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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND RETAIL LITIGATION CENTER, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America 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. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.[1]

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million people, contributes roughly $2.1 trillion to the national economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office.

legislative and regulatory environment conducive to economic growth.

The Retail Litigation Center, Inc., is a public-policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues affecting its members, and to highlight the potential industry-wide consequences of significant pending cases.

Arbitration agreements allow the parties to replace expensive, time-consuming, and contentious in-court litigation with speedy, inexpensive, fair, and often far less adversarial dispute-resolution procedures. For these reasons, many of *amici*'s members and affiliates routinely employ arbitration agreements as a key element in millions of their contractual relationships. As Congress intended when it enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16, the result has been not only conservation of judicial resources but also substantial cost savings for the parties, which in turn have allowed for lower prices for consumers, higher wages for employees, and benefits for the national economy as a whole.

The many benefits of arbitration agreements are threatened when courts impose or enforce state-law rules that do not apply uniformly to all contracts or are inconsistent with the strong federal presumption in favor of arbitrability. Although this Court has consistently condemned such discriminatory rules, some

state courts persist in their determined efforts to circumvent federal law. Accordingly, *amici* have a strong interest in ensuring that decisions like the one here that are starkly inconsistent with this Court's FAA precedents are not allowed to stand.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has observed that "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1747 (2011). The decision of the California Court of Appeal in this case represents just such a device—and one that poses a particularly troubling threat to the uniform, consistent application of the FAA and this Court's precedents throughout the nation.

The vast majority of arbitration agreements today require that disputes be resolved on an individual rather than classwide basis. That is because class proceedings are irreconcilable with the simplicity, informality, and expedition that are the hallmarks of arbitration. *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685-687 (2010); see also *Concepcion*, 131 S. Ct. at 1749-1753. The contract at issue here, for example, specifies that the parties agree not "to join or consolidate claims in arbitration * * * or arbitrate any claim as a representative member of a class or in a private attorney general capacity." Pet. App. 5a (internal quotation marks omitted).

That arbitration provision self-evidently was designed to apply as part of a uniform contract in the many states in which DIRECTV operated. It was drafted before this Court issued its decision in *Con-*

cepcion, when some courts (especially in California) not only refused to enforce agreements to arbitrate on an individual basis, but also ordered—contrary to the parties' agreements—that arbitration take place on a classwide basis. Recognizing that phenomenon—and seeking to make doubly sure that arbitrations would be conducted on an individual basis only—the arbitration agreement expressly provided that if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] is unenforceable." Pet. App. 5a (internal quotation marks omitted).

In a linguistic backflip that the Ninth Circuit properly termed "nonsensical" (*Murphy* v. *DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013)), the California Court of Appeal here interpreted the parties' additional safeguard not as an express statement of intent to require individual arbitration and avoid classwide arbitration, but instead as an agreement to divert claims from individual arbitrations to judicial class actions. Indeed, the court held that the safeguard applies even if the state-law rules requiring class procedures are preempted by the FAA.

The California Court of Appeal adopted so tortured a reading of clear contract language that its conclusion can be explained only as the singling out of the parties' arbitration agreement for suspect status. The court's decision thus constitutes impermissible discrimination against arbitration. Indeed, it reflects the precise judicial hostility toward arbitration that Congress enacted the FAA to forestall.

The California Court of Appeal also violated the principle that, as a matter of federal law, any ambiguities in arbitration agreements must be resolved in

favor of arbitration. The court concluded that the arbitration provision here was subject to two possible interpretations, and then, ignoring the FAA's requirement that ambiguities in arbitration agreements be construed in favor of arbitration, chose an unnatural reading of the contract that *disfavored* arbitration—interpreting the arbitration agreement in a manner that served to void it.

The lower court's failure to abide by these settled principles reflects not only hostility toward arbitration, but also an effort to evade the FAA and this Court's precedents interpreting the statute. This Court should reverse the holding below and reaffirm the supremacy of federal law.

