No. 07-773

In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND CTIA—THE WIRELESS ASSOCIATION® AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139 (2005) 5, 10, 11

Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61 14

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Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc.* v. *Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996) 12

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND CTIA—THE WIRELESS ASSOCIATION® AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes.[1] Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

CTIA—The Wireless Association®, formerly known as the Cellular Telecommunications & Internet Association, represents all sectors of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and internet companies, as well as other contributors to

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. A letter reflecting the parties' blanket consent to the filing of *amicus* briefs has been filed with the Clerk's office.

the wireless universe. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate government agencies and the public about wireless industry issues.

The Chamber and CTIA have regularly participated as *amici curiae* in cases before this Court addressing arbitration issues, including, most recently, *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008) (Chamber and CTIA); *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396 (2008) (CTIA); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006) (Chamber); *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (Chamber); and *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001) (Chamber).

Many members of the Chamber and CTIA have found that arbitration allows them to resolve disputes promptly and efficiently, while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts. Because disputes involving these members may arise in any or all of the states, they rely on the protection afforded by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, to ensure that their arbitration agreements are enforced despite the vagaries of state law and varying preferences of state courts. For this reason, *amici* have a strong interest in ensuring that efforts to enforce such agreements proceed in fora that will faithfully follow this Court's "strong endorsement of the Federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

INTRODUCTION AND SUMMARY OF ARGUMENT

The FAA was enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements" (*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)) and to declare "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" (*Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Despite this Court's repeated reaffirmations of this pro-arbitration policy and reversals of state-court rulings that threatened to undermine it, it is clear that several States—most notably Montana, California, West Virginia, and Pennsylvania—remain resistant to the enforcement of arbitration agreements. That state-court hostility to the FAA makes the availability of jurisdiction under Section 4 all the more critical.

As respondents ably explain, the plain language of Section 4 of the FAA provides a clear answer to the jurisdictional question on which certiorari was granted. But even if the statute were ambiguous, the strong federal policy favoring arbitration, together with the persistent resistance to arbitration demonstrated by some state courts, would provide an additional reason for giving the broad jurisdictional language of Section 4 its plain and natural reading, particularly when, as in this case, the underlying dispute to be arbitrated arises under federal law.

Put another way, there is no good reason to adopt the artificially narrow interpretation of Section 4 advanced by petitioner. To the contrary, leaving the determination of arbitrability to state courts when the plain language of the statute does not require such a course would needlessly frustrate "Con-

gress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" (*Preston*, 128 S. Ct. at 986 (quoting *Moses H. Cone*, 460 U.S. at 22)). In addition, adopting petitioner's approach would result in this Court being confronted with a far greater number of petitions for certiorari raising substantial questions of preemption under the FAA. Thus, the decision below is supported not only by the plain language of the statute but also by clear federal policy and prudential considerations.

ARGUMENT

As the Court reiterated last Term, "the Federal Arbitration Act * * * establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston*, 128 S. Ct. at 981. It is by now well-established that the FAA "supplies not simply a procedural framework applicable in federal courts" (*ibid.*); it also "creates federal substantive law requiring parties to honor arbitration agreements"—law that "appl[ies] in state as well as federal courts." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 n.9, 16 (1984); see also *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270–272 (1995) (reaffirming *Southland*); *Preston*, 128 S. Ct. at 983 n.2 ("[a]dhering to precedent, we do not take up [respondent's] invitation to overrule *Southland*"); *Moses H. Cone*, 460 U.S. at 24 (FAA requires application of federal substantive law "notwithstanding any state substantive or procedural policies to the contrary").

Even though the FAA makes an agreement to arbitrate "valid, irrevocable, and enforceable" (9 U.S.C. § 2) as a matter of federal law in both federal and state court, the experience of *amici*'s members is

that many state courts express open hostility toward arbitration and distort background state contract law to invalidate arbitration agreements. See*, e.g.*, Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 161–204 (2005); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006). By failing to adhere to the FAA's command that arbitration agreements be treated as valid and enforceable, such state courts act in defiance of clear instructions from Congress and this Court.

The consequence of this failure to honor the FAA's mandate is that, in a number of States, the enforceability of arbitration agreements depends as a practical matter on whether a federal forum is available to compel arbitration. Indeed, federal courts in a number of States have been forced to admonish the state courts for refusing to adhere to the FAA's requirements. Nonetheless, many state courts remain unalterably opposed to enforcing arbitration agreements.

