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 FOR THE RESPONDENTS

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Petitioner's opening brief identifies the opinions below.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Appendix to this brief reproduces the relevant provisions of the Federal Arbitration Act and the California Consumer Legal Remedies Act.

STATEMENT OF THE CASE

The contract between petitioner DIRECTV and its respondent customers provides that its arbitration provision is "unenforceable" if "the law of your state" would forbid the contract's prohibition on class action procedures. The California Court of Appeal held that the contract is subject to the Federal Arbitration Act (hereinafter, "the Act"), which freely permits parties to shape their own arbitration agreements, including by subjecting them to state arbitration law. Applying California law, the court concluded that "state" law refers to a California statute that bars class action waivers in cases under the California Consumer Legal Remedies Act, not to the preemptive effect of federal law.

1. Petitioner DIRECTV and its California customers (respondents here) entered into a Customer Agreement (hereinafter "the Contract"). *See* JA 122-25 (2007 version, operative at the time the dispute arose). The Contract is a form agreement, applicable

to all of DIRECTV's customers around the nation. DIRECTV claims the authority to unilaterally modify the Contract. JA 127 § 4. A customer who cancels the agreement in response to such a change will be subject to applicable early termination fees. *Id.*

Section 10(b) of the Contract includes a choice-of-law provision identifying the "applicable law." JA 129 (capitalization omitted). It states: "The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you." *Id.* Because respondents received services in California, the applicable "law of the state" is California law. *Id.*

Section 9 of the Contract addresses "resolving disputes," and when enforceable generally provides for the parties to attempt to resolve their disputes informally and, if that fails, to arbitrate. JA 128-29 (capitalization omitted). As provided in Section 10(b), "Section 9 shall be governed by the Federal Arbitration Act."

Section 9(c) sets forth certain "special rules." *Id.* Particularly relevant here is what we refer to as "the class action waiver": "Neither you [the customer] nor we [DIRECTV] shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative of a class or in a private attorney general capacity." *Id.* There is, however, a major exception that we refer to as "the anti-severability clause":

> If, however, the law of your state would find this agreement to dispense with class

> arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

Id. 129.

The latter clause's name reflects that it is an express departure from the Contract's general rule that if a provision of the Contract is "declared . . . to be invalid," that provision alone will be severed. *See Id.* § 10(d) ("If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of this Agreement will remain enforceable.").

Respondents Amy Imburgia and Kathy Greiner were DIRECTV customers as of the effective date of the 2007 Customer Agreement. Both terminated their DIRECTV accounts. In response, DIRECTV assessed them early-termination fees. Respondents then brought this action under, *inter alia*, the Consumers Legal Remedies Act ("CLRA"), Cal. Civil Code § 1750, *et seq.*, alleging that the fees were unlawful under California law.

At all relevant times – (1) when respondents terminated their DIRECTV services; (2) when DIRECTV imposed the fees giving rise to respondents' state law claims; and (3) when respondents initiated this action – it was settled in California that class action waivers with respect to claims under the CLRA were unenforceable. The statue so provides. *Id.* §§ 1751, 1781(a). A dispute under the Contract would therefore be litigated rather than arbitrated.

2. Respondents filed this suit (which consolidates two separate complaints) in 2008 as a putative class action in California Superior Court. In light of the anti-severability clause, DIRECTV represented to the court that it would not seek to arbitrate respondents'

claims. JA 52; JA 143-44. The Superior Court certified a class of DIRECTV's California customers who had been subject to early-termination fees. Pet. App. 3a-4a.

Nearly three years into the case, this Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that the Act preempts a California doctrine deeming certain class action waivers unconscionable. In response, DIRECTV moved under the Act to compel respondents to pursue their claims individually in arbitration. Pet. App. 4a. The Superior Court denied the motion. *Id.* 5a.

3. DIRECTV took an interlocutory appeal to the California Court of Appeal, which affirmed. The court agreed with respondents 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. . . . [T]he parties' entire arbitration agreement is unenforceable, pursuant to the agreement's express terms, because the law of plaintiffs' state would find the class action waiver unenforceable.

Id. 6a.

In reaching that conclusion, the Court of Appeal recognized that the Contract was subject to the Act, from which the parties could not "opt out." *Id.* 7a. The court explained that under this Court's precedents its obligation was thus to enforce the agreement "in accordance with [its] terms." *Id.* (quoting *Volt Info. Sci. v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)). Consistent with the Act's "policy of enforcement of arbitration agreements according to

their terms," parties are free to specify whether and how disputes will be arbitrated. *Id.* Thus, it was undisputed that nothing in the Act would preclude DIRECTV and respondents from expressly agreeing "that the enforceability of the class action waiver 'shall be determined under the law of your state without considering the preemptive effect, if any, of the FAA.'" *Id.* 8a.

Because the anti-severability clause did not specify whether it took account of preemption under the Act, the Court of Appeal undertook "to interpret section 9's choice of law concerning enforceability of the class action waiver." *Id.* DIRECTV argued that under the Act, *Concepcion* compelled a finding that the relevant state "law" was preempted. But applying California case law, the Court of Appeal concluded that the reference to "law of [the customer's] state" was inconsistent with – and thus an exception to – the more general provision that Section 9 is subject to the Act. Pet. App. 9a (citing *Prouty v. Gores Technology Group*, 121 Cal. App. 4th 1225, 1235 (2004)).

At the very least, the Court of Appeal reasoned, the Contract is ambiguous as to whether "law of your state" incorporates principles of preemption. It is a settled "common-law rule of contract interpretation" that ambiguity must be resolved against the party which drafted the agreement – DIRECTV. *Id.* (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995)).

4. After the California Supreme Court denied review, this Court granted certiorari.

SUMMARY OF ARGUMENT

I. The California Court of Appeal correctly construed the Contract according to state law, without applying a presumption that the parties intended to negate the anti-severability clause and arbitrate their disputes.

A. Under the Federal Arbitration Act, the Court of Appeal was required to interpret the Contract "according to its terms." Two "terms" are essential here: Section 10's choice-of-law provision requires interpreting the agreement under California law; and Section 9's anti-severability clause specifically incorporates the "law of [the customer's] state" regarding class action waivers. The former provision guides the interpretation of the latter – *i.e.*, California law determines what constitutes the "law of the [customer's] state." The California Court of Appeal determined that the law incorporated by the agreement is the California Consumer Legal Remedies Act's prohibition on class action waivers, without regard to whether the Act would preempt the state from imposing such a prohibition as a matter of positive law. That ruling resolves the case, because this Court does not sit to review the state court's construction of state law.

There is no merit to DIRECTV's counter-argument that under the Act this Court must determine whether the state court's interpretation of the agreement was correct. By definition, that would negate the settled principle under the Act that state law determines the meaning of arbitration provisions in ordinary contracts like this one. DIRECTV's suggestion that only extreme misinterpretations of arbitration provisions need be corrected would still

require the federal courts to examine and overturn the Contract's established meaning under state law. Every such ruling would negate the parties' determination that state law governs their contract's construction.

