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 PETITIONER

MELISSA D. INGALLS
ROBYN E. BLADOW
SHAUN PAISLEY
KIRKLAND & ELLIS LLP
333 S. Hope St.
Los Angeles, CA 90071
(213) 680-8400

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

May 29, 2015

QUESTION PRESENTED

Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner DIRECTV, Inc. has been merged into DIRECTV, LLC, with DIRECTV, LLC as the surviving entity. Pursuant to Supreme Court Rule 29.6, DIRECTV, LLC makes the following disclosures concerning parent entities and publicly held corporations that own 10% or more of its stock:

DIRECTV Holdings, LLC is the direct parent company and 100% owner of DIRECTV, LLC;

The DIRECTV Group, Inc. is the direct parent company and 100% owner of DIRECTV Holdings, LLC;

Greenlady Corp. controls a 57% interest in The DIRECTV Group, Inc.;

DTV Entertainment, Inc. is the direct parent company and 100% owner of Greenlady Corp.; and

DIRECTV, a publicly traded company and the ultimate parent company of DIRECTV, LLC, is the direct parent company and 100% owner of DTV Entertainment, Inc., and controls a 43% interest in The DIRECTV Group, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTRODUCTION

This case involves the interpretation of an arbitration agreement between petitioner DIRECTV, Inc. and respondents, representatives of a class of former DIRECTV customers. That agreement by its plain terms makes two points abundantly clear: (1) the parties wished to resolve their disputes through arbitration, as opposed to litigation, and (2) the parties did not wish to arbitrate on a classwide basis. The parties sought to reconcile these two objectives by specifying, in a proviso to their agreement to dispense with class arbitration, that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] shall be unenforceable." There is absolutely no mystery as to the intent and effect of that proviso: it underscores that the parties really meant what they said about precluding class arbitration, even to the point of renouncing arbitration altogether if they otherwise would be forced to arbitrate on a classwide basis.

The proviso, it turned out, reflected an abundance of caution. After the parties entered into their arbitration agreement, this Court held that state law cannot force parties to arbitrate on a classwide basis where, as here, they have not agreed to do so. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). 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). As the Court explained, "[r]equiring the availability of classwide arbitration interferes with fundamental

attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Because class arbitration "is not arbitration as envisioned by the FAA [and] lacks its benefits," it "may not be required by state law." *Id.* at 1752-53.

Ironically, however, the California Court of Appeal seized upon the proviso to deny arbitration here. According to that court, the proviso reflects the parties' intent to rely on state law *preempted* by the FAA to defeat their arbitration agreement, even though the parties affirmatively specified that their agreement is *governed* by the FAA. That interpretation, as the Ninth Circuit has explained, is "nonsensical." *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013). The California Court of Appeal transformed an agreement that *forbids* class arbitration into an agreement that *requires* class arbitration to be enforceable.

That decision cannot possibly be characterized as a faithful application of federal arbitration law. The whole point of the FAA is to counteract traditional judicial hostility to arbitration by requiring courts, as a matter of substantive federal law, to enforce arbitration agreements according to their terms, and to resolve any doubts in *favor* of arbitration. The court below did precisely the opposite, refusing to enforce this arbitration agreement according to its terms, and instead endorsing an outlandish interpretation that *defeats* arbitration. This case thus shows that the judicial hostility to arbitration that motivated the FAA is far from a relic of the past. Accordingly, this Court should reverse the judgment.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 170 Cal. Rptr. 3d 190, and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 2-16a. The unreported order of the California Supreme Court denying review of the Court of Appeal's decision is reprinted at Pet. App. 1a. The trial court's unreported opinion denying petitioner's motion to compel arbitration is reprinted at Pet. App. 17-20a.

JURISDICTION

The California Court of Appeal issued its decision on April 7, 2014. Pet. App. 2a. Petitioner filed a timely petition for discretionary review, which the California Supreme Court denied on July 23, 2014. Pet. App. 1a. Petitioner filed a timely petition for certiorari on October 21, 2014, which this Court granted on March 23, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the U.S. Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 2 of the FAA provides in relevant part:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … 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. § 2.

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any … court … for an order directing that such arbitration proceed in the manner provided for in such agreement. … The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration … 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.

9 U.S.C. § 4.

STATEMENT OF THE CASE

A. Background

The provision and acceptance of DIRECTV programming services—like many other consumer services (*e.g.*, banking, cellular, internet)—are subject to certain basic terms and conditions. Those terms and conditions are set forth in the DIRECTV

Customer Agreement. That Agreement is subject to revision by DIRECTV from time to time. When the Agreement is revised, it is sent to existing customers, who may either refuse it by canceling their DIRECTV service, or accept it by continuing to receive such service subject to the revised Agreement. *See* 2001 Customer Agreement § 4, JA115; 2004 Customer Agreement § 4, JA119; 2006 Customer Agreement § 4, JA123; 2007 Customer Agreement § 4, JA127; McCarthy Decl. ¶¶ 4-5, 12-15, 17-18, JA107-08, 110-13.

