully enforceable.

Similarly, suppose that the cellular telephone contract at issue in *Concepcion* were rewritten to contain the following terms:

> Any claim arising out of this agreement shall be settled by arbitration. There shall be no right to any class or representative proceedings in arbitration (the "class waiver"). However, if the law of your state invalidates this class waiver, this arbitration agreement is not enforceable.

Similar to the above hypotheticals, it seems clear that if the law of a customer's state invalidates judicial and arbitral class waivers, then the arbitration clause would be unenforceable for customers in that state because of the bargained-for terms of the contract, even though the FAA may displace such a state law under the *Concepcion* ruling. However, the hypothetical clause would be fully enforceable for customers in other states without such a law invalidating class waivers.

These hypotheticals illustrate that leading FAA preemption cases like *Preston*, *Southland*, and *Concepcion* would have been resolved differently if the parties had different arbitration clauses and specifically incorporated state law to govern, even if the FAA would, in the absence of party choice, override the particular state law. *Mastrobuono*, 514 U.S. at 59 ("*[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt the [state's] *Garrity* rule.") (emphasis added); *id.* at 65 (Thomas, J., dissenting) ("We concluded [in *Volt*] that even if the FAA preempted the state statute as applied to other parties, the choice-of-law clause in the contract at issue demonstrated that the parties had agreed to be

governed by the statute."). As the above hypotheticals demonstrate, the FAA's preemption doctrine cannot operate in a vacuum, without consideration of the parties' agreement. If parties incorporate state law to govern their arbitration clause, the FAA's prime directive is to enforce the agreement as written. *Volt*, 489 U.S. at 479.

If the FAA broadly trumped the parties' choice of state laws in the above hypotheticals, then the FAA would operate contrary to the most fundamental principle of arbitration law – "arbitration is simply a matter of contract." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). In the above hypotheticals incorporating state law, it is important to recognize that the particular state law is not preventing arbitration or frustrating the purpose of the FAA. Instead, the parties' agreement, not state law, is limiting arbitration as the parties intended, and ensuring rigorous enforcement of the terms of an agreement is the FAA's core purpose. *Volt*, 489 U.S. at 479.

The Court's opinions in *Mattel*, *Mastrobuono*, and *Volt* set forth a straightforward rule based on the axiomatic principle that arbitration is a matter of contract: courts must enforce the terms of an arbitration agreement, including terms incorporating state laws. Turning to the case at hand, this case boils down to the core question of whether the parties bargained for application of state law to govern the enforceability of the class waiver when the contract provided for "the law of [each customer's] state" to

govern this waiver. Even if one assumes that the FAA may preempt the state laws at issue in the absence of contractual intent to the contrary,[3] the appellate court here found such contractual intent to incorporate state law. *Mastrobuono*, 514 U.S. at 59 ("*[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt the [state's] *Garrity* rule.") (emphasis added). The appellate court in this case examined the parties' intent using contract law principles, and the court found the parties had explicitly bargained for adoption of state law to govern the class waiver's enforceability. Appendix to the Petition for Certiorari ("Pet. App.") at 2-16a. The appellate court reasoned that under state contract law, specific provisions govern over general provisions. Pet. App. 9-12a. Therefore, even though the contract states that the arbitration paragraph is generally subject to the FAA, the arbitration paragraph contains more specific language referring to the "law of your state" as governing the enforceability of the class waiver, and such specific language referencing state law trumps the more general reference to the FAA. *Id.* Furthermore, the appellate court reasoned that under state contract law, ambiguities are construed against the drafter, and this contract principle helped guide the court's interpretation of the phrase "law of your state" as referring to California law. *Id.*

---

[3] As explained in Section II, *infra*, such preemption is not entirely clear. Many conflicts exist in lower courts regarding *Concepcion*'s preemption analysis and its impact on state laws.

This Court generally does not sit to review state courts' interpretations of contractual terms based on state contract law, and thus, the Court should affirm the decision below which applied general contract law principles and found that the phrase "law of [each customer's] state" refers to California law in this case. *Volt*, 489 U.S. at 474 ("Appellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.").