ARGUMENT

The rules for interpreting contracts are generally the province of state law. With respect to arbitration agreements, however, the FAA constrains state law. It prescribes two federal-law principles to prevent courts from manipulating state law to undermine private parties' federal right to agree to resolve their disputes efficiently and fairly through arbitration. First, state law must not discriminate against arbitration or be applied in a manner that disfavors arbitration agreements. Second, any ambiguity in the terms of an arbitration agreement must be resolved in favor of arbitration.

The decision below violates both principles. And it does so in a particularly pernicious way, by construing the plain language of an arbitration agreement in an idiosyncratic manner to circumvent this Court's binding FAA precedents and thereby frustrate Congress's intent to promote the use of arbitration to resolve disputes. The Court should make

clear—once again—that state-law determinations violating these principles are preempted by the FAA.

A. The Decision Below Impermissibly Discriminates Against Arbitration.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted); see also, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008) ("Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner.") (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984)); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (FAA "seeks broadly to overcome judicial hostility to arbitration agreements").

At the heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (emphasis added) (quoting 9 U.S.C. § 2). "By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk* v. *Alberto-Culver Co.*, 417

U.S. 506, 511 (1974)). State-law rules that discriminate against arbitration are flatly forbidden.[2]

In *Casarotto*, for example, this Court held that "threshold limitations placed specifically and solely on arbitration provisions" are unenforceable because they are "antithetical to" the "'goals and policies' of the FAA" to promote arbitration by treating arbitration agreements as favorably as any other contract. 517 U.S. at 688. Thus, the Court concluded that the FAA preempted a Montana statute requiring special notice of an arbitration provision on the first page of a contract, because the statute "singl[ed] out arbitration provisions for suspect status." *Id.* at 687.

The Court refused to excuse this special notice requirement as a particular application of a general state policy that unexpected contract terms must be conspicuous, and instead reiterated that "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Casarotto*, 517 U.S. at 687 n.3 (quoting *Perry*, 482 U.S. at 492 n.9).

The Court has likewise held, in a long string of decisions, that the FAA preempts and forbids en-

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[2] See, *e.g.*, *Marmet Heath Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745; *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67-68 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Preston*, 552 U.S. at 356; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce*, 513 U.S. at 270-271; *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland*, 465 U.S. at 10-11 & 16 n.11.

forcement of state-law rules categorically "prohibiting arbitration of a particular type of claim," because such state-law bars are "contrary to the terms and coverage of the FAA." *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam) (FAA preempted state-law ban on arbitration of claims against nursing homes); see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA preempted state law requiring judicial resolution of claims involving punitive damages); *Perry*, 482 U.S. at 489-491 (FAA preempted state law requiring that litigants be provided a judicial forum for wage disputes); *Southland*, 465 U.S. at 10 ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," including for claims brought under state franchise-investment law).

2. The FAA permits states to apply general state-law principles of contract interpretation to ascertain the meaning of an agreement to arbitrate, as long as those rules "govern * * * the validity, revocability, and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added). "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.*, *Casarotto*, 517 U.S. at 686-688; *Allied-Bruce*, 513 U.S. at 281.

The California Court of Appeal in this case professed to engage in ordinary contract interpretation, but the tortured and illogical manner in which it did so "singl[ed] out [the] arbitration provision[] for sus-

pect status" (*Casarotto*, 517 U.S. at 687), thereby impermissibly discriminating against arbitration.

As explained above (at 3-4), the arbitration agreement here expressly required arbitrations to take place on an individual rather than classwide basis. Indeed, class arbitration was so antithetical that the agreement invalidated itself if class arbitration were required by the governing law: "[I]f 'the law of your state would find this agreement to dispense with class arbitration procedures unenforceable'"—thereby permitting enforcement of the arbitration agreement only if class arbitration were available—"'then this entire [arbitration provision] is unenforceable.'" Pet. App. 6a (quoting contract).

The parties also agreed that "'[t]he interpretation and enforcement of this Agreement shall be governed by * * * applicable federal laws, and the laws of the state and local area where Service is provided to you,'" and further specified that, "'[n]otwithstanding the foregoing, [the arbitration provision] shall be governed by the Federal Arbitration Act.'" Pet. App. 5a (quoting contract).