The Customer Agreement at issue here includes a dispute-resolution provision—Section 9—that broadly requires arbitration of "any legal or equitable claim relating to this Agreement, any addendum, or your Service (referred to as a 'Claim')." 2007 Customer Agreement § 9, JA128.

The arbitration provision specifies in relevant part:

> [I]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated ... and under the Rules set forth in this Agreement.

Id. § 9(b), JA128. The Agreement then proceeds to enumerate "Special Rules" governing arbitration, including the following:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or

> arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable.

Id. § 9(c), JA128-29. The latter "non-severability" provision represents a specific exception to the Customer Agreement's general severability provision, which specifies that "[i]f 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 the Agreement will remain enforceable." *Id.* § 10(d), JA129.

In addition, the Customer Agreement contains a choice-of-law provision stating as follows:

> Applicable Law. 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. This Agreement is subject to modification if required by such laws. *Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.*

Id. § 10(b), JA129 (emphasis added).

B. Proceedings Below

In September 2008, respondents Amy Imburgia and Kathy Greiner filed separate putative class actions against DIRECTV, which were later consolidated, in the Superior Court for Los Angeles County. Pet. App. 3a. Both Imburgia and Greiner had cancelled their DIRECTV accounts in 2008, when they were subject to the 2007 Customer Agreement described above. *See* McCarthy Decl. ¶¶ 12-15, 17-18, JA110-13. The consolidated complaint alleged that DIRECTV had violated a variety of California laws by assessing early cancellation fees when respondents cancelled their DIRECTV accounts before the end of an agreed-upon time period. *See* First Am. Class Action Compl. ¶¶ 63-108, JA78-95.

Although the parties had agreed to arbitrate disputes like this one, DIRECTV did not move to compel arbitration when the complaints were filed. That is because, in 2005, the California Supreme Court had announced a rule that invalidated as unconscionable almost all consumer arbitration agreements containing class-action waivers. *See Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1106-10 (Cal. 2005). Applying that rule, California courts had specifically refused to enforce the arbitration provision in the DIRECTV Customer Agreement. *See*, *e.g.*, *Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Cal. Ct. App. 2006). Accordingly, any attempt to compel arbitration when the complaints in this case were filed would have been futile under then-prevailing California law, *see, e.g.*, *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 143-45 (Cal. 2014); *Fisher v. Becker Paribas Inc.*, 791 F.2d

691, 697 (9th Cir. 1986)—and, indeed, could have subjected DIRECTV to punitive damages for seeking to enforce an unconscionable contract, *see* Cal. Civ. Code §§ 1770(a)(19), 1780(a)(4). The case therefore proceeded in court until, on April 27, 2011, this Court held in *Concepcion* that the FAA preempts state laws that purport to require class arbitration where the parties have not agreed to it. *See* 131 S. Ct. at 1747-53.

In light of *Concepcion*, DIRECTV promptly moved to compel arbitration. The trial court (Wiley, J.), however, denied the motion on the ground that the parties' arbitration agreement is unenforceable under *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), a case involving labor-related representative actions under California's Private Attorney General Act of 2004 (which is not at issue in this case). Pet. App. 17-20a.

DIRECTV appealed, but the Court of Appeal affirmed the trial court's decision on different grounds. *See* Pet. App. 2-16a. In particular, the appellate court focused on the proviso to the parties' agreement to dispense with class arbitration, which states that "if 'the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.'" Pet. App. 6a (quoting Customer Agreement § 9(c)). According to the court, the reference to "the law of your state" in that proviso means state law immune from the ordinary preemptive force of federal law. Pet. App. 6-15a. Thus, the court concluded, the proviso nullifies the arbitration agreement, because the parties agreed to be bound by state law preempted by the FAA—even

though the parties specified that their arbitration agreement was governed by the FAA. Pet. App. 15a.

The Court of Appeal acknowledged that its decision conflicted with the Ninth Circuit's decision in *Murphy*, which had characterized the reasoning embraced by the Court of Appeal as "nonsensical." *Murphy*, 724 F.3d at 1226. The Court of Appeal, in turn, dismissed the Ninth Circuit's analysis as "unpersuasive." Pet. App. 13a. According to the Court of Appeal, "*Murphy* provides no basis for concluding that the parties intended to use the phrase 'the law of your state'" to mean state law subject to the ordinary preemptive force of federal law. *Id.* Instead, the Court of Appeal interpreted the phrase "the law of your state" to mean "'the (nonfederal) law of your state *without considering the preemptive effect, if any, of the FAA*.'" Pet. App. 14a (emphasis added). Applying preempted California law, the Court held the class-action waiver invalid, and thus refused to enforce the arbitration agreement. Pet. App. 15a.

