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CLERK SUPREME COURT

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The Hon. Tani Cantil-Sakauye, Chief Justice,
and the Hon. Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Imburgia v. DirecTV, Inc.*, No. S218686

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of the Chamber of Commerce of the United States of America (the “Chamber”), the Nation’s largest business federation, I write to urge the Court to grant the petition for review and reverse the Second District’s decision in this case. That decision not only is wrong, but also threatens to disrupt thousands of consumer, employment, and business contracts throughout the State.

The Second District’s novel and counterintuitive rule of contract interpretation will frustrate the intent of contracting parties and undermine the strong policies under the Federal Arbitration Act (“FAA”) that favor the enforcement of arbitration agreements. Not only that, it also expressly conflicts with a recent decision of the U.S. Court of Appeals for the Ninth Circuit, which reached the opposite conclusion when interpreting the exact same contract. If the decision below is allowed to stand, the faithful enforcement of parties’ agreements may well depend on whether a case proceeds in state or federal court, depriving contracting parties of the stability and predictability that are essential for a well-functioning economy.

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Identity and Interest of the *Amicus Curiae*

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases involving the interpretation and enforceability of contracts containing arbitration agreements. Recent arbitration cases in which the Chamber has participated include *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740; *Iskanian v. CLS Transp. of L.A., LLC* (Cal. No. S204032); *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109; and *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.

Many of the Chamber's members and affiliates regularly include arbitration agreements in their contracts because arbitration allows them to resolve disputes quickly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. In reliance on the legislative policy reflected in the FAA and the Supreme Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements.

These agreements typically require that arbitration be conducted on an individual, rather than class or collective, basis. The contract at issue here, for example, specifies that the parties agree not "to join or consolidate claims in arbitration * * * , [n]or [to] arbitrate any claim as a representative

member of a class.” Despite this express language, however, the Second District misinterpreted the arbitration agreement’s reference to “state law” to require that arbitration proceed either on a class-wide basis or not at all—the very rule that the U.S. Supreme Court invalidated in *Concepcion*. Because this ruling, if allowed to stand, would thwart the expectations of contracting parties and undermine existing agreements, the Chamber and its members have a strong interest in this case.

Discussion

1. This Court’s intervention is needed because the Second District’s decision creates an untenable conflict between the state and federal courts in California and contravenes the FAA.

DirecTV’s customer agreement included a straightforward contract provision addressed at avoiding class arbitration, which provided that an arbitration agreement would be void “if the law of your state would find this agreement to dispense with class arbitration procedures unenforceable” (Typed Opn. 3). In the decision below, the Second District held that this provision somehow *excludes* the application of federal law. That is, according to the court below, a contract provision incorporating state law adopts not only valid state-law rules, but also state-law rules that have been held *invalid* and unenforceable under federal law—and therefore violate the Supremacy Clause of the U.S. Constitution. The court reached that result despite the parties’ express agreement in Section 10 of the contract that the arbitration agreement shall be governed by the FAA and other provisions of federal law.

The decision below stands in stark contrast to the holding of a unanimous panel of the U.S. Court of Appeals for the Ninth Circuit, whose decisions bind all of the federal courts in this State. See Typed Opn. 9-10

(citing *Murphy v. DirecTV, Inc.* (9th Cir. 2013) 724 F.3d 1218). As *Murphy* explains, the notion “that the parties intended for state law to govern the enforceability of DirecTV’s arbitration clause, even if the state law in question contravened federal law, is nonsensical.” 724 F.3d at 1226. Because the Supremacy Clause dictates that state constitutions and laws must always comport with federal law, federal law *is* state law. *Ibid.* (“the FAA * * * is the law of California and every other state”); *id.* at 1228 (“The ‘law of your state’ language of [the contract] *already* incorporates § 2 of the FAA.”). That view is consistent with other decisions holding that contract provisions adopting state law incorporate both state *and* federal law. *Id.* at 1225-1228.¹ And even if state law could somehow be read to contain a rule contrary to the FAA, “[a] contract cannot be unenforceable under state law if federal law requires its enforcement.” *Id.* at 1226. Put simply, “*Concepcion* precludes such state laws,” and the contractual reference to state law does nothing to change that. *Id.* at 1228.