B. Enforcing The Parties' Agreement To Incorporate State Law Advances Party Autonomy, Promotes Federalism, And Improves Dispute Resolution In Both Arbitration And The Courts

Why would parties choose to incorporate state law that could potentially invalidate an arbitration clause? Most fundamentally, because arbitration is a matter of contract, parties are free to limit the circumstances under which they are bound to arbitrate. Courts show respect for party autonomy, the most critical value in arbitration law, by allowing parties to incorporate state law in arbitration agreements and enforcing the parties' limitations regarding when they will arbitrate. Edward Brunet, Richard E. Speidel, Jean E. Sternlight & Stephen H. Ware, *Arbitration Law in America: A Critical Assessment* 3 (2006) ("parties own the dispute and should be able to control the details of their disputing process"); *Volt*, 489 U.S. at 479 ("[T]he FAA's primary purpose [is] ensuring

that private agreements to arbitrate are enforced according to their terms."). This critical value of party autonomy is also "directly related to the freedom essential in a democratic state." Brunet, *supra*, at 5. By respecting the bargained-for language in the contract at hand, the Court would advance this fundamental value of party autonomy.

Giving effect to state laws chosen by the parties in an arbitration agreement promotes not only party autonomy, but also federalism values. Peter B. Rutledge, *Arbitration and the Constitution* 121 (2013). Rigorous enforcement of arbitration agreements as written, including the incorporation of state law chosen by the parties, can promote federalism values by spurring competition among states to regulate arbitration in different ways. *Id.* Respecting parties' affirmative choices of state law to govern their arbitration agreements can lead to greater diversity of state laws and greater variations between state laws and federal practice. *Id.* Vibrant, diverse bodies of state law governing arbitration should allow parties greater flexibility and choices to design procedures to resolve disputes, and greater experimentation in the field of arbitration can, in turn, spur innovation and developments in judicial procedures. For example, in June 2014, New York established new court procedures for complex commercial cases, and pursuant to these new rules, cases are supposed to be ready for trial within nine months of a request for judicial intervention. *See* Administrative Order of the Chief Administrative Judge of New York's Courts (June 2,

2014), https://www.nycourts.gov/rules/comments/orders/AO-77-14.pdf. Interestingly, the growth and use of commercial arbitration inspired these procedural innovations in court. Lia Iannetti, *New Rule on Accelerated Adjudication Procedures in New York State Courts*, http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/861/New-Rule-on-Accelerated-Adjudication-Procedures-in-New-York-State-Courts.aspx.

Although nothing forces parties to submit to state laws regarding arbitration, they may voluntarily choose to do so for many reasons. The above hypothetical based on *Preston v. Ferrer*, *supra* p. 11, illustrates one reason why parties may voluntarily choose to submit to state law. If a state establishes a specialized administrative agency to resolve particular claims, the drafting party may prefer the benefits, expertise, and carefully-developed rules of such administrative agencies to arbitration, and thus, the drafting party may provide that if "the law of your state" requires resolution of a dispute before an administrative agency, the arbitration clause is not enforceable. But in other states where such specialized administrative agencies do not exist, the drafting party may prefer arbitration.

Another reason parties may bargain for application of state law is that state law may have special features unavailable through the FAA, and the ability to incorporate such features may make arbitration more appealing. *See, e.g.*, N.J. Stat. Ann. § 2A:23B-4(c) ("[N]othing in this act shall preclude the parties from expanding the scope of judicial review of an

award by expressly providing for such expansion. . . ."); *Mattel*, 552 U.S. at 590 (although the FAA does not provide for expanded judicial review of awards, parties can agree to incorporate "state statutory or common law" permitting a different level of judicial review). For example, taking advantage of state law, DirecTV made a purposeful choice in drafting its arbitration clause to provide that arbitral awards can be challenged for mere "errors of law," a level of judicial review not available under the FAA. *See* Customer Agreement § 9(c), JA 128.

Parties may also choose state law to govern arbitration clauses due to reputational concerns. For example, if a state has a strong policy guaranteeing a judicial or administrative forum for consumer or employment claims, a company or employer may be willing to forgo arbitration in that state in certain circumstances to promote a good reputation with employees or consumers in that state and to avoid the perception of undermining state policies. In addition to maintaining a good reputation with customers or employees, employers or corporations may willingly choose to submit to state policies to maintain a good rapport with state government officials or regulators, who may have the power to grant benefits in other matters. Perhaps DirecTV drafted a contract providing for application of "the law of [each customer's] state" in order to maintain a good reputation among customers and government regulators. Concern about one's reputation among members of the public and government officials due to the use of arbitration

clauses is not far-fetched. For example, in 2014, General Mills suddenly reversed its adoption of an arbitration clause just a few days after its implementation because of criticism from the public and government officials. *Sen. Menendez Urges FTC to Intervene on Behalf of General Mills Customers*, Apr. 17, 2014, http://www.menendez.senate.gov/news-and-events/press/sen-menendez-urges-ftc-to-intervene-on-behalf-of-general-mills-customers; Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, N.Y. Times, Apr. 20, 2014, at A17.