Nothing in the Act adopts a broad "presumption" that parties intend to arbitrate disputes between them. Instead, this Court has recognized more narrowly that when the parties have entered into a broad agreement to arbitrate, that agreement will be presumed to encompass all disputes between them. That principle reflects the common-sense understanding that the parties will expressly exclude matters that they instead intend to litigate. Neither that presumption nor its rationale applies here. The present controversy relates to whether the parties in fact have broadly agreed to arbitrate. There is no reason to presume the parties intended the Contract's anti-severability clause to be ineffective. Imposing such a presumption to overturn the Contract's meaning under California law would contravene the bedrock principle that the Act requires only the arbitration of claims that the parties have themselves chosen to arbitrate.

B. In any event, DIRECTV's argument depends on the false premise that the Act preempts the Contract's express incorporation of California's prohibition on class action waivers. According to DIRECTV, the Act preempts a state from requiring the parties to litigate as a class. That is true, but irrelevant, because that is not what happens under the Contract. The core principle under the Act is that the parties' own agreements will be respected. Here, the parties incorporated that state law and decided to

abide by it. Nothing in the Act preempts their agreement that if California would prohibit a waiver of the customers' right to proceed as a class, they would litigate their disputes instead.

DIRECTV's argument that its position is compelled by *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), fails. In that case, the parties agreed to prohibit class action arbitration, but the state purported to require them to permit it. This case is instead like *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). There, the arbitrator construed the parties' contract to authorize class action procedures. This Court held that *Concepcion* was no obstacle to that agreement.

II. Although DIRECTV's criticisms of the Court of Appeal's construction of the Contract are irrelevant as a matter of law, they are also wrong. DIRECTV's principal assertion is that the parties obviously intended to arbitrate their disputes if possible, so long as the state did not or could not require them to authorize class action procedures. In fact, the parties obviously intended to litigate their disputes both under the operative agreement and when this dispute arose. At those times, there was no doubt that the anti-severability clause barred arbitration in California. There is no reason to believe the parties intended that, when the understanding of federal preemption changed almost three years into the case, they would dissolve the class, terminate the court proceedings, and start the whole process over in innumerable individual arbitrations.

There is every reason to believe respondents instead intended the Contract to function as the Court of Appeal understood. Consumers would naturally

want to leave open the prospect that they could pursue claims as a class. DIRECTV now asserts that it always sought to arbitrate, if possible. But that proves at most that the parties had inconsistent interpretations of the Contract. That disagreement is resolved against DIRECTV, which drafted the agreement.

DIRECTV is also wrong that the phrase "law of your state" is naturally understood to incorporate principles of federal preemption. The answer to the question whether "California law" prohibits class action waivers is naturally "yes," not (as DIRECTV would have it) "no." The contract, DIRECTV's brief, this Court's precedents, and the Constitution's Supremacy Clause *all* distinguish state law from federal law in exactly this respect.

By contrast, DIRECTV's position would read the anti-severability clause out of the agreement (because it would have no effect in any state) or at least treat the phrase "of your state" as surplusage (because all that would matter is the lawfulness of class action waivers under "law" generally). If DIRECTV were correct that the parties intended the anti-severability clause to turn on the question whether the class action waiver would be invalid in a court challenge, they would have said so expressly.

The pattern of other similar clauses is striking. DIRECTV itself – in several versions of the Contract both before and after the one at issue in this case – wrote the anti-severability clause to turn on whether a court would deem the class action waiver valid. So do the arbitration provisions of numerous other Fortune 500 companies. No other major company used

or uses the unusual "law of your state" formulation at issue here.

III. For several reasons, the Court may conclude that the best course is simply to dismiss the petition for certiorari as improvidently granted. DIRECTV's argument assumes without foundation that the Court of Appeal recognized that the Contract contains an arbitration agreement. In fact, the better view is that the lower court concluded the parties had not entered into an agreement to arbitrate their disputes in the first place. Because the Court of Appeal did not address that question expressly, however, this Court would have to remand the case for further proceedings before resolving DIRECTV's argument. But given that the case will have little to no prospective significance, the more straightforward course would be to dismiss the case.

That disposition is supported by several other factors. The California Court of Appeal's definitive construction of the Contract under state law is controlling and therefore eliminates any conflict with the Ninth Circuit's previous interpretation of the Contract. This Court's holding that parties will not be presumed to agree to class action arbitral proceedings makes such anti-severability provisions prospectively unnecessary. Finally, DIRECTV's opening brief fails to address this Court's jurisdiction, meaning that the Court will be deprived of an adversarial presentation on that important issue.

Accordingly, the judgment should be affirmed or the writ of certiorari should be dismissed.

ARGUMENT

DIRECTV wants something unprecedented. It wants this Court to overturn a state court's interpretation of state law. That is unheard of, at least in the modern history of federal jurisdiction. DIRECTV's theory is that federal law required the state court to interpret the Contract "according to its terms." But that is exactly what the California Court of Appeal did: it interpreted the words of the agreement; it did not apply any state law to override those terms. In reality, DIRECTV's theory is that the state court did a bad job and produced a result that means this case is litigated rather than arbitrated. Good or bad, the job belongs to the state court, so long as it exhibits no particular hostility to arbitration. In this case, there is no evidence of enmity to arbitral proceedings. So DIRECTV's position, in the end, is that federal courts must closely scrutinize and potentially overturn state court interpretations of arbitration clauses governed by state law, whenever the state court declines to order arbitration. There is no precedent for that proposition, which would drag the federal courts directly into matters that Congress left to state law.

I. This Court's Precedents Establish That State Law Governs The Construction Of An Arbitration Clause, Which May Freely Incorporate State Arbitration Procedures.

The California Court of Appeal held as a matter of California law that DIRECTV and respondents did not agree to arbitrate this dispute. As relevant here, this Court's precedents establish two distinct principles which independently require affirming that judgment. First, under the Act, an arbitration agreement must

be interpreted by its terms, which requires abiding by the state law specified by the agreement's choice-of-law provision. Second, the Act does not preempt the parties' contractual choice to subject their arbitration agreement to state law, including to determine the enforceability of the class action waiver.

In *Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468 (1989), the choice-of-law clause of the parties' agreement called for the application of the "law of the place where the project is located," which in that case was California. Applying California law, the California Court of Appeal read the contract to incorporate a state-law arbitration rule – specifically, a rule permitting a court to stay arbitral proceedings pending the completion of related litigation. The petitioner argued that the Court of Appeal's ruling was contrary to the Act, which would have required the arbitration to proceed. This Court disagreed.

The Court explained that the controlling principle under the Act is that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.* at 474. Therefore, the claim of the petitioner in that case, that the Act prohibited the California Court of Appeal from construing the agreement according to ordinary state law contract principles, "fundamentally misconceives the nature of the rights created by the FAA." *Id.* The state court's determination that the parties had agreed to incorporate state law – including state arbitration law – was not contrary to "an FAA-guaranteed right to compel arbitration, but [was] a finding that it had no such right in the first place,

because the parties' agreement did not require arbitration to proceed in this situation." *Id.* at 475.

This Court found no merit to the petitioner's two arguments to the contrary. First, the Court rejected the contention that the Court of Appeal's failure to apply a presumption favoring arbitration "violates the settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration." *Id.* That assertion, the Court explained, fails to recognize that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure enforceability, according to their terms, of private agreements to arbitrate." *Id.* In *Volt*, the contract incorporated and called for the application of California law, so the Court of Appeal had rigorously enforced the terms of the agreement by applying that state's law. *Id.* This Court explained that although "ambiguities as to the *scope* of the arbitration clause itself are resolved in favor of arbitration," that special rule was not implicated by the state court's distinct ruling "that the parties intended the California rules of arbitration . . . to apply." *Id.* at 476.