It is thus apparent that the very same "judicial hostility to arbitration agreements" that the FAA was enacted to overcome (*Gilmer,* 500 U. S. at 24) remains alive and well in many state courts. Therefore, while we fully concur in respondents' position that Section 4's plain language authorizes their petition to compel arbitration to proceed in federal court, the strong federal interest in promoting arbitration, together with the growing rift between state and federal courts in a number of jurisdictions, provides an additional reason for this Court to give Section 4's broad language its natural meaning—rather than

the artificial and insupportably narrow interpretation that petitioner seeks to give it.

A. The judicial hostility towards arbitration that the FAA was enacted to overcome remains alive and well in some state courts.

A number of state courts have repeatedly sought to evade this Court's decisions holding that the FAA preempts state-law rules that frustrate arbitration. These courts have routinely distorted traditional state-law contract doctrines—particularly the reasonable expectations and unconscionability doctrines—to impose special hurdles and barriers to the enforcement of arbitration agreements, obstacles that are not applicable to contracts generally. Indeed, in many cases, state courts have gone so far as to declare the most basic and defining characteristics of arbitration to be substantively unconscionable as a matter of law.

This state-court resistance both to arbitration and to the strong federal policy supporting it has largely been led by the Montana Supreme Court, which has engaged in the most open and egregious defiance of the FAA; the California, West Virginia, and Pennsylvania courts, among others, have issued similar decisions, explicitly or implicitly expressing hostility to arbitration. This hostility unfortunately has not been limited to these specific jurisdictions; rather, these jurisdictions vividly illustrate a broader problem: An increasing number of state courts across the country are devising new ways to subvert the FAA on a variety of pretextual grounds.

1. ***Montana.*** The Montana Supreme Court's repeated efforts to undercut the FAA present the

starkest example of judicial hostility to arbitration. After this Court made clear in *Southland*—and again in *Allied-Bruce*—that the FAA preempts state laws that frustrate arbitration, the Montana Supreme Court repeatedly refused to adhere to these decisions, requiring reversal by this Court. See *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996). But rather than accede to this Court's decision, the Montana high court has instead distorted longstanding principles of state contract law and thereby continued to defy the clear direction of Congress and this Court. Its rulings make little effort to hide the Montana court's obvious distaste for the FAA, and they make clear that the state court will continue to seek new grounds to refuse enforcement of nearly any arbitration provision that comes before it.

a. The Montana Supreme Court's ongoing and persistent efforts to impede arbitration are reflected in its decision in *Casarotto* v. *Lombardi*, 886 P.2d 931 (Mont. 1994) (*Casarotto I*), *vacated*, 515 U.S. 1129 (1995), in which the court refused to enforce an arbitration provision because the provision did not comply with a state statute that specifically required arbitration provisions to appear on the first page of a contract. In reaching this result, the Montana Supreme Court failed to follow this Court's decisions in *Southland* and *Perry*, which make clear that the FAA preempts any state law that imposes on arbitration provisions restrictions that are not equally applicable to other contractual provisions. See *Southland*, 465 U.S. 1; *Perry* v. *Thomas*, 482 U.S. 483 (1987). This error was more than a mere mistake; rather, the author of the majority opinion explained in a second, "specially concurring" opinion that the court's decision was motivated by its disagreement

with the FAA and, indeed, hostility toward the federal judiciary:

> To those federal judges who consider forced arbitration as the panacea for their "heavy case loads" and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy, I would like to explain a few things.
>
> What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of * * * the [FAA], and due to their naïve assumption that arbitration provisions * * * are knowingly bargained for, * * * procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick * * * an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it. * * *
>
> [T]hese provisions, which are not only approved of, but encouraged by [federal judges], do, in effect, subvert our system of justice as we have come to know it. If any foreign government tried to do the same, we would surely consider it a serious act of aggression.

Casarotto I, 886 P.2d at 939–941 (Trieweiler, J., specially concurring).