One can infer that another particular reason petitioner DirecTV drafted a contract providing for state law to govern is that a state-by-state analysis can be used to frustrate the certification of a nationwide class. DirecTV included a "blowup" or non-severability clause, which invalidates the entire arbitration agreement if "the law of [each customer's] state" finds the class waiver unenforceable. Customer Agreement § 9(c), JA 128. Imagine a hypothetical situation where DirecTV's agreement did not contain the blowup clause. Without a blowup clause and its direction to engage in a state-by-state analysis of the class waiver, there is a risk that a court in one state may apply its state law to invalidate the class waivers for an entire nationwide class. After such a sweeping invalidation of the class waivers for an entire nationwide class based on the laws of one state, perhaps class proceedings could potentially occur consisting of a nationwide class of all DirecTV customers. However, by including the blowup clause

requiring an individualized, state-by-state analysis, DirecTV ensures that if a customer files a nationwide class action in court, a court would not sweepingly invalidate the class waiver for the entire nationwide class based on the laws of just one state. As a result of the blowup clause with its state-by-state analysis, arbitration will generally be compelled on an individual basis in states whose laws permit class waivers. But in the event a court finds that a class waiver is not allowed under a particular state's laws, the blowup clause providing for a state-by-state analysis would invalidate the arbitration clause just in that one state, not the entire country, and the case could perhaps proceed as a statewide class, but not automatically as a nationwide class. By incorporating the "law of [each customer's] state" in the blowup clause, DirecTV made a calculated choice to provide for a state-by-state analysis of its class waiver, which in turn helps thwart the possibility of certification of a nationwide class. *See, e.g.*, *Hill v. T-Mobile USA, Inc.*, 2011 WL 10958888, at *18 (N.D. Ala. May 16, 2011) ("Plaintiffs have also failed to factor in the varying impact that class action waivers, agreements to arbitrate, and challenges to such provisions' contractual enforceability *as a matter of state law* will have on the predominance inquiry [in connection with a purported nationwide class].") (emphasis added); *Cohen v. DirecTV, Inc.*, 2007 WL 5314555 (Cal. Super. Ct. Nov. 15, 2007) ("Where a *state by state* analysis of an arbitration provision's enforceability would be required to certify a nationwide class, predominance does not exist and the nationwide class should not be

certified.") (emphasis added and citation omitted), *aff'd*, 101 Cal. Rptr. 3d 37 (Cal. Ct. App. 2009).

DirecTV's arbitration clause is a sophisticated, tailored arbitration clause reflecting DirecTV's calculated decisions to design a specific arbitration proceeding of its own liking, which parties are entitled to do under the FAA. Taking advantage of state law, DirecTV's custom-fit arbitration clause provides that arbitral awards can be challenged for mere "errors of law," a level of judicial review not available under the FAA. Customer Agreement § 9(c), JA 128; *Mattel*, 552 U.S. at 590 (although the FAA does not allow for contractually-expanded judicial review of awards, parties can modify the level of judicial review pursuant to "state statutory or common law"). Also, most likely to hinder the certification of a nationwide class and ensure individual arbitration proceedings or at most, statewide classes, DirecTV specifically provided for a state-by-state analysis regarding the enforceability of its class waiver. Customer Agreement § 9(c), JA 128-29. Having drafted such a detailed, sophisticated arbitration clause incorporating state laws for its own benefit, DirecTV should be held to its side of the bargain, and the clause should be enforced according to its terms.

II. The Court Should Not Apply *Concepcion*'s Preemption Test In This Case

DirecTV relies heavily on *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), to argue that the

class waiver must be enforced as a matter of federal law under *Concepcion*'s preemption analysis, notwithstanding the provision that the "law of [each customer's] state" governs the enforceability of the class waiver in this case. However, *Concepcion* is distinguishable and does not control this case because *Concepcion* did not involve a contract where parties explicitly chose to incorporate state law and because *Concepcion* involved an unrelated conflict between the FAA and a vague state rule not at issue here. Furthermore, *Concepcion*'s "purposes-and-objectives" preemption test is destabilizing arbitration law, and because of many problems associated with this test, the Court should be hesitant to expand *Concepcion* to the case at hand where the parties bargained for application of state law in a custom-fit arbitration clause.