Second, the Court rejected the petitioner's argument that the Act's procedural provisions, which do not provide for such a stay pending litigation, preempt California's contrary rule. The Court did not doubt that the Act would preempt the stay provision of California law from having effect as a matter of positive law. But that fact was irrelevant, because the Act does "not prevent application of [the California rule] to stay arbitration where, as here, the parties have *agreed* to arbitrate in accordance with California

law." *Id.* (emphasis added). Quite the opposite. The Act "simply requires courts to enforce privately negotiated agreements, like other contracts, in accordance with their terms." *Id.* at 478. "[T]he Act was designed 'to make arbitration agreements as enforceable as other contracts, but not more so.'" *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)) (emphasis added).

On that basis, the Court rejected the petitioner's argument that the Act "prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act," a theory which "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479. "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is" contrary to what the Act would provide itself. *Id.* "By permitting the courts to 'rigorously enforce' such agreements 'according to their terms,' we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *Id.*

This Court reaffirmed those principles in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), which addressed whether a court or instead an arbitrator should decide whether the petitioner was a party to the arbitration agreement. This Court reasoned from the premise that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *Id.*

at 943 (citations omitted). For that reason, in "deciding whether the parties agreed to arbitrate a certain matter," courts generally "should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944 (citing, *inter alia*, *Volt*, 489 U.S. at 475-76).

This Court rejected the petitioner's contrary argument that a federal policy in favor of arbitration compelled it to find that all disputes under the agreement would presumptively be decided by the arbitrator. The Court explained that there is no abstract "strong arbitration-related policy" that would give rise to such a presumption, because "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts 'are enforced according to their terms' and according to the intentions of the parties." *Id.* at 947 (quoting *Volt*, 489 U.S. at 479).

Subsequently, this Court specifically made clear that the Act permits the contracting parties to agree to authorize class action arbitration, even when the Act would not permit the state to require class action arbitration procedures by law. In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), the parties' agreement prohibited class-wide arbitration, but California law required it, by deeming such a provision in a consumer contract of adhesion to be unconscionable and therefore unlawful. This Court held that the Act preempted state law from requiring the parties to arbitrate in that fashion. The Court placed significant weight on the "fundamental principle that arbitration is a matter of contract," such

that courts must "enforce [arbitration agreements] according to their terms." *Id.* at 1745 (citing *Volt*, 489 U.S. at 478) (quotation marks and additional citation omitted). The Court reasoned that the state law rule was inconsistent with the Act because it overrode the parties' own agreement with respect to a central element of the arbitral proceedings. *Id.* at 1751-52.

Applying that same logic, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010), the Court ruled that the parties may themselves choose to authorize class action arbitration. In determining the parties' intentions, "the interpretation of an arbitration agreement is generally a matter of state law," albeit subject to the Act's "basic precept that arbitration 'is a matter of consent, not coercion.'" *Id.* at 681 (quoting *Volt*, 489 U.S. at 479). Based on the latter principle, the Court concluded that the parties would not be assumed to have consented to class arbitration when they avowedly had reached "no agreement" on that question. *Id.* at 687.

The Court subsequently distinguished *Stolt-Nielsen*, and refused to overturn an arbitrator's finding that the parties had reached an agreement to permit class action arbitration, in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). The petitioner in that case contended that the arbitrator's ruling contravened a federal policy against class-wide arbitration. The Court disagreed, reiterating that the parties were free to agree to whatever procedures they liked. By contrast, the Act permitted this Court to overturn the arbitrator's reading of the agreement only if the arbitrator had ignored the parties' intentions and imposed his own notion of economic justice. *Id.* at 2068. It was sufficient to sustain the

finding that the parties authorized class action arbitration that "the arbitrator did construe the contract (focusing, per usual, on its language)." *Id.* at 2070.

II. The California Court Of Appeal Was Correct To Interpret The Contract According To California Contract Law.

Under this Court's precedents, the judgment of the California Court of Appeal must be affirmed for two independent reasons. First, under the Act, an arbitration agreement must be interpreted "according to its terms," including the choice-of-law provision requiring that the Court of Appeal apply the law of the state of the customer's residence – here, California. That is exactly what the lower court did. Second, in any event, even if DIRECTV were correct that the "law of your state" includes the preemptive effect of federal law, the result would be the same, because the Act only preempts requirements imposed by positive state law that would override the parties' own agreement. By contrast, the Act does not preempt the parties' own choice to incorporate into their agreement California's state-law prohibition on class action waivers.

A. Under The Act, The Court Of Appeal Correctly Used State Law To Construe The Contract.

DIRECTV asserts that the parties entered into an arbitration agreement, which is governed by the Act. Respondents agree. But the fact that the Act applies to the Contract changes nothing. As DIRECTV itself explains, the applicable principle of federal law under the Act is simply that an arbitration agreement will be enforced "according to its terms." Pet. Br. 11 (major

heading). The statute thus provides that a court may direct the parties to proceed with arbitration "in accordance with the terms of the agreement." 9 U.S.C. § 4.

Critically, the applicable "terms" of course include the agreement's choice-of-law provision, as well as (in this case) its express incorporation of the "law of [that] state" regarding waivers of class action rights. It is not possible to interpret the agreement correctly while ignoring the body of law that the parties chose to direct its interpretation. Here, the Contract provides, with respect to California customers like respondents, that it will be interpreted according to California law. Construing the agreement "according to its terms" therefore requires determining the Contract's meaning under California contract law. That determination was made by the California Court of Appeal in this case: the parties did not intend to arbitrate their disputes.

This Court approved precisely that methodology in *Volt*. There, the California Court of Appeal construed the parties' contract, which was subject to the Act, according to California law. This Court explained that the ruling was perfectly consistent with the principle that arbitration agreements must be construed "according to their terms." 489 U.S. at 475. Because the contract's choice-of-law provision called for the application of California law, this Court concluded, the state court properly looked to that law – rather than a supposed general "federal policy favoring arbitration" – in interpreting the agreement. *Id.* "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules

according to the terms of the agreement is fully consistent with the goals of the FAA." *Id.* at 479.

In fact, DIRECTV itself agreed below that California law controls, a fact it never acknowledges in this Court. DIRECTV explained that, "despite Plaintiffs' efforts to characterize the non-severability clause as unique because it refers to 'the law of your state', the question of whether an FAA-governed arbitration agreement is enforceable or unenforceable due to a generally applicable contract defense is *always a matter of state law*." JA 52 (citation omitted) (emphasis added). DIRECTV's position was simply that its reading of the Contract was superior under "California contract law." *Id.* DIRECTV was right then in acknowledging that state law is controlling; its attempt to now argue the opposite position lacks merit.