Despite the contract's express designation of the FAA to govern the arbitration provision, the California Court of Appeal interpreted the self-invalidation clause—rendering the arbitration provision void if "the law of your state" precluded class-arbitration waivers—to be triggered by "'the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA." Pet. App. 13a-14a; see also *id.* at 8a.

The lower court's analysis is starkly inconsistent with generally applicable principles of contract interpretation. Contractual provisions referring to the

"law of" a particular state are commonplace, and they are construed to incorporate *both* state *and* federal law—not to exclude application of federal law. See *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 157 n.12 (1982) ("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."). That general principle holds true in California as well (at least outside the arbitration context). See *California* v. *Sischo*, 144 P.2d 785, 791-792 (Cal. 1943) (per curiam) ("The Constitution of the United States and all laws enacted pursuant to the powers conferred by it on the Congress are the supreme law of the land * * * *to the same extent as though expressly written into every state law*.") (emphasis added; citing Supremacy Clause, U.S. Const. art. VI, cl. 2).

As the Ninth Circuit explained with respect to the very provision at issue in this case:

> The Customer Agreement's reference to state law "does not signify the inapplicability of federal law, for 'a fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'"

Murphy, 724 F.3d at 1226 (quoting *de la Cuesta*, 458 U.S. at 157).

For that reason, *Concepcion*'s holding that the FAA preempts the California state-law rule banning class-arbitration waivers necessarily means that the state ban "is not, and indeed never was, California

law." *Murphy*, 724 F.3d at 1226. As a matter of federal law and fundamental constitutional principles, the "contention 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." *Ibid.* And that is especially so given the arbitration provision's express statement that it is governed by the FAA.

Moreover, the Supremacy Clause demands as much: "A contract cannot be unenforceable under state law if federal law requires its enforcement, because federal law is 'the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Murphy*, 724 F.3d at 1226 (quoting U.S. Const. art. VI, cl. 2). When the parties here agreed that disputes must be arbitrated, and that the arbitrations must occur on an individual basis unless "the law of your state" forbids class-action waivers, the term "law of your state" necessarily meant, and continues to mean, "the valid, enforceable law of your state."

Perhaps California could adopt a general principle of contract interpretation that—contrary to the plain meaning of "the law of your state" or "the law of the State of California"—such phrases must be interpreted to mean "state law without consideration of federal law." That would mean that *any* contract expressly incorporating California state law would have to be read to forbid application of conflicting federal law, even if, as here, the contract on its face also incorporates federal law. Such a generally applicable state-law rule would upend the settled expectations of parties to an untold number of contracts affecting citizens and businesses throughout California.

Unsurprisingly, there is absolutely no evidence that California has adopted such a rule in any other context—much less one that would apply to all contracts. For its part, the California Court of Appeal did not identify any such authority. Rather, the interpretive principle applied here was invented solely to invalidate an arbitration agreement, and this arbitration-specific rule therefore violates Section 2 of the FAA.

B. The Decision Below Violates The Rule That Contractual Ambiguities Should Be Resolved In Favor Of Arbitration.

Even assuming for the sake of argument that the meaning of the arbitration provision here was unclear, the decision below violates a second key principle of the FAA: In light of the statute's "emphatic federal policy in favor of arbitral dispute resolution" (*Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)), this Court has declared that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability" (*Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added)).[3] The decision below does just the opposite.

1. The California Court of Appeal concluded that the self-invalidation clause in the arbitration provision here was not "explicit" as to whether the parties intended for state law to apply "to the extent [that] it

[3] Accord *Mitsubishi*, 473 U.S. at 631.

is not preempted by the FAA" or whether they instead intended for state law to apply "without considering the preemptive effect, if any, of the FAA." Pet. App. 8a (internal quotation marks omitted). Asserting that the self-invalidation clause is for that reason "ambiguous," the court then invoked "'the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it'" (*id.* at 10a (quoting *Mastrobuono*, 514 U.S. at 62)).

Purporting to apply that principle, the court held that because DIRECTV had drafted the contract and had not expressly specified that controlling federal precedent would apply, the contract should be construed, against DIRECTV, to forbid application of federal precedent. Pet. App. 10a-11a. The court further reasoned that "'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." *Id.* at 11a.