A. *Concepcion* Is Inapplicable Because The Parties In *Concepcion* Did Not Bargain For State Law To Govern The Enforceability Of The Class Waiver

In *Concepcion*, the Court faced a narrow, specific issue: in connection with a broad arbitration clause, whether § 2 of the FAA preempted California's *Discover Bank* rule, which classified class waivers as unconscionable under certain circumstances. 131 S. Ct. at 1746 ("The question in this case is whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."). As explained above, the FAA's preemption doctrine does not operate in a vacuum without

consideration of the parties' agreement, the foundation of all arbitration. In other words, a correct preemption analysis under the FAA must take into account the parties' agreement; the FAA's preemption analysis cannot be limited to solely examining the FAA and a particular state law in the abstract without consideration of the agreement. It is critical to remember that the arbitration clause in *Concepcion* was broad, and the Court in *Concepcion* did not address a situation where the parties explicitly adopted state law to govern the arbitration agreement, or more specifically, the enforceability of the class waiver. Instead, the plaintiffs in *Concepcion* tried to argue that a state rule superseded and invalidated the terms of their contract. *Id.* at 1745-46. Here, however, the parties specifically incorporated state law into their contract. If the parties in *Concepcion* specifically chose state law to govern the enforceability of the class waiver, the outcome in *Concepcion* could have been different because, as explained above, the FAA allows parties to incorporate state law to govern their arbitration agreements.

B. *Concepcion* Is Inapplicable Because *Concepcion* Addressed An Unrelated, Manipulable State Rule Not At Issue Here

Concepcion is also distinguishable because *Concepcion* involved California's *Discover Bank* rule, which only applies if certain factors exist, including "small amounts of damages," a "consumer contract of adhesion," a party with "superior bargaining power,"

and "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 131 S. Ct. at 1746. The Court in *Concepcion* was skeptical of the *Discover Bank* rule because it found this particular state rule was "malleable" and "toothless." *Id.* at 1750. For example, the requirement of "small" damages was found to be unclear because several thousand dollars could be considered "small," and virtually every consumer transaction involves adhesive contracts with a stronger party. *Id.* Moreover, to trigger the *Discover Bank* rule, a party needed just a mere allegation of a scheme to defraud. *Id.* In other words, the Court found the *Discover Bank* rule was a hollow rule that could be manipulated to invalidate arbitration agreements.

In the present case, however, the vague *Discover Bank* rule from *Concepcion* is not at issue. Instead, the plaintiffs' underlying claims, which also serve as a basis for invalidating the class waiver provision, include California's Consumers Legal Remedies Act, CAL. CIV. CODE § 1750, *et seq.*, a consumer protection statute embodying strong, fundamental state policies and banning all contractual waivers of the right to bring collective proceedings on behalf of other consumers. JA 56-97. The trial court in the present case found that this California law, which the parties bargained for, provided a clear basis to invalidate the class waiver provision in DirecTV's contract. Pet. App. 17-20a. After finding the waiver of class procedures to be invalid under the bargained-for state law, the court then enforced the parties' bargain to invalidate

the entire arbitration clause pursuant to the blowup or non-severability clause in the contract. *Id.* The statute at issue in the present case, which helps protect public rights by banning all contractual waivers of collective proceedings, is different from the "malleable" and "toothless" state rule considered in *Concepcion*.

It is not clear whether the FAA as interpreted in *Concepcion* would preempt every possible law that could invalidate waivers of judicial class procedures or arbitral class procedures, such as, for example, state or federal laws providing for *qui tam* actions, laws providing for public injunctive and collective relief to protect consumers or employees, or the right of workers to engage in concerted activity. *See, e.g.*, *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (class waivers violate federal labor law). *Concepcion* did not involve the state law at issue in this case and instead involved a manipulable state rule, which the *Concepcion* plaintiffs tried to use to override the terms of their agreement.

However, and more importantly, the Court does not need to determine the precise contours of the FAA's preemption doctrine under *Concepcion* because, unlike the arbitration clause in *Concepcion*, DirecTV and the respondents specifically chose state law to govern the enforceability of the class waiver in this case.