Although the Montana Supreme Court refused in *Casarotto I* to follow this Court's decisions on federal law, the Montana court was given an opportunity to correct its error after this Court granted, vacated, and remanded the case for reconsideration in light of *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265

(1995), which reaffirmed *Southland*. See 515 U.S. 1129 (1995) (Mem.). Yet even after this Court signaled that *Allied-Bruce* and *Southland* were controlling, the Montana Supreme Court insisted that it could "find nothing in the [*Allied-Bruce*] decision which relates to the issues presented to this Court in this case." *Casarotto* v. *Lombardi*, 901 P.2d 596, 598 (Mont. 1995) (*Casarotto II*), *rev'd sub nom. Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996) (*Casarotto III*). Although the court claimed to have given the issue "careful review" (*ibid.*), it had in fact refused to permit any further briefing or oral argument on remand. See *id.* at 599–600 (Gray, J., dissenting); see also *Casarotto III*, 517 U.S. at 686 n.2 (noting that "[d]issenting Justice Gray thought it cavalier of her colleagues to ignore the defendants' request for an opportunity to brief the issues raised by the * * * remand and to present oral argument") (quotation marks omitted). Having failed to reexamine its prior ruling, the court reaffirmed and reinstated its prior decision. *Casarotto II*, 901 P.2d at 596–597.

Ultimately, even after this Court reversed the Montana *Casarotto* decisions, two of the Montana justices insisted on a final act of defiance. When the case returned to the Montana Supreme Court for further proceedings consistent with *Casarotto III*, Justices Trieweiler and Hunt refused to sign the routine remand order, boldly declaring that they could not "in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the United State [sic] Supreme Court's * * * interpret[ation] and appl[ication] [of] the [FAA]." Order at 3, *Casarotto* v. *Lombardi*, No. 94-488 (Mont. Jul. 16, 1996); see also Richard C. Reuben, *Western Showdown: Two Mon-*

tana Judges Buck the U.S. Supreme Court, 82 A.B.A. J., Oct. 1996, at 16.

b. Nor was *Casarotto* the end of the matter. Seven years later, the Montana Supreme Court signaled that it intends to strike down *any* meaningful arbitration agreement. In *Kloss* v. *Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002), the court considered a challenge to an arbitration agreement under both the reasonable expectations and unconscionability doctrines. Again expressing unabashed hostility to arbitration, the court stated:

> [T]he arbitration provision by which Kloss waived her right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal were clearly not within Kloss' reasonable expectations.

Id. at 8. While couching its decision in the language of "reasonable expectations," the court never discussed the form of the contract or the manner in which the arbitration provision was presented to Kloss. This suggests that, in the court's view, "the problem with the provision was its substance rather than its form" and that "the court was really analyzing it under the doctrine of unconscionability and effectively determining that all arbitration clauses are unconscionable." Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 195 (2005).

Indeed, the *Kloss* opinion discusses the unconscionability issue and makes clear that few if any arbitration agreements will ever pass muster under the

court's analysis. Although the court had no reason to reach the unconscionability issue after finding that the arbitration provision violated Kloss's reasonable expectations, the opinion nonetheless offers up "a guide to future litigants who raise the issue of conscionability in the context of arbitration provisions." *Kloss*, 54 P.3d at 8. Among the factors identified by the court are the opportunity to conduct discovery. *Id.* at 8–9. But one of the primary purposes of arbitration is to avoid costly and elaborate discovery procedures. See *Gilmer*, 500 U.S. at 31. Moreover, the factors cited by the court as violating Kloss's reasonable expectations—her state constitutional rights to trial by jury, to conduct discovery, and to seek appellate review (54 P.3d at 8–9)—are, together with these unconscionability factors, "simply descriptive of arbitration" (Burnham, *supra*, at 196). In short, under the Montana Supreme Court's standard, no arbitration agreement will be enforced by the Montana state courts unless it provides for all of the procedural hallmarks that distinguish arbitration from a full-on civil trial.

Even more alarmingly, Justice Nelson, joined by three other justices, issued a separate opinion in *Kloss* that resurrected several themes from the court's *Casarotto* opinions—the very same decisions that this Court rejected in *Casarotto III*—as "an additional rationale supporting [its] decision in th[e] case." 54 P.3d at 11 (Nelson, J., specially concurring). Citing *Casarotto I*, Justice Nelson accused "large national and multi-national corporations" of "effectively privatizing an important segment of the civil justice system." *Id.* at 13–14. And looking to the Montana Constitution, the court insisted that state-law rights to a jury trial and to access to the courts are "sacred[,] * * * inviolable[,] * * * [and] fundamental" (*id.*

at 12–13), and, apparently in the view of the concurring justice, paramount to federal law. Such a view clearly violates this Court's decision in *Casarotto III*. Cf. Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1016 (1996) ("Justice Trieweiler could not have avoided FAA preemption by labeling the reasoning * * * used in [*Casarotto I*] 'unconscionability,' instead of 'Montana Code section 27-5-114(4).'").