This conflict creates profound problems for businesses operating in California. If the decision below is allowed to stand, different rules will apply to contracts in California state court than apply in federal court. But the meaning of a contract should not change based on whether a case proceeds in a state or federal forum, and allowing such a disparity will only encourage jurisdictional gamesmanship. Worse still, this uncertainty will

¹ See, e.g., *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta* (1982) 458 U.S. 141, 157 n.12 (“Paragraph 15 provides that the deed is to be governed by the ‘law of the jurisdiction’ in which the property is located; but the ‘law of the jurisdiction’ includes federal as well as state law.”); *Brown v. Inv. Mortg. Co.* (9th Cir. 1997) 121 F.3d 472, 476 (“The fact that the parties chose to apply the law of Washington, rather than the laws of another state, does not mean that the parties decided that federal law should not apply.”).

hinder businesses and individual consumers and employees in California that depend on consistency, predictability, and uniformity in their contract relationships.²

2. The Second District’s decision thwarts, rather than promotes, the intent of contracting parties. Whereas the Second District refused to apply the FAA here, Section 10 of the contract could not be clearer that the parties intended for the arbitration agreement to “be governed by the Federal Arbitration Act.” And whereas the Second District held that class arbitration could not be waived, *Concepcion* squarely held that the FAA—which the parties explicitly adopted—forbids States (and state courts) from conditioning arbitration on the availability of class-wide proceedings.

But even if the contract here were ambiguous, the U.S. Supreme Court has held that, “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25.³ The Second District’s decision to require this case to proceed as a

² Cf. *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 280 (“arbitration’s advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation”); *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 123 (“Arbitration agreements * * * may be of particular importance in employment litigation, which often involves smaller sums of money.”).

³ The Second District suggested that this dispute can be resolved by applying the common-law rule that ambiguous language is interpreted against the drafter. Typed Opn. 7-8. But where a state law canon such as *contra proferentem* conflicts with the federal policy favoring arbitration, that state-law rule must give way to the FAA’s mandate that ambiguities “be resolved in favor of arbitration.” *Moses H. Cone*, 460 U.S. at 25; see also *Chan v. Drexel Burnham Lambert Inc.* (1986) 178 Cal. App. 3d 632, 639 (“[A]mbiguities in an arbitration clause are to be resolved in favor of arbitration, notwithstanding the California rule that a contract is construed

judicial class action, rather than be resolved through individual arbitration, thus contravenes both the parties' express written agreement and the FAA.

3. The Second District's approach would work mischief across a vast array of consumer, employment, and business contracts. To begin, as DirecTV has amply shown, contractual provisions incorporating the law of a particular state are commonplace in arbitration agreements in California and elsewhere. See Pet. 10-12. And while the particular language of those provisions may vary, the Second District's reasoning might be extended to a wide variety of these provisions. But the deleterious consequences of the Second District's novel rule of contract interpretation could reach even more broadly.

While the FAA permits States to apply general state-law principles of contract interpretation to ascertain the meaning of the parties' agreement, it requires that such rules "govern * * * the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas* (1987) 482 U.S. 483, 492 n.9. "A court may not * * * construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Ibid.*; see also, e.g., *Doctor's Assocs., Inc. v. Casarotto* (1996) 517 U.S. 681, 676-688; *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 281.

most strongly against the drafter"); *Erickson v. Aetna Health Plans. of Cal., Inc.* (1999) 71 Cal. App. 4th 646, 656 (quoting *Chan*); accord *Huffman v. Hilltop Cos.* (6th Cir. 2014) 747 F.3d 391, 396-97 ("It is true that courts generally rely on the *contra proferent[e]m* doctrine to resolve ambiguities against the drafter of the agreement. But where ambiguity in agreements involving arbitration exists, such as here, the strong presumption in favor of arbitration applies instead.").

This principle means that the Second District’s rule requiring that contractual references to state law be interpreted to exclude federal law must apply to *all* contracts, not just to arbitration provisions. If the decision below is allowed to stand, then any time a contract includes language like DirecTV’s that is aimed at complying with appropriate state law, the contract must be read to exclude the application of federal law. If the opinion below is permitted to stand as precedent, other courts might decide that a contractual choice of state law excluded the parties from protection of federal constitutional provisions other than the Supremacy Clause, which the Second District held inapplicable here. The Second District’s ruling therefore threatens to upend the settled expectations of parties to an untold number of contracts affecting citizens throughout the State.

4. It is critical that this Court step in to rectify the Second District’s error and restore the proper application of federal law and the FAA. Because “[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act * * * [i]t is a matter of great importance” that they rigorously enforce the FAA’s commands, “including the Act’s policy favoring arbitration.” *Nitro-Lift Techs., LLC v. Howard* (2012) 133 S.Ct. 500, 501.

When—as here—lower courts directly under the supervision of this Court clearly err in their enforcement of federal law, this Court should make clear that federal law cannot be cast aside so easily. This Court’s review and reversal of the plainly erroneous and deeply problematic decision below will send a message to the courts of this State that they cannot “contradict or fail to implement the rule[s] * * * established” by the U.S. Supreme Court’s interpretations of the FAA. *Marmet Health Care Ctr., Inc. v. Brown* (2012) 132 S.Ct. 1201.

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Conclusion

The petition for review should be granted and the decision of the Court of Appeal reversed.

Respectfully submitted,



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I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On June 27, 2014, I served the foregoing document(s) described as:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 27, 2014, at Palo Alto, California.


Kristine Neale