Indeed, DIRECTV never articulates a coherent rule supporting its position. At times, it describes the interpretation of an arbitration agreement as a question of "substantive federal law," Br. 12, which it says "serves as an important check on the application of state law," *Id.* 14. Elsewhere, it describes the "interpretation and enforcement of an arbitration agreement governed by the FAA [as] a *hybrid* of state and federal law." *Id.* 13. But DIRECTV never articulates anything resembling an administrable legal rule for courts to identify which matters are assigned to one body of law and which are the province of the other. In particular, it never explains why the construction of the phrase "law of your state" would be resolved as a matter of federal rather than state law. Nor can it explain how to integrate the two bodies of law when the court, as it must, reads all the provisions

of the agreement as a whole. *Mastro Plastics Corp. v. Nat'l Labor Relations Bd.*, 350 U.S. 270, 279 (1956); Cal. Civil Code § 1641.

DIRECTV cannot save its position by resort to a supposed "presumption" that parties intend to arbitrate their disputes. As this Court made clear in *Volt* and *First Options*, *supra*, the Act does not embody such a sweeping assumption about the parties' intention in every case and context. Indeed, in certain circumstances, the applicable presumption is that parties intend *not* to arbitrate. *First Options*, 514 U.S. at 947.

This Court's decisions applying the Act do recognize a presumption that when the parties disagree over whether a particular dispute falls within the *scope* of their arbitration agreement, the presumption is in favor of arbitration. The Act departs from the application of pure state law in that circumstance to impose a "presumption of arbitrability *only* where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at issue." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010) (emphasis added).

For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), the Court concluded that most statutory claims are arbitrable under a general arbitration provision, based on a presumption that the parties would have intended to subject all of their controversies to that agreement. In support, the Court relied on its prior ruling in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967), which applied the same presumption to hold that a claim of fraud in the

inducement of the contract was arbitrable. In both instances, the role of the presumption was simply to reject the assertion that the parties implicitly intended to exclude a particular category of claims from the ambit of an otherwise-encompassing arbitration provision.

The targeted presumption that a dispute falls within an arbitration agreement arises from a common-sense understanding of what the parties themselves probably intended:

> We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.

Granite Rock, 561 U.S. at 303 (citing, *inter alia*, *First Options*, 514 U.S. at 944-45).

DIRECTV would have this Court enact a quite different legal rule. Its proposed presumption is that parties intend not to apply contractual provisions that would, by their terms, render their arbitration agreement ineffective. Here, DIRECTV argues that it and its customers in California presumably did not intend to read "law of your state" to trigger Section 9's anti-severability provision in California.

DIRECTV's proposed rule is completely untethered from this Court's assumption that parties with effective arbitration agreements intend a particular class of disputes to be arbitrable. As in *Volt*,

although "ambiguities as to the *scope* of the arbitration clause itself resolved in favor of arbitration," that special rule is not implicated by the state court's distinct ruling "that the parties intended the California rules of arbitration . . . to apply." *Volt*, 489 U.S. at 476 (emphasis added). And if DIRECTV were correct, then *Volt* – which held that the contract incorporated a state-law rule that inhibited arbitration, despite the invocation of the same supposed presumption – would have come out the other way.

In particular, there is no reason to presume *ex ante* that DIRECTV and respondents intend to negate an arbitration provision under which they would litigate rather than arbitrate. It is at least equally plausible that the parties, having gone to the trouble to include such a provision in the contract, intended for it to have some teeth. That is particularly true when, as here, the meaning of the contractual provision is resolved as a matter of state law. In this case, we know that the phrase "law of your state" refers to California law without regard to preemption under the Act. There is no reason to believe that the parties subjected their agreement to California law but incorrectly presumed that the Contract would mean something very different.

Importantly, the fact that Section 9 contains provisions relating to arbitration does not support an assumption that the parties intended to arbitrate every type of dispute. DIRECTV's suggestion that the presence of an arbitration clause within a contract is evidence that the parties agreed to arbitrate at least some of their disputes may have some force with respect to an ordinary bilateral contract. In that

context, why would the parties have included such a provision if they did presumably intend to use it? But the same inference does not arise from a form contract like this one, which applies to all of DIRECTV's customers, nationwide. Many provisions of such form consumer agreements are governed by state law, which can vary by jurisdiction. When a company wants all of its customers to sign a single nationwide agreement, it regularly provides that certain provisions apply in some states but not others.

That is what happened here. The states vary with respect to whether they prohibit class action waivers. So DIRECTV wrote Section 9 to provide for the arbitration of its disputes with its customers, except any of those living where "the law of your state" would prohibit waiving the class action remedy. DIRECTV could have created a separate contract for its California customers that omitted the arbitration provisions of Section 9 altogether; the result would have been the same. But for its own convenience, it instead used a single nationwide contract which, because Section 9 *was* enforceable in some (indeed, the great majority of) states, includes detailed provisions regarding how any arbitration would be conducted. In particular, DIRECTV's decision to use one customer agreement facilitated making unilateral changes applicable to all of its customers simply by revising the single form contract.

Indeed, DIRECTV itself confirmed that it intended that certain provisions apply in some states and not others. In moving for a stay of this action, DIRECTV acknowledged that

> The Customer Agreement between DIRECTV and its customers provides that the customer's

> home state laws will govern the relationship, and that any disputes will be resolved in individual arbitration if the customer's home state laws enforce the parties' arbitration agreement. Because California law would not enforce the arbitration agreement as between DIRECTV and California customers, DIRECTV has not sought and will not seek to arbitrate disputes with California customers.

JA 52; *see also* JA 143-44.

B. DIRECTV's Argument In Any Event Fails Because The Act Does Not Preempt The Parties' Choice To Incorporate California's Ban On Class Action Waivers Into Their Agreement.

DIRECTV's argument fails for the independent reason that it rests on a false premise: that the Act preempts California's prohibition on class action waivers, even when (as in this case) the parties themselves agree to be bound by that state law rule. DIRECTV argues that no "law of [a customer's] state" in the United States ever prohibits class action waivers with respect to contracts subject to the Act, because all such laws are preempted under *Concepcion*.

This Court rejected exactly that characterization of the Act's preemptive effect in *Volt*; in fact, the parallels are exact. In both cases, the agreement's choice-of-law clause called for the application of California law; the California Court of Appeal construed the agreement to incorporate a California arbitration rule that was inconsistent with the provisions of the Act; and the party favoring arbitration argued that the Act preempted the

California rule. In *Volt*, this Court rejected that argument, holding that the Act does "not prevent application of [the California rule] to stay arbitration where, as here, the parties have *agreed* to arbitrate in accordance with California law." 489 U.S. at 476. To the contrary, holding that the parties' agreement was preempted by the Act "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479.

According to DIRECTV, its contrary position is compelled by *Concepcion*. That is not correct. In *Concepcion*, the parties did not incorporate the relevant provisions of California law into their arbitration agreement. Quite the opposite: the plaintiffs argued that California law overrode the terms of the agreement. This Court reasoned that, because arbitration is a matter of contract, the Act does not permit positive state law to require the parties to make class action arbitration available. As DIRECTV explains, *Concepcion*'s actual holding is that "state law cannot *force* people to arbitrate on a classwide basis." Pet. Br. 1 (emphasis added).

This case, by contrast, is analogous to *Oxford Health*. Here, the Contract is subject to California law not by operation of law, but as a result of the choice-of-law provision to which the parties agreed. Section 9 then expressly incorporates state law – here, California law, including particularly the provision of the California Consumers Legal Remedies Act prohibiting the waiver of the right to pursue a claim under class action procedures. The parties were free to make that choice, which is not overridden by *Concepcion*. As DIRECTV acknowledges, Br. 15, and

Stolt-Nielsen holds, parties are free to choose whatever state rules they want, including rules that are contrary to the result that would obtain under the Act's own provisions.