As these decisions make clear, the Montana Supreme Court is extremely hostile to arbitration, and it has little intention of faithfully applying the FAA or this Court's decisions. Even after its *Casarotto* decisions were reversed by this Court, the Montana court has invented new ways to circumvent the clear direction of this Court and strike down arbitration agreements that fall squarely within the FAA's protections. In light of this persistent hostility to arbitration in Montana state court, it is apparent that parties seeking to enforce valid arbitration agreements in that State will be able to do so only if they have access to federal court.

2. ***California.*** Like Montana, California also has actively resisted the liberal federal policy favoring arbitration. First, the California Legislature tried to make claims under the Franchise Investment Law non-arbitrable. This Court held that the FAA preempts such efforts. *Southland*, 465 U.S. at 10. Next, the Legislature tried to place certain wage-collection claims under the California Labor Code off limits to arbitration. This Court struck down that effort too. *Perry*, 482 U.S. at 491.

And just last Term, this Court had to reverse a decision of the California Court of Appeal that re-

fused to enforce an arbitration agreement, this time on the ground that a state statute vested exclusive jurisdiction over the dispute in an administrative agency. *Preston*, 128 S. Ct. at 987. This Court was forced to grant certiorari to correct the California court even though a straightforward application of *Buckeye*, 546 U.S. 440, "largely, if not entirely, resolve[d]" the question presented. 128 S. Ct. at 984. Applying *Buckeye*, the Court "disapprove[d] the distinction between judicial and administrative proceedings * * * adopted by the [California] court," explaining that "[w]hen parties agree to arbitrate * * *, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 987.[2]

Despite such rulings by this Court, the California courts' hostility to arbitration remains undeterred. For example, the California Supreme Court has held that claims for so-called "public" injunctive relief under the state Consumer Legal Remedies Act (CLRA) and Unfair Competition Law (UCL) are non-arbitrable. See *Cruz* v. *PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1159 (Cal. 2003) (UCL); *Broughton* v. *Cigna Healthplans of Cal.*, 988 P.2d 67, 71 (Cal. 1999) (CLRA). During the same time frame, it held that discrimination claims brought under the state Fair Employment and Housing Act are arbitrable

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[2] In *Buckeye* itself, this Court reversed a decision of the Florida Supreme Court because that court had failed to follow long-established precedent: "*Prima Paint* and *Southland* answer the question presented here * * *. So also here, we cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law[.]'" *Buckeye*, 546 U.S. at 445–446 (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967)).

only if the arbitration agreement in question provides for, among other things, "more than minimal" discovery and a written ruling. *Armendariz* v. *Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 682–689 (Cal. 2000).

Armendariz also imposed a special "mutuality" requirement on arbitration provisions, holding that an agreement that requires one party but not the other to arbitrate all claims will be deemed substantively unconscionable unless the party seeking to enforce it can prove a "reasonable justification for such one-sidedness based on 'business realities.'" *Id.* at 692."[3] California state courts have employed this standard—albeit solely in the context of arbitration—to strike down a wide variety of arbitration agreements. See, *e.g.*, *Flores* v. *TransAmerica Homefirst, Inc.*, 113 Cal. Rptr. 2d. 376 (Ct. App. 2001) (loan agreement); *Bucy* v. *AT&T Wireless Servs., Inc.*, No. A105910, 2005 WL 2404424 (Ct. App. Sept. 30, 2005) (unpublished) (cellular phone service contracts); *Torigian* v. *Michael Cadillac, Inc.*, No. F039900, 2003 WL 21246609 (Cal. Ct. App. May 29, 2003) (unpublished) (automobile sales contract).

Most recently, the California Supreme Court held that in cases involving claims for the failure to pay statutorily required overtime, courts should refuse to enforce an arbitration provision calling for individual arbitration of disputes "if a trial court de-

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[3] To date, while striking down dozens of arbitration agreements on this ground, no California court has ever found the "business realities" exception to be satisfied. See Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 81.

termines * * * that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." *Gentry* v. *Super. Ct.*, 165 P.3d 556, 559 (Cal. 2007), *cert. denied sub nom. Circuit City Stores, Inc.* v. *Gentry*, 128 S. Ct. 1743 (2008). Incredibly, the court strongly implied that the arbitration agreement at issue was unenforceable as a matter of public policy even though it was "set forth in a package of written materials, which [the employee] received, and [was] further explained in a video presentation, which he attended"; the employer "suggested that he could consult with an attorney about his legal rights"; and, finally, the employee was given 30 days to "opt out" of the arbitration program, without penalty. *Id.* at 576 (Baxter, J., dissenting).