C. The Court Should Be Hesitant To Expand *Concepcion*'s "Purposes-And-Objectives" Preemption Test, Which Is Destabilizing Arbitration Law

Concepcion's preemption test examines whether a state law presents an "obstacle" to the FAA's objectives, or whether a state law has a "disproportionate impact" on arbitration or somehow interferes with a vague notion of the "fundamental attributes of arbitration," which are not explicitly defined in the statute. 131 S. Ct. at 1747, 1748. This vague "purposes-and-objectives" preemption test is destabilizing arbitration law and causing confusion and conflicting lower court decisions.

Prior to *Concepcion*, many courts engaged in a review of arbitration agreements by borrowing an analysis derived from this Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). For example, based on *Gilmer*, lower courts would sometimes find that an arbitration agreement was unconscionable and unenforceable if the plaintiff had to pay prohibitively expensive arbitrator's fees. *See, e.g.*, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) (relying on *Gilmer* to develop standards regarding arbitrator's fees); *Abrahim v. ESIS, Inc.*, 2008 WL 220104, at *5-6 (N.D. Cal. Jan. 25, 2008) (relying on the *Armendariz* unconscionability analysis to invalidate an arbitration agreement's fee provisions); *Lelouis v. W. Directory Co.*, 230 F. Supp. 2d 1214 (D. Or. 2001) (same). However, based on the vague, broad preemption

analysis of *Concepcion*, some courts have rejected or questioned this pre-*Concepcion* unconscionability analysis regarding arbitration fees. *Compare Mercado v. Doctors Med. Ctr. of Modesto, Inc.*, 2013 WL 3892990, at *6 (Cal. Ct. App. July 26, 2013) (*Concepcion*'s preemption test casts doubt on the continuing validity of the *Armendariz* unconscionability analysis because unconscionability arguments can no longer rely on the uniqueness of an arbitration clause), *with Collins v. Taco Bell Corp.*, 2013 WL 3984252, at *4 (C.D. Cal. July 31, 2013) (*Concepcion* does not abrogate the unconscionability analysis set forth in *Armendariz*).

Some courts are interpreting *Concepcion* as severely restricting the scope of unconscionability analysis. For example, in *Lucas v. Hertz Corp.*, a federal district court addressed an unconscionability challenge to an arbitration agreement that arguably banned all discovery. 875 F. Supp. 2d 991 (N.D. Cal. 2012). The court explained that prior to *Concepcion*, many courts invalidated severe discovery limits as unconscionable: "Prior to the Supreme Court's ruling in *Concepcion*, numerous courts, at both the state and federal level, found arbitration agreements substantively unconscionable where the rules of the arbitral forum allowed for only minimal discovery or where the affect [sic] of the discovery rules operated solely to one side's benefit." *Id.* at 1007 (citations omitted). However, the *Lucas* court noted that under *Concepcion*, the FAA preempts an unconscionability analysis relying on the "uniqueness of an agreement to arbitrate,"

and therefore, "limitations on arbitral discovery no longer support a finding of substantive unconscionability." *Id.* at 1007. The *Lucas* court found that "in this post-*Concepcion* landscape, the arbitration agreement [at issue with its limited discovery provisions] is not substantively unconscionable." *Id.* at 1009. *See also Zaborowski v. MHN Gov't Servs., Inc.*, 2014 WL 7174222, at *3 (9th Cir. Dec. 17, 2014) (dissenting opinion) (the majority's test regarding severance, which finds that multiple unconscionable provisions will render an entire arbitration agreement unconscionable and unenforceable, has "a disproportionate impact on arbitration agreements," and therefore under *Concepcion*, the FAA should preempt the majority's test).

Concepcion's broad preemption test is also causing problems with lower courts' analysis of lack of mutuality in arbitration agreements. If only one party is bound to arbitrate, or if an arbitration clause excludes from its scope certain claims likely to be brought by one party, some courts have held that such a lack of mutuality makes the arbitration clause unconscionable. For example, in *Figueroa v. THI of New Mexico*, 306 P.3d 480 (N.M. Ct. App. 2012), a personal injury nursing home case, a New Mexico appellate court found such a one-sided arbitration clause to be unconscionable and unenforceable. The court explained that an arbitration agreement is one-sided or unconscionable "where the drafter unreasonably reserved the vast majority of his claims for the courts, while subjecting the weaker party to arbitration

on essentially all of the claims that party is likely to bring." *Id.* at 491. However, in another case involving the identical arbitration clause in *Figueroa*, the Tenth Circuit, relying on *Concepcion*, found that the clause was fully enforceable because the FAA preempted such an unconscionability analysis. *THI of New Mexico v. Patton*, 741 F.3d 1162 (10th Cir. 2014). The Tenth Circuit reasoned that the lack of mutuality analysis, whereby an arbitration clause is unconscionable because one party reserves the right to go to court, incorrectly presumes the inferiority of arbitration. *Id.* at 1169-70. The Tenth Circuit held that under *Concepcion*, the FAA preempts such a state law focusing on the uniqueness of an arbitration clause. *Id.*

