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 California Court of Appeal, Second District

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The brief in opposition only confirms that this Court's review is warranted. Respondents do not seriously deny that the decision below conflicts with the Ninth Circuit's decision in *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013), which enforced the *same* arbitration agreement at issue here and dismissed the reasoning adopted by the court below as "nonsensical." Rather, respondents attempt to shield the conflict from this Court's review by asserting that it (1) involves nothing more than state contract law, and is thus "not subject to review by this Court," Opp. 5-10 (capitalization modified), (2) is "marginal," and involves an intermediate state court, *see id.* at 10-17, and (3) is "not important," *see id.* at 17-22 (capitalization modified). Each of these arguments is manifestly incorrect.

ARGUMENT

A. Respondents' Efforts To Deny This Court's Jurisdiction Are Unavailing.

Respondents lead with the remarkable assertion that this Court lacks "jurisdiction" to review a state court's refusal to enforce an arbitration agreement governed by the Federal Arbitration Act (FAA). Opp. i, 6. That assertion conflates jurisdiction with the merits. Respondents contend that this Court lacks "jurisdiction" over this case because, in their view, "the FAA is not violated" here. *Id.* at 6.

But that is the whole dispute—the parties disagree on whether the court below violated the FAA, a federal statute, by refusing to enforce an arbitration agreement concededly governed by that statute. Respondents are obviously free to argue

that there was no such violation, but the question whether federal law has been violated itself presents a federal question subject to this Court's review. *See, e.g.*, *Bell v. Hood*, 327 U.S. 678, 682 (1946).

In light of the FAA, it is simply not true that "the question of how to interpret language in an arbitration agreement is not a preemption issue, but a matter of state contract law." Opp. 3. This Court "ha[s] said on numerous occasions that the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced *according to their terms*." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (emphasis added; internal quotations omitted). It follows that the interpretation and enforcement of arbitration agreements governed by the FAA involves a hybrid of state and federal law. "While the interpretation of an arbitration agreement is generally a matter of state law," *id.* at 681, the FAA ensures that, as a matter of *federal* law, the agreement is interpreted and enforced in a way that "give[s] effect to the intent of the parties," *id.* at 684. Under the FAA, thus, "[w]hether 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.'" *Id.* at 682 (quoting *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)).

The court below flouted that federal mandate by refusing to enforce an arbitration agreement governed by the FAA on a "nonsensical" ground. *Murphy*, 724 F.3d at 1226. As the Ninth Circuit explained, far from indicating their assent to state laws requiring classwide arbitration, the parties here

"did exactly the opposite"—they "agreed not to arbitrate only if state law required the availability of class arbitration procedures to enforce the arbitration clause." *Id.* at 1228. Because the FAA preempts any such state-law requirements, "there is no conflict between the reference to 'the law of your state' in Section 9 of the Customer Agreement and the reference to the FAA in Section 10." *Id.* By refusing to enforce the arbitration agreement based on state law preempted by the FAA, Pet. App. 7-15a, the state court below thus turned the parties' arbitration agreement on its head and made a mockery of the "emphatic federal policy in favor of arbitral dispute resolution," *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (*per curiam*) (internal quotation omitted).

Were respondents correct that the interpretation and enforcement of arbitration agreements governed by the FAA is purely a matter of state law, the statute would be a nullity—courts hostile to arbitration would be free to invoke state-law contract principles at will to defeat the parties' intent. That is not the law. Thus, in *Stolt-Nielsen*, this Court held as a matter of *federal* law that contractual silence with respect to classwide arbitration cannot be interpreted as consent to classwide arbitration, regardless of contrary state law. *See* 559 U.S. at 684-87. Similarly, in *Buckeye Check Cashing, Inc. v. Cardegna*, this Court held as a matter of *federal* law that an arbitration clause is severable from the rest of the contract, regardless of contrary state law. 546 U.S. 440, 445-49 (2006). Needless to say, these decisions would be inexplicable if, as respondents contend, the FAA has no role to play in the

interpretation and enforcement of arbitration agreements according to their terms.

Respondents appear grudgingly to acknowledge this point, arguing that "[t]his Court does not review matters of state-law contract interpretation, *unless the state-court determination denies a party's rights under ... a federal statute*." Opp. 6 (emphasis added). But that is exactly what has happened here. The decision below denied petitioner its federal arbitration rights by refusing to enforce an arbitration agreement governed by the FAA by relying on state law preempted by the FAA.

Respondents fare no better by trying to change the subject, and asserting that "[t]he dispute in this case concerns whether or not there *exists* an agreement to arbitrate." Opp. 8 (emphasis added). That assertion is mystifying. There has never been any dispute here over the existence of an arbitration agreement. *See* Pet. App. 4a (quoting parties' agreement that, if they could not resolve a dispute informally, then "any Claim either of us asserts will be resolved only by binding arbitration"). Rather, the dispute here is, and always has been, whether that agreement is *enforceable* where it would be unenforceable under state law preempted by the FAA. Because there is no dispute that the parties here entered into an arbitration agreement, *see Buckeye,* 546 U.S. at 444-46 & n.1, and that this agreement is governed by the FAA, *see* Pet. App. 5a (parties' arbitration agreement "shall be governed by the Federal Arbitration Act"), there can be no dispute that this case presents the federal question whether the parties' agreement is being enforced

"according to [its] terms," *Stolt-Nielsen*, 559 U.S. at 682 (internal quotation omitted).