The same mistaken premise underlies *Cruz*, *Broughton*, *Armendariz*, and *Gentry*: that a state is free to declare certain disputes or claims to be nonarbitrable as a matter of public policy—or to impose conditions on the enforcement of arbitration provisions—whenever it believes that such conditions are necessary to advance "unwaivable statutory rights" (*Gentry*, 165 P.3d at 559). According to the California Supreme Court, this Court has acknowledged that if there is an "inherent conflict" between arbitration and a statute's underlying purpose, a dispute or claim under that statute may be declared nonarbitrable. *Broughton*, 988 P.2d at 73–74. What it persistently has overlooked (despite being repeatedly advised), however, is that this premise is valid only when the statute is a *federal* one and that only *Congress*—not the State of California—has the constitutional authority to displace the FAA. See *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S.79, 90 (2000); *Gil-*

mer, 500 U.S. at 26; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985).

By contrast, some federal district courts in California have correctly concluded that *Broughton* and *Cruz* are preempted because the FAA precludes the State from "declar[ing], through the nature of the remedies * * * offer[ed] in a statute, that it [does] not wish to have certain claims subjected to arbitration." *Arriaga* v. *Cross Country Bank*, 163 F. Supp. 2d 1189, 1198–1199 (S.D. Cal. 2001), *overruled on other grounds by Ingle* v. *Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *accord*, *e.g.*, *Lozano* v. *AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (C.D. Cal. 2002), *overruled on other grounds by Ingle*, 328 F.3d 1165. These cases well demonstrate that a federal forum can make a difference as to whether an arbitration agreement will be enforced in California.

California courts have also relied on a unique version of the unconscionability doctrine to refuse to enforce arbitration provisions in a variety of circumstances. Several decisions, for example, have declared arbitration agreements to be procedurally unconscionable "even if the weaker party could reject the terms and go elsewhere." *Villa Milano Homeowners Ass'n* v. *Il Davorge*, 102 Cal. Rptr. 2d 1, 5–6 (Ct. App. 2000).[4] By contrast, California courts have repeatedly held—outside the context of arbitration—that a contract provision is not procedurally uncon-

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[4] See also, *e.g.*, *Gatton* v. *T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 353–356 (Ct. App. 2007), *cert. denied*, 128 S. Ct. 2501 (2008); *Szetela* v. *Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002).

scionable if reasonable market alternatives are available.[5]

Other decisions have found arbitration provisions procedurally unconscionable even when the party resisting arbitration had "considerable bargaining strength." See *Graham* v. *Scissor-Tail, Inc.*, 623 P.2d 165, 171, 180 (Cal. 1971) (refusing to enforce arbitration agreement in contract signed by Bill Graham, the famous rock music impresario); *Stirlen* v. *Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 146 (Ct. App. 1997) (finding procedural unconscionability in arbitration agreement accepted by "successful and sophisticated corporate executive" who was "sought out" by other companies). And like the Montana Supreme Court, several California courts have found even the most basic elements of arbitration to be substantively unconscionable. See, *e.g.*, *O'Hare* v. *Mun. Resource Consultants*, 132 Cal. Rptr. 2d 116 (Ct. App. 2003) (holding standard American Arbitration Association rules to be unconscionable because they limit discovery and direct parties to share the costs of arbitration).