Concepcion's vague "purposes-and-objectives" preemption test is creating confusion and conflicting decisions in a variety of fact patterns involving arbitration fees, discovery limits, severance of unconscionable terms, and lack of mutuality. Such confusion in arbitration law is particularly harmful because increased litigation regarding arbitration law undermines the value of arbitration. Because *Concepcion* is destabilizing arbitration law with its vague preemption doctrine in many different contexts, the Court should not expand *Concepcion* to apply here. Instead, *Concepcion* should be limited to its unique facts regarding the validity of a class waiver in the face of a malleable state rule and broad arbitration clause, where parties did not specifically incorporate state law to govern. *Cf. Wyeth v. Levine*, 555 U.S. 555,

594, 604 (2009) (Thomas, J., concurring) ("purposes-and-objectives" preemption analysis is "freewheeling" and "inherently flawed," gives effect to "judicially manufactured policies," and ultimately results in an "illegitimate" and "unconstitutional invalidation of state laws").

D. The Court Should Re-Affirm The Role Of State Arbitration Law Because Of The Shrinking Scope Of Judicial Review Of Arbitration Agreements

There is a more troubling aspect arising from *Concepcion* when one considers the broader context of the Court's arbitration jurisprudence. Some courts are using *Concepcion*'s broad preemption test to narrow the scope of judicial review regarding the enforceability of arbitration agreements. As explained in the prior section, *Concepcion*'s vague preemption doctrine is circumscribing the unconscionability analysis of courts, which in turn makes it more difficult for courts to police the fairness of arbitration clauses. As demonstrated by the *Lucas* case discussed in the prior section, some courts broadly construe *Concepcion* as preempting any argument related to the uniqueness of an arbitration clause, and hence some courts are rejecting unconscionability attacks regarding one-sided, unfair arbitration procedures. Furthermore, in *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2011), the Court limited the applicability of the effective vindication doctrine and characterized the doctrine as dicta. For decades,

the effective vindication doctrine provided a tool for courts to review the fairness of particular arbitration agreements to ensure that parties could effectively vindicate their rights. However, courts are construing the *American Express* case as limiting the ability of parties to challenge unfair arbitral terms. *Byrd v. SunTrust Bank*, 2013 WL 3816714, at *18 (W.D. Tenn. July 22, 2013) ("[The Court's *American Express* decision] makes it more difficult to demonstrate that particular provisions in an arbitration clause are unenforceable because those provisions make it more expensive to arbitrate a federal statutory claim."); *compare Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (finding "provisions of . . . arbitration agreements . . . invalid because they prevent the vindication of statutory rights under *state* and federal law") (emphasis added), *with Torres v. CleanNet, U.S.A., Inc.*, 2015 WL 500163, at *6-7 (E.D. Pa. Feb. 5, 2015) (*American Express* limited the effective vindication doctrine as dicta, and this dicta does not apply to protect the vindication of state statutory rights). Additionally, in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), the Court addressed delegation clauses whereby parties delegate to the arbitrator issues regarding the enforceability of arbitration agreements. The Court found that such delegation clauses are fully enforceable unless a party makes the difficult showing of directing a narrow, specific challenge to the delegation clause. *Id.* at 72.

Taken together, *Concepcion*'s expansive preemption test, *American Express*' limiting of the effective

vindication doctrine as dicta, and *Rent-A-Center*'s enforcement of delegation clauses are all combining to constrict the scope of judicial review of the enforceability of individual arbitration agreements. The significance of these cases is that there is less judicial oversight of arbitration agreements for fundamental fairness.

Furthermore, as demonstrated by the Consumer Financial Protection Bureau's landmark report to Congress regarding arbitration, meaningful consent from consumers is often lacking in connection with arbitration agreements. Consumer Fin. Prot. Bureau, *Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at 11 (March 2015) ("Consumers are generally unaware of whether their credit card contracts include arbitration clauses."). However, the foundation of all arbitration is supposed to be based on the meaningful consent of the parties. *Cf. Wellness Int'l Network v. Sharif*, 575 U.S. ___ (2015) (waiver of the right to Article III adjudication should be "knowing and voluntary").