Indeed, if anything, respondents' argument that the interpretation and enforcement of an arbitration agreement governed by the FAA "is purely a matter of state law for state-court determination is all the more reason for this Court to assert jurisdiction." *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*). Federal law is "the supreme Law of the Land," U.S. Const. art. VI, and the refusal of state courts to enforce the FAA, like any other federal statute, manifestly presents a federal question subject to, and worthy of, this Court's review. *See, e.g.*, *Marmet*, 132 S. Ct. at 1202 ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.").

B. Respondents' Efforts To Downplay The Conflict Between The Court Below And The Ninth Circuit Are Unavailing.

Respondents next assert that this Court's review is unwarranted because the decision below and the Ninth Circuit's decision in *Murphy* conflict "only marginally," Opp. 12, 17, and the court below is only an intermediate state appellate court, *id.* at 10-12. Again, these assertions do not withstand scrutiny.

There is nothing "marginal" about the conflict between the decision below and the Ninth Circuit's decision in *Murphy*. Both cases involved the *same* language in the *same* arbitration agreement governed by the *same* law, and the Ninth Circuit enforced that agreement while the court below refused to do so. The Ninth Circuit dismissed the reasoning adopted by the court below as

"nonsensical," 724 F.3d at 1226, while the court below dismissed the Ninth Circuit's analysis as "unpersuasive," Pet. App. 13a. It is hard to imagine a more direct conflict than this.

Respondents nonetheless try to distinguish this case from *Murphy* by arguing that state law at issue in *Murphy* was the judge-made rule of *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005), whereas the state law at issue here is the statutory anti-waiver provision of the Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1751. Opp. 13-17. That argument is both baseless and immaterial.

As an initial matter, there is no basis for respondents' assertion that the court below refused to enforce the parties' agreement based on the CLRA's anti-waiver provision, as opposed to the *Discover Bank* rule. The court certainly never said so; to the contrary, the court justified its result in part on the theory that "[a]s a practical matter, it seems unlikely that plaintiffs anticipated in 2007 that the Supreme Court would hold in 2011 that the FAA preempts the *Discover Bank* rule concerning the enforceability of class action waivers in arbitration agreements." Pet. App. 11a (internal quotation omitted); *see also id.* at 6a ("Plaintiffs argue that the law of California would find the class action waiver unenforceable because, *for example*, the CLRA expressly precludes waiver of the right to bring a class action under the CLRA.") (emphasis added).

There was no reason for the court below to distinguish between the *Discover Bank* rule and the CLRA's anti-waiver provision, because both sources of state law purport to preclude the enforcement of arbitration agreements with a class-action waiver.

And for just that reason, the FAA preempts both of them. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."). Regardless of whether state law purports to require classwide arbitration through a judge-made rule or a statute, any such requirement conflicts with the FAA. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (FAA preempts inconsistent "state law, whether of legislative or judicial origin"). Indeed, the Ninth Circuit held more than a decade ago that the FAA preempts the CLRA's anti-waiver provision. *See Ting v. AT&T*, 319 F.3d 1126, 1147-48 (9th Cir. 2003); *see also Meyer v. T-Mobile USA, Inc.*, 836 F. Supp. 2d 994, 1001 (N.D. Cal. 2011) (Breyer, J.) ("Plaintiffs' citations to the CLRA and *Discover Bank* are misplaced, as the FAA preempts both."). Indeed, respondents themselves acknowledge that "[t]he CLRA's non-waivable right to sue as a class may be preempted as to arbitration agreements governed by the FAA." Opp. 15. Thus, whether the court below applied the *Discover Bank* rule, the CLRA's anti-waiver provision, or both, is legally irrelevant: what matters is that the court applied state law preempted by the FAA to refuse to enforce an arbitration agreement governed by the FAA.

Finally, respondents miss the mark by arguing that review of this conflict is unwarranted because "the California Supreme Court has not ruled upon the issue in dispute." Opp. 10 (capitalization modified). The California Court of Appeal, unlike some other intermediate state appellate courts, binds every state trial court in the Nation's largest State.