DIRECTV timely petitioned for review in the California Supreme Court to resolve the conflict between the California Court of Appeal and the Ninth Circuit. On July 23, 2014, however, the California Supreme Court denied review over Justice Baxter's dissent. Pet. App. 1a. This Court subsequently granted certiorari.

SUMMARY OF ARGUMENT

The FAA requires state and federal courts alike to interpret and enforce arbitration agreements according to their terms, and to resolve any doubts in favor of arbitration. The California Court of Appeal here, however, did precisely the opposite: the court

refused to enforce arbitration by embracing a nonsensical interpretation of the parties' agreement. That agreement reflects an unmistakable intent to arbitrate disputes *unless* state law would force the parties into class arbitration. The FAA, however, preempts state law that would force the parties into class arbitration. Accordingly, the state court should have enforced the parties' arbitration agreement.

Instead, the court interpreted the reference to state law in the parties' arbitration agreement to mean state law immune from the ordinary preemptive effect of federal law. In context, however, that interpretation makes no sense: once state law that might force the parties into class arbitration is preempted, it necessarily poses no risk of forcing them into class arbitration, and hence provides no basis for nullifying their manifest intent to arbitrate their disputes. That point is all the more compelling in light of the contractual provision specifying that the arbitration agreement here is governed by the FAA: the parties hardly would have specified that their arbitration agreement is governed by the FAA if they intended to bind themselves by reference to state law inconsistent with, and thus preempted by, the FAA. In any event, in our federal system, there is no such thing as state law immune from the ordinary preemptive force of federal law; preempted state law is a legal nullity. There is absolutely nothing in the arbitration clause at issue here to indicate that the parties chose to forego their arbitration rights by reference to *hypothetical* state law immune from federal preemption as opposed to *actual* state law subject to federal preemption.

And even if there were any ambiguity on any of the foregoing—which there is not—the court below would have been constrained to compel arbitration. The FAA, as this Court has long held, requires courts to resolve any ambiguities in *favor* of, not *against*, arbitration.

At bottom, the decision below cannot possibly be characterized as a faithful application of the FAA and this Court's arbitration precedents. Rather, that decision distorts the parties' agreement to thwart their federal arbitration rights. Accordingly, this Court should reverse the judgment.

ARGUMENT

The California Court of Appeal Violated The FAA By Failing To Interpret And Enforce The Parties' Arbitration Agreement According To Its Terms.

The California Court of Appeal erred by refusing to interpret and enforce the parties' arbitration agreement according to its terms. Whatever the merits of the state court's decision as a matter of *state* law, the court violated *federal* law by denying arbitration here.

By its terms, the FAA provides that a written arbitration provision in a transaction involving interstate commerce "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. § 2; *see also id.* § 4 (specifying that courts must direct parties to proceed to arbitration "in accordance with the terms of the agreement"). These provisions were enacted to overcome the "ancient judicial hostility to arbitration," *Mastrobuono v.*

Shearson Lehman Hutton, Inc., 514 U.S. 52, 56 (1995) (internal quotations omitted), by "ensur[ing] that 'private agreements to arbitrate are enforced according to their terms,'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)).

To that end, the FAA "create[s] a body of *federal substantive law of arbitrability*, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). In the absence of such substantive federal law, after all, courts could thwart federal arbitration law at will by simply refusing to enforce arbitration agreements under state law. Thus, substantive federal arbitration law "establish[es] that, in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 475-76 (internal citation omitted); *see also Stolt-Nielsen*, 559 U.S. at 682 (substantive federal arbitration law applies "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause"); *Moses H. Cone*, 460 U.S. at 25 (substantive federal arbitration law applies "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability").

As a result, the interpretation and enforcement of an arbitration agreement governed by the FAA is a *hybrid* of state and federal law. "While the interpretation of an arbitration agreement is generally a matter of state law," *Stolt-Nielsen*, 559 U.S. at 681, the FAA ensures that, as a matter of federal law, the agreement is interpreted and enforced in a manner consistent with federal arbitration law—especially the cardinal federal rule that courts must "'give effect to the contractual rights and expectations of the parties,'" *id.* at 682 (quoting *Volt*, 489 U.S. at 479); *see also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) ("[C]onsistent with th[e] text [of the FAA], courts must 'rigorously enforce' arbitration agreements according to their terms.") (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms.").