In light of the narrowing scope of judicial review of arbitration agreements under the FAA, it seems that courts are moving closer to a model of almost rubberstamping arbitration agreements, without much analysis of the fairness of particular arbitration provisions. Courts are increasingly sending consumers and employees, without meaningful consent, into a quasi-judicial system lacking many procedural protections. Because of the decreasing level of judicial

review of arbitration agreements under the FAA, state law can play an increasingly important role in reviewing the enforceability and fairness of arbitration agreements. Considering this broader context of the development of FAA jurisprudence and the explosion of arbitration clauses in America, the Court should re-affirm the role of state law in connection with arbitration agreements when selected by the parties and avoid further expansion of *Concepcion* preemption in this case.

III. The Court Should Affirm The Appellate Court's Interpretation Of The Contractual Terms Because Disregarding The Appellate Court's Interpretation Would Result In Erosion Of State Sovereignty

To better understand the preemption issues and federalism concerns in this case, it is helpful to recall the context in which Congress enacted the FAA in 1925. This background provides additional reasons why the Court should not disturb the state court's interpretation of the phrase "the law [of a customer's] state" to refer to California law in this case.

It is important to remember that arbitration laws existed in America long before the enactment of the FAA and similar state statutes during the 1920s. The FAA and similar state statutes enacted during the 1920s are "modern" arbitration statutes, in the sense that these statutes generally provide for the enforcement of an agreement to arbitrate *future* disputes

arising out of the agreement. Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 15 (1992). However, arbitration law in America did not begin with these modern arbitration statutes. Prior to the enactment of modern arbitration laws during the 1920s, nineteenth-century America was teeming with a rich, complex body of arbitration laws, both statutory and judge-made. *Id.* at 15; Wesley A. Sturges, *A Treatise on Commercial Arbitration and Awards* 2 (1930) (nearly every state permitted "at least two general systems of arbitration," arbitration pursuant to common law and arbitration pursuant to state statutes); James S. Caldwell, *A Treatise of the Law of Arbitration* (1853). There was, and still is, a rich tapestry of state arbitration laws that should co-exist with the FAA in our federalist system. In cases like *Mattel*, *Mastrobuono*, and *Volt*, this Court has recognized that through the parties' agreement, parties may tap into and incorporate these state laws.

Merchants during the early 1900s developed and lobbied for the FAA because they desired a binding way to resolve future commercial disputes outside of court, particularly in light of a changing and growing national economy in a pre-*International Shoe* era. Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* 98-99, 176-77 (2013). The quintessential type of dispute covered by the FAA involved contractual, not statutory, claims

regarding the quality of goods shipped from one state to another.[4] Also, the enactment of the FAA was part of a broader movement for procedural reform. Szalai, *supra*, at 166-73; *see also* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. Rev. 1939 (2014). Business interests turned to arbitration because of frustrations with the delays and technicalities of an overly-complex, overburdened judicial system of the early 1900s. Szalai, *supra*, at 166-73. Both the FAA and the Rules Enabling Act of 1934, which, of course, led to the establishment of a nationally-uniform set of procedural rules for the federal courts, were landmark procedural reforms which grew out of this same environment of frustration with the complex, existing judicial system. *Id.*

The governing, universal understanding of arbitration law at the time of the FAA's enactment was that arbitration law was procedural law and the law of the forum. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 287 & n.1 (1995) (Thomas, J.,

---

[4] *See* 9 U.S.C. § 2 ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such contract*. . . .") (emphasis added); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting, joined by Brennan, J.) ("The plain language of this statute . . . does not encompass a claim arising under federal law. . . . Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims."). The FAA was drafted to cover only claims arising out of a contract, not statutory claims, such as some of the claims in this case. JA 56-97.

dissenting, joined by Scalia, J.). As thoroughly demonstrated by the late-Professor Ian Macneil in his groundbreaking book regarding the FAA, Congress passed the FAA in 1925 as a procedural statute applicable solely in the federal courts. *See generally* Macneil, *supra*. However, in 1984, decades after the FAA's enactment, this Court held that the FAA governed state proceedings in *Southland v. Keating*, 465 U.S. 1 (1984). As a result of the *Southland* decision, many believe that *Southland* has created an ongoing, "permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes," and "*Southland* will not become more correct over time." *Allied-Bruce Terminix*, 513 U.S. at 285 (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling [*Southland*]."); *Southland*, 465 U.S. at 23 (O'Connor, J., dissenting, joined by Rehnquist, J.) ("Congress intended to require federal, not state, courts to respect arbitration agreements."). In light of these constitutional concerns regarding *Southland*'s interference with state sovereignty, the Court should respect the state court's interpretations of the terms of the arbitration agreement at hand and not prevent parties from choosing state law.[5]