See Pet. 9. Thus, this Court routinely reviews that court's judgments where, as here, the California Supreme Court has denied discretionary review. *See*, *e.g.*, *Riley v. California*, 134 S. Ct. 2473 (2014); *Prado Navarette v. California*, 134 S. Ct. 1683 (2014); *Fernandez v. California*, 134 S. Ct. 1126 (2014); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011). Indeed, several of this Court's leading precedents in the arbitration area involve cases on review from the California Court of Appeal. *See*, *e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 351 (2008); *Volt*, 489 U.S. at 471-73; *Perry*, 482 U.S. at 488-89. It would certainly be perverse for this Court to decline to protect federal arbitration rights in California, or to resolve a conflict between federal and state courts in that State on the scope of such rights, just because the California Supreme Court (over a dissent) has declined to do so. Because the California Court of Appeal refused to enforce the arbitration agreement at issue here, and the California Supreme Court declined to review that decision, the matter is ripe for this Court's review. *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (state-court decision refusing to enforce federal arbitration rights is final and reviewable by this Court under 28 U.S.C. § 1257).

C. Respondents' Efforts To Minimize The Importance Of This Case Are Unavailing.

Respondents finally urge this Court to deny review by asserting that the conflict between the Ninth Circuit and the California Court of Appeal is "not remotely important enough" for this Court to resolve. Opp. 17. That assertion fails on two levels.

At a basic level, respondents err by characterizing the legal issues presented here as "unique." Opp. 1, 3, 4, 12. Obviously, virtually every arbitration agreement is different. But that does not mean that the interpretation and enforcement of such agreements can never present important federal issues under the FAA. Rather, different arbitration agreements can present common legal issues. This case presents one such issue: whether a court may refuse to enforce an arbitration agreement governed by the FAA by construing a reference to state law to include state law preempted by the FAA (and thus "nullified," *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), and "without effect," *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2470, 2473, 2477 (2013) (internal quotation omitted)).

Such references to state law, as explained in the petition, are present in *millions* of consumer arbitration agreements governed by the FAA. *See* Pet. 14-16. Respondents do not seriously dispute that point. Indeed, they grudgingly concede that the H&R Block and MovieTickets.com arbitration agreements are materially indistinguishable from the agreement at issue here. *See* Opp. 20; *see also In re H&R Block Refund Anticipation Loan Litig.*, __ F. Supp. 2d __, 2014 WL 3672124, at *5 (N.D. Ill. July 23, 2014) (rejecting decision below). And they try to distinguish the T-Mobile and Time Warner agreements on the ground that the reference to state law in those agreements applies not only to the class-action waiver but also to other provisions of the agreement. Opp. 18-19. But the reasoning of the decision below applies equally to those agreements, which explains why that reasoning has been used to

challenge those agreements. *See Meyer*, 836 F. Supp. 2d at 1001. The decision below ensures that the enforcement of FAA-governed arbitration agreements in California will depend on whether the dispute is litigated in state or federal court.

Undeterred, respondents fall back on the argument that the issue is unimportant because companies are generally free to alter their arbitration agreements to remove class-action waivers altogether. Opp. 20-21. Such waivers, respondents assert, are "unnecessary" in light of *Stolt-Nielsen*, which establishes a general default rule that contractual silence cannot be construed as consent to classwide arbitration. *See id.* at 4, 13, 17, 20. That argument might have some force if this Court were the only adjudicative body in the land, but it is not. Other courts and arbitrators also construe arbitration agreements, and they may purport to find indicia that the parties sought to depart from this background rule even where this Court would not. *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067-70 (2013). Thus, out of an abundance of caution, prudent parties still include class-action waivers in their arbitration agreements, and there is no reason to penalize them for doing so.

Respondents nonetheless suggest that the issue is not important because petitioner itself has since amended its arbitration agreement to remove the reference to state law from the non-severability clause. *See* Opp. 1, 4, 21-22. But that change, of course, has no bearing on former customers, like respondents, who are not parties to the new agreement. Petitioner and other affected companies

are powerless to alter their arbitration agreements in a way that would affect their former customers. And, as the Ninth Circuit's *Murphy* decision makes clear, petitioner and other affected companies should not be required to alter their arbitration agreements at all, because it is "nonsensical" to interpret a provision designed to prevent classwide arbitration to negate arbitration altogether by resurrecting state law preempted by the FAA. 724 F.3d at 1226.

At an even deeper level, however, this case is important because it reflects "the judicial hostility towards arbitration that prompted the FAA" in the first place. *Concepcion*, 131 S. Ct. at 1747; *see also id.* ("California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts."). Precisely because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration[,] … [i]t is a matter of great importance … that state ... courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 133 S. Ct. at 501; *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (*per curiam*) ("State courts ... have a prominent role to play as enforcers of agreements to arbitrate.") (internal quotation omitted). State courts may not always like federal law, but they are duty-bound to enforce it. *See, e.g.*, *Testa v. Katt*, 330 U.S. 386, 389-94 (1947).

Because it embraced a "nonsensical" theory to thwart federal rights, *Murphy*, 724 F.3d at 1226, the decision below cannot be dismissed as a harmless error. Rather, it can only be characterized as state-court defiance of federal law. This Court, which alone can vindicate the supremacy of federal law in

state court, should not tolerate or encourage such insubordination. Because the state court below refused to enforce federal law, and in the process created a direct conflict with the Ninth Circuit, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant review.

Respectfully submitted,

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