Thus, in *Oxford Health*, this Court deferred to the arbitrator's determination that the parties' contract provided for class-wide arbitration, rejecting the petitioner's argument that this interpretation could not be reconciled with *Concepcion*. DIRECTV's argument faces an even more substantial hurdle than the failed invocation of *Concepcion* in *Oxford Health*. At least in *Oxford Health*, a federal court would overturn an arbitrator's ruling under the Act, albeit in limited circumstances. *Oxford Health*, 133 S. Ct. at 2068 (citing 9 U.S.C. § 10(a)(4)). By contrast, no provision of the Act authorizes overturning a state court's conclusion that as a matter of state law the parties' agreement by its terms renders the agreement's arbitration clause unenforceable.

In fact, the result in this case would be the same even if this Court were to accept DIRECTV's invitation to construe the Contract de novo. In *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), this Court considered an arbitration agreement subject to New York law. Invoking *Volt*, the respondent argued that the agreement thereby incorporated New York arbitration law – in particular, that state's prohibition on arbitrators imposing punitive damages. But this Court disagreed, recognizing a critical distinction between the cases. *Volt* was a case in which, because it arose from a state court's construction of the parties' agreement, "we did not interpret the contract de novo. Instead, we deferred to the California court's construction of its own State's laws." *Id.* at 59 n.4. By

contrast, the contract in *Mastrobuono* was not subject to a binding state court interpretation because it had only been construed by a federal court of appeals. *Id.* Construing the contract *de novo*, this Court concluded that because the agreement did not by its terms include New York arbitration law, it was properly read to incorporate the "substantive principles that New York courts would apply, but *not* to include special rules limiting the authority of arbitrators." *Id.* at 64 (emphasis added).

Thus, in *Mastrobuono*, the Court applied the legal principle announced in *Volt* that the Act does not preempt state law that the parties choose to incorporate into their agreement. *Mastrobuono* simply found that the language of the contract before it was not sufficiently clear on de novo review to incorporate New York's rule against arbitrators awarding punitive damage awards. But here, unlike *Mastrobuono*, there is no ambiguity about what state law the parties incorporated. Section 9 *expressly* incorporates state law prohibitions on class action waivers.

At the very least, the members of the Court who dissented in *Concepcion* should perceive no need to extend that ruling to these distinct circumstances. Furthermore, respondents ask that Justice Thomas adhere to his view that the Act does not apply to cases, like this one, that originate in state court and raise state law claims. *E.g.*, *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S.

279, 314-15 (2002) (Thomas, J., dissenting); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285-97 (1995) (Thomas, J., dissenting).[1]

III. There Is No Merit To DIRECTV's Irrelevant Criticisms Of The Court Of Appeal's Reading Of The Contract.

1. For the foregoing reasons, the Contract is governed by California law, which the California Court of Appeal has definitively construed to conclude that the parties did not agree to arbitrate their disputes. That holding is unassailable in this Court, which does not sit to review the application of state law. *Volt*, 489 U.S. at 474.

DIRECTV thus turns this Court's rulings on its head when it invokes *Volt* and *Stolt-Nielsen* for the proposition that the California Court of Appeal's ruling "cannot stand as a matter of substantive federal law, as it manifestly fails to enforce the parties' arbitration agreement 'according to [its] terms.'" Br. 17 (quoting *Stolt-Nielsen*, 559 U.S. at 682 (quoting, in turn, *Volt*, 489 U.S. at 479)). In *Volt*, the Court refused to override the California Court of Appeal's ruling construing the parties' agreement as a matter of

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[1] DIRECTV does not identify any other applicable requirement of the Act that calls into question the California Court of Appeal's determination to interpret the Contract on the basis of ordinary California contract law. Respondents are aware of none. There is no suggestion that the Court of Appeal applied a unique set of interpretive principles that discriminate against arbitration. Nor did the court rest its ruling on its own views of economic justice rather than interpreting the parties' agreement. *Cf. Oxford Health*, 133 S. Ct. at 2069-70.

California law, rejecting the claim that there was a general federal policy favoring arbitration or that the Act otherwise preempted the lower court's decision. Similarly, in *Stolt-Nielsen*, the Court refused to override an arbitrator's determination that the parties' agreement authorized class-wide arbitration, rejecting the assertion that such a construction was contrary to principles embodied in the Act. Both decisions thus stand for the proposition that this Court does not sit to revisit the conclusion that the parties have entered into agreements that either limit arbitration (as in *Volt*) or require that it be conducted under certain rules (as in *Stolt-Nielsen*).

Volt also illustrates DIRECTV's error in repeatedly relying on the contrary reading of the Contract adopted by *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013). In *Murphy*, the Ninth Circuit attempted to determine the Contract's meaning, which as noted is a question of California law. *Id.* at 1227. Because the California Court of Appeal subsequently construed the Contract, its ruling by definition supplants the federal court's interpretation adopted in *Murphy*. *See* 28 U.S.C.A. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). The fact that a federal court would read state law differently and give a different reading to the agreement is of no moment. *Volt*, 489 U.S. at 470.

2. DIRECTV's argument that on a de novo reading of the Contract this Court would adopt a different interpretation are therefore beside the point. But in any event, for the reasons given by the California Court of Appeal, the contract is *at the very least* ambiguous. Pet. App. 10a-11a. And as this Court has recognized, that ambiguity is properly

resolved against DIRECTV as the party that drafted this form contract of adhesion. *Mastrobuono*, 514 U.S. at 62-63.

DIRECTV relies heavily on the fact that the Contract expressly provides that the Act applies to Section 9. But as discussed, that adds nothing. DIRECTV reads that provision to refer to the Act's preemptive effect. But as the California Court of Appeal concluded, the more specific incorporation of the "law of [the customer's] state" controls over the general application of the Act. Pet. App. 12a.

In any event, DIRECTV concedes that there is no conflict between the result below and the Act, which freely permits the parties to incorporate provisions of state law that would produce a different result than the Act. In *Volt*, for example, the parties were free to incorporate California's rule allowing stays of arbitral proceedings, notwithstanding that the Act itself would require the arbitration to proceed. And in *Stolt-Nielsen*, the parties were free to authorize class action arbitral procedures, notwithstanding that the Act would preempt state laws requiring those procedures.

DIRECTV's contrary argument pretends that the Contract exclusively subjects Section 9 to principles of preemption under the Act. On its view, the parties only incorporated the Act's prohibition on state law requiring the parties to permit class action procedures. But that is not what the Contract says. Instead, the Contract simply provides that the Act governs the arbitration clause. In turn, for the reasons discussed in Part II, *supra*, the Act calls for the Contract to be construed consistent with its "terms," including the choice-of-law provision, which incorporates California law. The state court's

conclusion that the parties did not agree to arbitrate their disputes thus does not violate any right of DIRECTV under the Act, but is instead "a finding that it had no such right in the first place." *Volt*, 489 U.S. at 475.

DIRECTV next asserts that the parties obviously intended to arbitrate their disputes, if possible. But at the time the operative version of the Contract took effect, the parties plainly intended to litigate and *not* to arbitrate. So too at the time respondents initiated this action. Look no further than the fact that when this litigation commenced, DIRECTV did not seek to compel arbitration and affirmatively represented to the trial court that it would not move to compel arbitration of the respondents in this matter. JA 52, 143-44.