As these decisions illustrate, California state courts have shown a tremendous hostility to arbitration agreements. Indeed, one recent study that reviewed California state-court decisions from 1982 to 2006 found that unconscionability challenges to arbitration agreements were successful in 58 percent of

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[5] See *Belton* v. *Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631, 650 (Ct. App. 2007); *Wayne* v. *Staples, Inc.*, 37 Cal. Rptr. 3d 544, 556 (Ct. App. 2006); *Aron* v. *U-Haul Co.*, 49 Cal. Rptr. 3d 555, 564 (Ct. App. 2006); *Morris* v. *Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 807 (Ct. App. 2005); *Dean Witter Reynolds, Inc.* v. *Super. Ct.*, 259 Cal. Rptr. 789, 795 (Ct. App. 1989).

all cases, whereas unconscionability challenges to other contract provisions succeeded only 11 percent of the time. See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44–48 (2006). That study echoes, and if anything, amplifies, the results of an earlier analysis that found that courts are twice as likely to find arbitration agreements unconscionable as they are other types of contract provisions, and that "a significant number of these cases" are from California. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–195 (2004). The cumulative effect of such decisions is that businesses find it nearly impossible to enforce their arbitration agreements in California state courts.

3. ***West Virginia.*** The West Virginia Supreme Court of Appeals repeatedly has sought to undermine national laws that further important commercial policies, and the "liberal federal policy favoring arbitration agreements" (*Moses H. Cone*, 460 U.S. at 24) has been no exception. For example, in one notorious product liability case, that court unanimously declared that it would adopt "the rule most favorable to the plaintiff" on the extraordinary basis that "for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense." *Blankenship* v. *Gen. Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991).

a. Consistent with this rhetoric, and in clear violation of the FAA, the West Virginia high court refuses to enforce any arbitration agreement against state consumers unless the arbitration procedures are the equivalent of a full civil trial. See *State ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265 (W. Va. 2002). In *Dunlap*, the court refused to enforce an arbitration agreement because it required arbitration on an individual basis and did not authorize punitive damages. In the course of its opinion, the court strongly implied that, based on state constitutional rights to a trial by jury and access to the courts, it would not enforce *any* arbitration agreement, absent proof of a "knowing and intelligent waiver" of those rights (a signed agreement apparently being insufficient to establish the requisite knowledge and intelligence). See *id.* at 276–277 & n.7. The court, however, reserved decision on this issue because it found other reasons not to enforce the arbitration agreement. *Id.* at 277.

The West Virginia Supreme Court of Appeals has also held broadly that claims under that State's employment discrimination statute are not arbitrable. *Copley* v. *NCR Corp.*, 394 S.E.2d 751, 755–756 (W. Va. 1990). Such a ruling is, of course, in direct contradiction to this Court's command that, "[h]aving made the bargain to arbitrate, [a] party should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628 (emphasis added); *accord*, *e.g.*, *Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26.

b. Because the West Virginia state courts have refused to give effect to FAA preemption of state law, the outcome of a petition to compel arbitration in West Virginia will often depend solely on whether

the petition is filed in state or federal court. Both of West Virginia's district courts have repudiated *Dunlap* and declared its limits on arbitration preempted by the FAA. For example, Chief Judge Faber of the Southern District of West Virginia has held that *Dunlap* violates the FAA by "impos[ing] * * * heightened requirements on the enforcement of agreements to arbitrate." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Coe*, 313 F. Supp. 2d 603, 612 (S.D. W. Va. 2004). Chief Judge Faber explained that to the extent *Dunlap* "imposes heightened requirements on 'agreements that waive rights under the Rules of Civil Procedure,'" the decision "would necessarily impose heightened requirements on 'agreements to not submit claims to the Rules of Civil Procedure'—and this would obstruct agreements to resolve claims in an arbitral forum instead of a court." *Id.* at 615. While such a rule would not target "'arbitration' * * * as an abstract matter," it would nonetheless be preempted because it would have the impermissible "effect of placing agreements to arbitrate * * * on a different footing than other contracts." *Ibid.*

The *Coe* court's reasoning has been adopted by other federal judges in West Virginia. For example, Judge Stamp of the Northern District of West Virginia "agree[d] with [*Coe*'s] analysis[] and [ruled] that the holding in *Dunlap* [was] preempted by the FAA" to the extent that it invalidated agreements to arbitrate individually rather than as part of a class. *Schultz* v. *AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005); see also *Miller* v. *Equifirst Corp.*, No. 2:00-0335, 2006 WL 2571634, at *16 n.12 (S.D. W. Va. Sept. 5, 2006) (tentatively agreeing with *Schultz* that "the FAA preempts *Dunlap* to the extent [*Dunlap*] would invalidate

plaintiff's waiver of the right to pursue class action relief").