The California Court of Appeal brushed aside the parties' express agreement that the FAA governed the arbitration provision and refused to impute to the parties the intent to apply binding interpretations of federal law. Pet. App. 11a. It therefore concluded that the contract required it to treat this Court's decision in *Concepcion* (which had invalidated the state-law rule) as irrelevant and instead to apply California's ban on class-action waivers despite the fact that this state-law rule is preempted by federal law.

2. The California Court of Appeal erred in concluding that the arbitration agreement is ambiguous

about whether its self-invalidation mechanism incorporated federal as well as state law.

The parties expressly agreed that (1) "applicable federal laws" do in fact apply, (2) the FAA is one of those laws, and (3) the FAA governed the arbitration provision over and above the parties' general selection of local state law. See Pet. App. 5a ("The interpretation and enforcement of this Agreement shall be governed by * * * applicable federal laws, and the laws of the state and local area where Service is provided to you," but "[n]otwithstanding the foregoing, [the arbitration provision] shall be governed by the Federal Arbitration Act."). Despite that clear language, the California Court of Appeal treated the parties' agreement to require individual arbitration and forbid class arbitration as instead foreclosing individual arbitration.

The court's reading of the parties' agreement—transforming a contractual commitment to resolve the parties' disagreements through individual arbitration into an agreement to eschew arbitration and instead to resolve disputes through judicial class actions—comports with no rule of contract interpretation of which we are aware, in California or anywhere else. Rather, it stands the parties' intent and the ordinary rules of contract interpretation on their head. The California Court of Appeal's conclusion that ambiguity existed in the arbitration provision's language is so inimical to settled rules of contract interpretation that it cannot be explained except as the product of judicial hostility toward arbitration—the very thing that Congress meant to bar when it passed the FAA.

3. Even if the contract's reference to "the law of your state" were ambiguous because it could plausi-

bly be read to include preempted state statutes and court decisions, the alternate reading—based on the settled rule that preempted state law is a legal nullity—is undeniably plausible as well. Under such circumstances, this Court's precedents are clear that the FAA requires courts to resolve the contractual ambiguity in favor of arbitration. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (emphasis added); see also *Mitsubishi*, 473 U.S. at 631.

The decision below (Pet. App. 10a) relied on this Court's decision in *Mastrobuono* to justify its reliance on the common-law principle that contractual terms are construed against the drafter, instead of following the FAA's requirement that ambiguities must be resolved in favor of arbitration. But *Mastrobuono* did not hold, or even suggest, that the *Federal* Arbitration Act takes a backseat to the *state*-law maxim. That would be a surprising inversion of the Supremacy Clause.

What *Mastrobuono* did was to decide the question presented—whether the contract at issue authorized arbitration of punitive-damages claims—by applying the strong federal policy *favoring* arbitration. The Court first drew the pro-arbitration conclusion that punitive-damages claims are arbitrable absent a clear statement of the parties' contrary intent, which the parties had not made. 514 U.S. at 57-62. The Court then explained that (in the context of that case) construing the language of the arbitration provision against the drafter lent further support to the

conclusion that the dispute was subject to arbitration. *Id.* at 62-63.

The Court did not so much as hint in *Mastrobuono* that the common-law presumption should trump the FAA's presumption of arbitrability when the two point in opposite directions—much less that the former should trump the latter when, as here, the supposed contractual ambiguity is starkly at odds with the plain intent of the contract (to require individual arbitration), the Supremacy Clause, and common sense. *Cf. Murphy*, 724 F.3d at 1225-1226 (describing reasoning later adopted by court below as "nonsensical").

* * *

The California Court of Appeal's ruling in this case attempts a transparent end-run around the FAA. As this Court has explained in the past, the lower courts "must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2," and must faithfully apply "the opinions of this Court interpreting that law. '* * * [O]nce [this] Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500, 503 (2012) (per curiam) (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)). Because "the FAA forecloses precisely this type of 'judicial hostility towards arbitration'" (*ibid.* (quoting *Concepcion*, 131 S. Ct. at 1747)), the decision below cannot stand.

CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for enforcement of the arbitration agreement.

Respectfully submitted.

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