At those times, DIRECTV and any consumer who considered the question would both have regarded all of Section 9 as unenforceable by its terms because California law prohibited waiver of class and representative actions in any forum, including arbitration. Indeed, that was in fact how DIRECTV itself understood Section 9. Even assuming the parties considered whether the Act preempted such a law, no court had held that it was.

Nor is there anything anomalous about the mechanism by which the parties memorialized their choice not to arbitrate. The Contract incorporates the law of the state in which the consumer resides. On its face, the agreement reflects a perfectly sensible, voluntary decision to abide by state laws that protect consumers by forbidding agreements that preclude class action procedures.

DIRECTV's contrary position must be that the parties expected that a duty to arbitrate would spring into existence if California law was later found to be preempted. But because contracts depend on the parties' intent, they are generally interpreted according to the circumstances as they stood when they are formed. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984).

That rule makes the most sense with respect to the interpretation of a contract – like this one – in which one party (DIRECTV) claims the unilateral right to change it prospectively at any time. JA 127 ¶ 4. The contracting parties do not need the agreement to account for unexpected changes in the law, because those can instead be addressed through unilateral revisions without the parties needing to go to the trouble of entering into a new agreement. Indeed, after this Court decided *Concepcion*, DIRECTV unilaterally modified the Contract's arbitration provision to eliminate the "law of the state" phrasing of Section 9.

But DIRECTV's interpretation suffers from an even deeper implausibility. In this case, DIRECTV sought to compel arbitration after the proceedings had been underway in state court for almost three years. DIRECTV's position thus is not merely that the parties intended their agreement to account for changing conceptions of federal preemption, but that they intended the obligation to arbitrate to attach after the parties were out of the contract and in the middle (or even near the end) of litigating the dispute. That is on its face an extremely unlikely description of how the parties believed their agreement would operate. The purpose of arbitration is to resolve the

parties' disputes more efficiently. *Concepcion*, 131 S. Ct. at 1751. But on DIRECTV's view, years of effort in bringing the dispute to a final resolution would be cast aside – and the entire matter litigated all over in numerous separate arbitrations – based on an unexpected change in the understanding of whether the state law they incorporated into the agreement was preempted.

DIRECTV emphatically argues that its own intention was to arbitrate whenever possible, including whenever it became apparent that California's prohibition on class action waivers was preempted. That is an entirely self-interested assertion advanced well after the Contract was formed, and it is just as plausible that DIRECTV wanted to know with certainty in advance whether claims would be arbitrated or instead litigated in any given state. But in all events, contracts require mutual assent, and there is every reason to believe that consumers believed they were fully protected under California law, because the contract said so. To the extent the parties read the Contract differently, it is construed against DIRECTV, which drafted it. Pet. App. 10a.

There is no merit to DIRECTV's further argument that the phrase "law of your state" necessarily requires incorporating the determination whether state law is preempted. Importantly, the closely related provisions of Section 10 of the Contract expressly distinguish the law of the customer's state from federal law. JA 129 ("The interpretation and enforcement of this agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable

federal laws, and the laws of the state and local area where the service is provided to you.").

Ordinary usage also distinguishes the requirements of state law from the further question whether that state law is preempted by federal law. The answer to the question whether "California law" prohibits class action waivers is naturally "yes," not (as DIRECTV would have it) "no." Both DIRECTV's brief and this Court's ruling in *Concepcion* illustrate the point. *See* Pet. Br. 1 ("Any state law that conditions the enforceability of an arbitration agreement on the availability of classwide arbitration, this Court held, is preempted by the Federal Arbitration Act (FAA)."); *Concepcion*, 131 S. Ct. at 1746 ("Under California law, courts may refuse to enforce any contract found 'to have been unconscionable at the time it was made,' or may 'limit the application of any unconscionable clause.'" (quoting Cal. Civ. Code Ann. § 1670.5(a)). So does the constitutional provision on which DIRECTV rests its argument – the Supremacy Clause. U.S. Const. art. VI, cl. 2 (federal law is "the supreme law of the land, . . . anything in the constitution or laws of any state to the contrary notwithstanding"). *Compare C&L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 419 (2011) ("By selecting Oklahoma law ('the law of the place where the Project is located') to govern the contract, the parties have effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration Act." (citations omitted)) *with Fidelity Fed. Sav. & Loan v. De la Cuesta*, 458 U.S. 141, 157 n.12 (1982) ("law of the *jurisdiction*" in context of federal banking law "includes federal as well as state law" (emphasis added)).

DIRECTV's contrary position is that Section 9 is properly read effectively to ask whether a class action waiver is lawful – *i.e.*, whether it would be prohibited by "law." But the Contract is not naturally interpreted that way. On DIRECTV's view, the anti-severability clause has no purpose, because no state law triggers its provisions. At the very least, by looking to the requirements of "law" generally, DIRECTV's reading turns the words "of your state" in Section 9's operative language into surplusage. They serve only to mislead. It is a settled principle of contract interpretation, however, that the words of the agreement should be given meaning where possible. *Valencia v. Smyth*, 185 Cal. App. 4th 153, 176 (2010). No ordinary consumer reading the agreement would understand its provisions to lack force in the manner DIRECTV describes.

If DIRECTV were right that the parties instead intended the enforceability of Section 9 to turn on whether a court would find the class action waiver *valid*, they would have said so expressly. The Contract's general severability clause, for example, looks to whether a provision of the Contract "is declared" to be unlawful. JA 129 ¶ 10(d).

Even more striking, that is precisely how DIRECTV wrote Section 9's anti-severability provision in the version of the Contract prior to the one in effect in this case. Prior to mid-2006, Section 9(c) had instead provided: "A court may sever any provision of Section 9 that it finds to be unenforceable, except for the prohibition on class or representative arbitration." JA 121. Then, after this Court decided *Concepcion*, it reverted to that language. The current version, effective as of June 24, 2015, provides: "A court may

sever any portion of Section 9 that it finds to be unenforceable, except for the prohibition on class, representative and private attorney general arbitration."
http://www.directv.com/learn/pdf/residential_customer_agreement.pdf (last accessed July 17, 2015)

An exhaustive review of the arbitration provisions of the form customer agreements of the Fortune 500 companies reveals that such provisions are commonplace.[2] No other major company used or uses

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[2] For example, Ally Financial, Inc.'s retail installment sale contract/lease agreement states, "[i]f the agreement to arbitrate on an individual basis and not on a class basis is deemed or found to be unenforceable in a case in which class action allegations have been made, the remainder of this arbitration provision will be unenforceable." http://www.gmaconline.com/docs/AllyArbitrationAgreement.pdf (last accessed July 17, 2015); Dillard's Inc.'s Credit Card Agreement states, "[i]f any of the provisions of this Arbitration Agreement dealing with class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, that invalid provision shall not be severable and this entire Arbitration Agreement shall be unenforceable. https://retailservices.wellsfargo.com/pdf/ccra/dillards-credit-card.pdf (last accessed July 17, 2015). Mastercard's Credit Card Agreement states, "[i]f any of the provisions of this Arbitration Agreement dealing with class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, that invalid provision shall not be severable and this entire Arbitration Agreement shall be unenforceable." http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/creditcardagreement_5181.pdf (last accessed July 17, 2015). Microsoft's Customer Agreement states, "[i]f the class action waiver in section 10.4 is found to be illegal or unenforceable as to all or some parts of a dispute, then section 10

the novel "law of your state" formulation at issue in this case; not even DIRECTV does at this point in time.