The Fourth Circuit likewise has denounced both *Dunlap* and *Copley*. See *Am. Gen. Life & Accident Ins. Co.* v. *Wood*, 429 F.3d 83, 87–91 (4th Cir. 2005). Although the party resisting arbitration in *Wood* sought to rely on *Dunlap*'s discussion of state constitutional rights to a trial by jury and access to the courts, as well as *Copley*'s holding that state-law discrimination claims are non-arbitrable, the Fourth Circuit properly held that this precedent "must be necessarily circumscribed" in light of the FAA, as interpreted by this Court. *Id.* at 90. The Fourth Circuit then criticized *Dunlap* for failing to adhere to the FAA and this Court's decisions: "To the extent that *Dunlap* intends to fashion a broad prohibition against the arbitrability of state-law claims," the court admonished, "such a ruling, whether dicta or otherwise, cannot contravene the FAA." *Ibid.* The court also noted that it had already rejected *Copley* as preempted. *Ibid.*

Nevertheless, West Virginia state courts continue to adhere to *Dunlap* rather than to clear direction from Congress and this Court. See*, e.g.*, *Cummins* v. *H&R Block, Inc.*, No. 03-C-134, 2004 WL 5362608 (W. Va. Cir. Ct. June 1, 2004) (relying on *Dunlap* to find arbitration provision unenforceable because it does not provide for class action or recovery of attorneys' fees), *cert. denied*, 543 U.S. 1148 (2005). And the West Virginia Supreme Court of Appeals continues to cite favorably to the *Dunlap* standard for attacking arbitration clauses under state law. See*, e.g.*, *State ex rel. Saylor* v. *Wilkes*, 613 S.E.2d 914, 921 (W. Va. 2005); *State ex rel. Wells* v. *Matish*, 600 S.E.2d 583, 588–589 (W. Va. 2004) (per

curiam). Because the West Virginia state courts' hostility to arbitration shows no signs of abating, West Virginia litigants will often be unable to enforce valid arbitration agreements under the FAA unless they can invoke the jurisdiction of the federal courts.

4. ***Pennsylvania.*** A similar rift has recently arisen between the Third Circuit and the Pennsylvania state courts. In a 2002 decision, the Pennsylvania intermediate court of appeals held that an agreement to arbitrate individually (rather than as part of a class) is unconscionable under Pennsylvania law when damages are small. *Lytle* v. *CitiFinancial Servs., Inc.*, 810 A.2d 643, 665–666 (Pa. Super. Ct. 2002).[6] Referring to the litigation before it as "yet another vignette in the timeless and constant effort by the *haves* to squeeze from the *have nots* even the last drop," the *Lytle* court made no effort to conceal its clear contempt for arbitration and the business community, declaring that "*if it's good for the power-*

[6] A separate holding in *Lytle* has since been abrogated by the Pennsylvania Supreme Court. That portion of the *Lytle* decision concluded that "the reservation by [the stronger party] of access to the courts for itself to the exclusion of the consumer creates a *presumption of unconscionability* * * * in the absence of 'business realities' that *compel* inclusion of such a provision * * *." 810 A.2d at 665 (first emphasis added). Reviewing this holding in a later case, the Pennsylvania Supreme Court concluded that this presumption "was well intentioned in its effort to guard against pernicious lending practices * * * [but] it swept too broadly." *Salley* v. *Option One Mortgage Corp.*, 925 A.2d 115, 129 (Pa. 2007). The *Salley* court rejected any strict presumption and clarified that "the burden of establishing unconscionability lies with the party seeking to invalidate a contract." *Ibid.* But *Salley* did not directly address the portion of *Lytle* concerning the waiver of class action procedures. *Gay* v. *CreditInform*, 511 F.3d 369, 393 n.18 (3d Cir. 2007) (noting that *Salley* concerns "a very different context from that here").

ful, it's bad for the people." *Id.* at 658 n.8. After decrying "the influence, if not the domination of the *haves* upon the election process by reason of *the haves*['] profligate, even unwholesome, financing of both the *selection* and the *election* of candidates" (*ibid.*), the court criticized Congress for declining to restrict the scope of the FAA and denounced businesses seeking the benefits of arbitration as "pinstriped exploiters." *Id.* at 660–661. Following its lengthy diatribe against arbitration, the *Lytle* court decreed that "class actions are favored in this Commonwealth as a means of resolving many meritorious claims which would otherwise, due to the amounts involved, escape prosecution" (*id.* at 655) and remanded the case to the trial court to conduct additional fact-finding and reconsider the contract in light of these new instructions (*id.* at 666).