---

[5] Petitioner DirecTV quotes from section 4 of the FAA to stress that arbitration must be compelled "in accordance with the terms of the agreement." Pet. Br. 4, 11 (quoting 9 U.S.C. § 4). However, when quoting section 4 of the FAA in its brief, DirecTV does so very selectively. DirecTV conveniently omits the language from section 4 of the FAA making it clear that section 4

(Continued on following page)

Furthermore, even if one accepts *Southland* as correctly decided and that the FAA applies in state courts, the Court should still rule in favor of the respondents. As explained above, this Court generally does not sit to review state courts' interpretations of contractual terms based on state contract law. *Volt*, 489 U.S. at 474 ("Appellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review."). Moreover, as recognized in cases like *Mattel*, *Mastrobuono*, and *Volt*, courts must enforce the terms of an arbitration agreement, including terms that incorporate state law, even if the FAA would normally override the state law. State arbitration law should be allowed to flourish and co-exist with the FAA when the parties agreed to incorporate such state law.

CONCLUSION

To promote party autonomy, to carry out the FAA's core purpose, and to respect federalism values, *amici* respectfully ask the Court to enforce the

was designed for petitions to be filed only in "United States district court." *Compare* 9 U.S.C. § 4 (a party "may petition any United States district court" for an order compelling arbitration) *with* Pet. Br. 4 (a party "may petition any . . . court . . . " for an order compelling arbitration) (ellipsis in petitioner's brief). The FAA, which is a fully integrated, unitary statute covering the different stages of arbitration, was intended to apply only in federal court. *See generally* Macneil, *supra*.

bargained-for terms of the parties providing for "the law of [each customer's] state" to govern. The Court should affirm the appellate court's decision and interpretation of the contract in favor of the respondents.

Respectfully submitted,

Professor IMRE S. SZALAI
Counsel of Record
LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW
7214 St. Charles Avenue, Box 901
New Orleans, LA 70118
(504) 861-5589
iszalai@loyno.edu

List of Amici Curiae

Barbara Babcock
Judge John Crown Professor of Law, Emerita
Stanford Law School

Christine P. Bartholomew
Associate Professor of Law
SUNY Buffalo School of Law

Debra Lyn Bassett
Justice Marshall F. McComb Professor of Law
Southwestern Law School

Benjamin G. Davis
Associate Professor of Law
University of Toledo College of Law

Ellen E. Deason
Joanne Wharton Murphy/Classes of 1965 & 1973
Professor of Law
The Ohio State University Moritz College of Law

J. Herbie DiFonzo
Professor of Law
Maurice A. Deane School of Law, Hofstra University

Michael Z. Green
Professor of Law
Texas A&M University School of Law

Jack B. Harrison
Associate Professor of Law
Salmon P. Chase College of Law
Northern Kentucky University

Deborah R. Hensler
Judge John W. Ford Professor of Dispute Resolution
Stanford Law School

Patricia W. Moore
Professor of Law
St. Thomas University School of Law

Jacqueline Nolan-Haley
Professor of Law and Director of ADR & Conflict
Resolution Program
Fordham University School of Law

David B. Oppenheimer
Clinical Professor of Law
University of California, Berkeley School of Law

Richard C. Reuben
James Lewis Parks Professor of Law and Journalism
University of Missouri School of Law

Cassandra Burke Robertson
Professor of Law and Laura B. Chisolm
Distinguished Research Scholar
Case Western Reserve University School of Law

Victoria Shannon Sahani
Assistant Professor of Law
Washington and Lee University School of Law

Andrea Kupfer Schneider
Professor of Law and Director, Dispute
Resolution Program
Marquette University Law School

Joan E. Steinman
Distinguished Professor of Law
Chicago-Kent College of Law

Jean Sternlight
Saltman Professor and Director, Saltman
Center for Conflict Resolution
University of Nevada, Las Vegas, Boyd School of Law

Elizabeth Tippett
Assistant Professor
University of Oregon School of Law

Nancy A. Welsh
William Trickett Faculty Scholar and
Professor of Law
Penn State University, Dickinson Schools of Law

Margaret Y. K. Woo
Professor of Law
Northeastern University School of Law