DIRECTV's final argument that under the Contract there can be no such thing as "state law" divorced from the preemptive effect of federal law is obviously meritless. Unquestionably, the California law in question does "exist": The California's Consumer Legal Remedies Act *is* the law of the State of California. Undoubtedly, it continues to apply in cases not subject to the Act.

In any event, DIRECTV is describing the distinct operation of positive law – *i.e.*, the fact that state law cannot impose legal requirements without accounting for the effect of the Supremacy Clause. In this case, by contrast, "California law" does not apply to the parties' agreement of its own force. Here, the parties

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won't apply to those parts. Instead, those parts will be severed and proceed in a court of law, with the remaining parts proceeding in arbitration." http://windows.microsoft.com/en-us/windows/microsoft-services-agreement (last accessed July 17, 2015); The Western Union Company's agreement states, "[t]his agreement is governed by the Federal Arbitration Act, and any award shall be subject to judicial confirmation. Any arbitration shall take place on an individual basis; class actions or arbitrations are not permitted. If any part of this paragraph is deemed invalid, it shall not invalidate the other parts." https://www.westernunion.com/us/en/terms-conditions.html (last accessed July 17, 2015). Whirlpool Corporation's Extended Service Plan Agreement states, "If any portion of this Provision is deemed invalid or unenforceable, it shall not invalidate the remaining portions of the Provision, except that in no event shall this Provision be amended or construed to permit arbitration on behalf of a group or class." https://www.whirlpoolextendedserviceplans.com/Home/TermsConditions_USA (last accessed July 17, 2015).

agreed to incorporate that law themselves. The Act left them perfectly free to do just that. As DIRECTV explains, "[p]arties to arbitration agreements (like any other contracts), after all, are free to choose the law that will govern the interpretation and enforcement of their agreements." Br. 15. So "[c]ontracting parties can always choose, of course, to bind themselves by reference to state law that has been 'nullified' by federal law, just as they can choose to bind themselves to the rules of a board game." *Id.* 20. As the California Court of Appeal concluded as a matter of California law, that is what they did here.

DIRECTV of course also could have provided explicitly in the Contract that principles of preemption under the Act override state arbitration law, as many companies do. *See, e.g.*, Alcoa Inc.'s Sales Agreement, "[n]otwithstanding anything to the contrary herein, the arbitration provisions set forth herein, and any arbitration conducted thereunder, shall be governed exclusively by the Federal Arbitration Act, Title 9 United States Code, to the exclusion of any state or municipal law of arbitration." https://www.alcoa.com/primary_na/en/pdf/AMM_Sales_Terms_and_Conditions.pdf (last accessed July 14, 2015); Bank of America's Customer Agreement, "[t]his Agreement, and your and our rights and obligations under this Agreement, are governed by and interpreted according to federal law and the law of the state where your account is located… If state and federal law are inconsistent, or if state law is preempted by federal law, federal law governs." https://www.bankofamerica.com/deposits/resources/deposit-agreements.go (last accessed July 14, 2015); PulteGroup, Inc.'s agreement, "[t]his Warranty, including, but not limited to, the arbitration provision, will be governed by the Federal

Arbitration Act ('FAA') which overrides and preempts certain state, local, or other laws concerning arbitration, including, but not limited to, laws that have the purpose of defeating or restricting arbitration."
http://www.pulte.com/assets/pdf/PulteProtectionPlan.pdf (last accessed July 14, 2015); and Windstream Holdings, Inc.'s, "[t]he interpretation and enforceability of the arbitration provisions, and whether a dispute is subject to arbitration, is subject to the Federal Arbitration Act ('FAA') only and not state law." http://www.windstream.com/Terms-and-Conditions/ (last accessed July 14, 2015).

IV. The Court May Conclude That The Better Course Is To Dismiss The Writ Of Certiorari As Improvidently Granted.

This Court should not adopt DIRECTV's argument for the further reason that it would require deciding the case on the basis of what is, at best, a doubtful premise: that the Court of Appeal interpreted an arbitration agreement. The better view is that the court instead decided the antecedent question whether the parties entered into an arbitration agreement at all. DIRECTV's apparent view is that because Section 9 appears in the Contract, and Section 9 addresses the subject of arbitration, the parties *ipso facto* had entered into an "arbitration agreement." Br. 1, 14. More narrowly, DIRECTV may maintain (though it does not argue in its opening brief) that certain claims that could be brought under the Contract – such as a purely personal dispute with an individual customer – would be arbitrable under Section 9 because they do not implicate California's prohibition on class action waivers.

The anti-severability clause, however, is better read as categorical – *i.e.*, it provides either that all disputes with customers residing within a single state are arbitrable, or that none are. The Contract thus turns broadly on whether its prohibition on class action waivers is lawful in the consumer's state, not whether it is unlawful with respect to a particular claim.

Indeed, and as DIRECTV admitted, the *whole point* of Section 9's "anti-severability" clause is to ensure that parties in the states that would find this agreement to dispense with class procedures unenforceable (such as California) do *not* form an agreement to arbitrate. If the parties merely intended not to arbitrate a dispute for which the plaintiffs had an unwaivable right to class action procedures, they could have said that. The general rule under the Contract is thus that any provisions deemed to be prohibited by law will be severed, leaving the rest of the agreement intact. Under that provision, if the class action waiver were invalid it would be severed; arbitration would proceed on a class or individual basis as the circumstances warranted.

But DIRECTV took great care to write Section 9 very differently. The anti-severability clause renders unenforceable the *entire* arbitration provision. Thus, where the anti-severability clause applies, the parties will not arbitrate even claims that would only be litigated individually. Indeed, the provision must operate in that fashion, because it will often be uncertain at the outset of a case whether the plaintiffs will seek to proceed as a class.

DIRECTV wrote the agreement to include the anti-severability provision for one reason only: to

make clear beyond doubt that, in states that prohibit class action waivers, the parties would not agree to arbitrate any disputes between them. As petitioner's *amicus* explains, without such a provision, DIRECTV perceived a risk that it could be subject to penalties for employing an arbitration provision in its customer agreement that on its face included what state law regards as an unconscionable class action prohibition. New England Foundation Amicus Br. 8. That risk would exist if DIRECTV were to arbitrate only individual claims, not class actions.

The dispositive fact under the Contract is thus that California law prohibits class action waivers. The provisions of Section 9 relating to arbitration are accordingly always "unenforceable" because the law of California "would find this agreement to dispense with class arbitration procedures unenforceable." The Court of Appeal accordingly stated as its holding: "The class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable." Pet. App. 15a. And as DIRECTV itself explains, the court thereby held that "the proviso nullifies the arbitration agreement." Br. 8; *see also* Pet. for Cert. 8.