A second Pennsylvania case likewise refused to enforce an agreement that required arbitration on an individual basis, relying heavily on *Lytle* to conclude that these agreements must be unconscionable because "[i]t is only the class action vehicle which makes small consumer litigation possible." *Thibodeau* v. *Comcast Corp.*, 912 A.2d 874, 885 (Pa. Super. Ct. 2006).

The Third Circuit has expressly refused to follow these Pennsylvania cases, explaining that it would enforce such arbitration agreements "largely because federal law requires that we do so[,] and Pennsylvania law must conform with federal law." *Gay* v. *CreditInform*, 511 F.3d 369, 392 (3d Cir. 2007). The court correctly recognized that state-court attempts to cloak their hostility to arbitration in the language of "unconscionability" are frequently mere pretext and that "[i]t would be sophistry to contend * * * that

the Pennsylvania cases do not rely on the uniqueness of an agreement to arbitrate." *Id.* at 395 (internal quotation marks omitted). That is, while "the Pennsylvania cases are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Ibid.* Accordingly, the court held that it would "not apply state law as explicated in *Lytle* and *Thibodeau* and thereby interfere with"—and "significant[ly] narrow[]"—"the appropriate application of the FAA." *Ibid.*

B. Respondents' reading of Section 4 would further the FAA's underlying policies and purposes and counteract state-court hostility to arbitration.

As the foregoing state-court decisions show, more than eighty years after the FAA's enactment there remains significant hostility to arbitration in the state courts. As a consequence, litigants seeking to enforce valid arbitration agreements under the FAA will in many instances be denied relief unless a federal forum is available.

In theory, this Court could grant certiorari in each case evidencing such hostility and repeatedly reinstruct state courts on the proper application of federal law. In practice, however, such an approach would be unworkable. And even if it were practical, it would still undermine the benefits of arbitration because it would require lengthy and expensive appeals to enforce arbitration agreements—all in direct "contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible'" (*Preston*,

128 S. Ct. at 986 (quoting *Moses H. Cone*, 460 U.S. at 22)). Moreover, as experience shows, state courts will continue to devise new pretextual grounds for continuing to deny the enforcement of many valid arbitration agreements.

But the FAA's framers already provided a simple and effective solution for overcoming much of the state-court hostility to arbitration. They recognized that judicial hostility to arbitration was pervasive, and their primary purpose was to overcome such attitudes. *Buckeye*, 540 U.S. at 443 ("[t]o overcome judicial resistance to arbitration, Congress enacted the [FAA]"); see also *Allied-Bruce*, 513 U.S. at 270 ("the basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"); *Gilmer*, 500 U.S. at 24. Differential treatment of arbitration by state and federal courts is something the framers of the FAA easily could have predicted, and it is thus no wonder that the plain language of Section 4 allows parties in many cases to bring a petition to compel arbitration in federal, rather than state, court.

While petitioner would have this Court "relegate[] [Section 4] to a curiosity" (Respondents' Br. at 3) it is clear that the language of Section 4 is not nearly so narrow as she would have it. Rather, that provision, understood in light of the principal purpose of the FAA, calls for federal courts to look to the "subject matter of a suit arising out of the controversy between the parties" for purposes of determining jurisdiction. 9 U.S.C. § 4. This gives parties to disputes involving federal law the option of avoiding potentially hostile state courts and vindicating their federal rights to compel arbitration in a federal forum. Cf. *England* v. *La. State Bd. of Med. Examin-*

ers, 375 U.S. 411, 415 (1964) ("There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.").[7]

In short, proper respect for the important federal policies behind the FAA strongly counsels in favor of construing the Act to permit federal courts to exercise jurisdiction over a petition to compel arbitration by looking to the nature of the underlying dispute to be arbitrated. Thus, the court of appeals' decision is supported not only by the plain language of the statute, but also by the important federal policies underlying the FAA.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

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[7] We note that Justice Thomas has thus far adhered to the view that the FAA applies only in federal courts, not in state courts. See, *e.g.*, *Preston*, 128 S. Ct. at 989 (Thomas, J., dissenting); *Allied-Bruce*, 513 U.S. at 285–297 (Thomas, J., dissenting). Although the rest of the Court has rejected that view, there can be no denying that adopting respondents' reading would cause the issue that has concerned Justice Thomas to arise less frequently.

Respectfully submitted.

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