The better view is thus that the question before the Court of Appeal was not how to construe an arbitration agreement, but instead whether the parties had *formed* an agreement "to settle by arbitration a controversy thereafter arising out of [their] contract." 9 U.S.C. § 2. "[W]here the dispute at issue concerns contract formation," the issue is decided "'apply[ing] ordinary principles that govern the formation of contracts.'" *Granite Rock*, 561 U.S. at 296 (quoting *First Options*, 514 U.S. at 944 (citing, in

turn, *inter alia*, *Mastrobuono*, 514 U.S. at 62-63; *Volt*, 489 U.S. at 475-76)). That conclusion follows from "the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent,' and thus 'is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration.'" *Id.* at 299 (quoting *Volt*, 489 U.S. at 479, and *First Options*, 514 U.S. at 943).

DIRECTV's repeated assertion that the "Court of Appeal transformed an agreement that *forbids* class arbitration into an agreement that *requires* class arbitration to be enforceable," Br. 2, is thus nothing more than empty rhetoric. Having specifically written Section 9's anti-severability provision to provide categorically that no agreement to arbitrate existed, DIRECTV cannot now take the opposite position that the parties entered into an arbitration agreement that must be construed to favor submitting the parties' dispute to arbitration.

We nonetheless recognize, however, that the Court of Appeal itself never clearly specified whether it was deciding the threshold question whether the parties entered into an arbitration agreement or instead recognized that such an agreement exists. As noted, the opinion describes the "entire agreement" as "unenforceable," not merely inapplicable in a case such as this one. Pet. App. 15a. On the other hand, at times, the opinion refers to an "arbitration agreement," but seemingly only in the colloquial sense of an agreement respecting the subject of an arbitration, as opposed to a contract to resolve disputes by arbitration. *Id.* 3a. Further, in a footnote, the Court of Appeal acknowledged DIRECTV's argument that certain of respondents' claims were not

subject to California's prohibition on class action waivers. The court rejected that argument on the narrower ground that the Contract's anti-severability clause renders Section 9 unenforceable so long as California law prohibits such a waiver with respect any of the plaintiff's claims. It did not endorse DIRECTV's premise that certain types of claims could be subject to arbitration under the Contract. Pet. App. 15a n.5.

Because DIRECTV cannot establish the premise of its argument – *i.e.*, that the parties entered into an arbitration agreement, which is itself a distinct question of state law – the judgment cannot be affirmed without further guidance provided by a remand to the California Court of Appeal. The better course, however, may simply be to dismiss the petition as improvidently granted. For the reasons described in Part I, *supra*, the law governing the case is well settled. A ruling by this Court in unlikely to illuminate any clouded questions regarding the application of the Act.

Although this Court likely concluded that granting review would resolve the inconsistency between the California Court of Appeal's reading of the Contract and the reading adopted by the Ninth Circuit in *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013), there is no conflict as a prospective matter, for several reasons. As discussed, because the Contract is properly construed as a matter of state law, the state court's ruling in this case supplants the federal court's contrary reading of the document. The language of the Contract itself has no broader significance, given that almost no other entity uses it, not even DIRECTV any longer. Even more significant,

in the wake of this Court's rulings in *Concepcion* and *Stolt-Nielsen*, parties seeking to avoid state prohibitions on class action waivers need not include any language in their contracts at all. Silence will be construed not to be assent to class action arbitration, and contrary state law is preempted.

The Court should also be concerned about the lack of adversarial presentation in the case with respect to several issues. As discussed, on the merits, DIRECTV's entire opening brief rests on the premise that the parties entered into an "arbitration agreement." But the brief includes not a word explaining why that is so, notwithstanding that DIRECTV knew that respondents' principal position was that no such agreement had been formed. BIO 7. Many of DIRECTV's arguments on the principal issue in the case will therefore appear for the first time in its reply brief, when it is too late for respondents to reply.

DIRECTV's opening brief also fails to explain this Court's jurisdiction, in either of two important respects. Supreme Court Rule 14(g)(i) provides that the petition for certiorari must specify when, in all the lower courts, "the federal questions sought to be reviewed were raised." Rule 24(e) provides that the petitioner's brief on the merits must explain "the basis for jurisdiction in this Court." But DIRECTV did not seriously do either, such that respondents are unable to address its position on either issue.

DIRECTV states that it moved to compel arbitration in the trial court "[i]n light of *Concepcion*," Pet. 7, but then says nothing about the arguments it presented to the Court of Appeal or California Supreme Court, *Id.* 7-8. In fact, as discussed,

DIRECTV previously agreed that under the Act state law controls. Later, DIRECTV took the position that state law controls except in the limited circumstances that it is preempted by the Act. *E.g.*, DIRECTV Memo. In Support Of Motion To Motion To Compel Arbitration at *Id.* 7-9, 11-12. But even that argument did not include its current theory that federal contract law supplants state law. DIRECTV did not even argue substantially in the trial court or on appeal that the Act requires a presumption in favor of arbitration, much less resolving all doubts in favor of arbitration. Although respondents did not raise this argument in the brief in opposition, that is easily explained: DIRECTV's argument in its merits brief has evolved substantially from the petition for certiorari.

DIRECTV also summarily asserts in its merits brief that this Court has jurisdiction under 28 U.S.C. § 1257(a). Br. 3. But that statute applies to "final" judgments, whereas the Court of Appeal's judgment in this case is interlocutory. DIRECTV presumably would argue that the ruling below imperils the interests protected by the Act. But it has never articulated the basis for that position, including by explaining whether or not it intends to pursue any other arguments under the Act on remand. (Its "jurisdictional" argument in the certiorari reply brief related only to whether the case raises a question of federal law.) So respondents are unable to address whatever theory DIRECTV might advance.

For the foregoing reasons, the Court may conclude that the appropriate course is simply to dismiss the petition for certiorari as improvidently granted.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed or the writ of certiorari dismissed.

Respectfully submitted,

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APPENDIX

FEDERAL ARBITRATION ACT

9 U.S.C. § 1

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil

Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CALIFORNIA CONSUMER LEGAL REMEDIES ACT

California Civil Code § 1751

Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.

California Civil Code § 1752

The provisions of this title are not exclusive. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.

Nothing in this title shall limit any other statutory or any common law rights of the Attorney General or any other person to bring class actions. Class actions by consumers brought under the specific provisions of Chapter 3 (commencing with Section 1770) of this title shall be governed exclusively by the provisions of Chapter 4 (commencing with Section 1780); however, this shall not be construed so as to deprive a consumer of any statutory or common law right to bring a class action without resort to this title. If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the consumer may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such law.

California Civil Code § 1753

If any provision of this title or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the title and the application of such provision to other persons or circumstances shall not be affected thereby.

California Civil Code § 1760

This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

California Civil Code § 178

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:(1) It is impracticable to bring all members of the class before the court.(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.(4) The representative plaintiffs will fairly and adequately protect the interests of the class.(c) If notice of the time and place of the hearing is served upon the other

parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:(1) A class action pursuant to subdivision (b) is proper.(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.(3) The action is without merit or there is no defense to the action. A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a).(d) If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.(e) The notice required by subdivision (d) shall include the following:(1) The court will exclude the member notified from the class if he so requests by a specified date.(2) The judgment, whether favorable or not, will include all members who do not request exclusion.(3) Any member who does not request exclusion, may, if he desires, enter an appearance through counsel.(f) A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did

not request exclusion.(g) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The best possible notice of the judgment shall be given in such manner as the court directs to each member who was personally served with notice pursuant to subdivision (d) and did not request exclusion.