That is why the interpretation and enforcement of an arbitration agreement subject to the FAA presents a question of substantive federal law subject to this Court's review. Thus, in *Stolt-Nielsen*, this Court held as a matter of *federal* law that contractual silence with respect to classwide arbitration cannot be interpreted as consent to classwide arbitration, regardless of contrary state law. *See* 559 U.S. at 684-87. Similarly, in *Buckeye Check Cashing, Inc. v. Cardegna*, this Court held as a matter of *federal* law that an arbitration clause is severable from the rest of the contract, regardless of contrary state law. 546 U.S. 440, 445-49 (2006). Needless to say, these decisions and countless others

would be inexplicable if federal law had no role to play in the interpretation and enforcement of arbitration agreements governed by the FAA. *See*, *e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-73 (1995). Substantive federal arbitration law serves as an important check on the application of state law, safeguarding the parties' federal arbitration rights. *See*, *e.g.*, *Mastrobuono*, 514 U.S. at 56-64 (reversing lower court's interpretation of arbitration agreement); *cf. Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). Indeed, the suggestion that, "despite this Court's jurisprudence," the interpretation and enforcement of arbitration agreements governed by the FAA "is purely a matter of state law" provides "all the *more* reason for this Court to assert jurisdiction" to ensure faithful application of that federal statute. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*) (emphasis added).

There can be no dispute that the parties here entered into a written arbitration agreement, or that the interpretation and enforcement of that agreement is governed by FAA. As an initial matter, the parties' Customer Agreement is "a contract evidencing a transaction involving commerce," 9 U.S.C. § 2, which this Court has interpreted to signal "Congress' intent to exercise its Commerce Clause powers to the full." *Allied-Bruce*, 513 U.S. at 273; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). In any event, to dispel any conceivable doubt on this score, the parties here specified that their arbitration agreement "shall be governed by the Federal Arbitration Act," 2007 Customer Agreement

§ 10(b), JA129. Thus, the FAA governs the interpretation and enforcement of the arbitration agreement in this case not only of its own force, but also as a matter of private contract. Parties 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. *See*, *e.g.*, *Volt*, 489 U.S. at 476-79 (respecting parties' choice of state procedural law to govern the enforcement of their arbitration agreement); *Rodriguez v. American Techs., Inc.*, 39 Cal.Rptr.3d 437, 445 (Cal. Ct. App. 2006) (respecting parties' choice of federal procedural law to govern the enforcement of their arbitration agreement).

Accordingly, this case squarely presents the substantive federal question whether the California Court of Appeal violated the FAA by failing to interpret and enforce the parties' arbitration agreement according to its terms. The answer to that question is clearly "yes." Indeed, this case is about as easy as they come.

The parties here agreed that "any legal or equitable claim relating to this Agreement, any addendum, or your Service," if not resolved informally, would be "resolved *only* by binding arbitration." 2007 Customer Agreement § 9, JA128 (emphasis added). There is no dispute that respondents' challenge to DIRECTV's early-cancellation policy is a "legal or equitable claim relating to this Agreement, any addendum, or your Service." *Id.*

The parties' arbitration agreement, however, did not stop with identifying the claims subject to arbitration. Rather, it proceeded to set forth rules

governing the arbitration process. Thus, it specified that "[t]he arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated ... and under the rules set forth in this Agreement." *Id.* § 9(b), JA128. And "[i]f there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern." *Id.*

Of particular relevance here, in a section of the agreement entitled "Special Rules," the parties agreed that neither side "shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity." *Id.* § 9(c), JA128-29. In light of that agreement, the parties further specified that "the JAMS Class Action Procedures do not apply to our arbitration." *Id.*, JA129. And, to foreclose any possibility of being forced into class arbitration, the parties included a proviso to their agreement to dispense with class arbitration: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [*i.e.*, the arbitration provision] is unenforceable." *Id.*

The California Court of Appeal seized on that proviso to justify denial of DIRECTV's request to enforce arbitration. According to the state court, the phrase "the law of your state" is subject to two different interpretations: it could mean either "[1] 'the law of your state to the extent it is not preempted by the FAA,' or [2] 'the law of your state without considering the preemptive effect, if any, of the FAA.'" Pet. App. 8a. Purporting to apply state-

law rules of contract interpretation, the court chose the latter interpretation, and accordingly applied preempted state law to refuse to enforce the parties' arbitration agreement. *See* Pet. App. 8-11a.

That interpretation cannot stand as a matter of substantive federal law, as it manifestly fails to enforce the parties' arbitration agreement "'according to [its] terms.'" *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Volt*, 489 U.S. at 479). Indeed, the California Court of Appeal turned the parties' arbitration agreement upside down by applying state law preempted by the FAA to refuse to enforce an arbitration agreement governed by the FAA.

For starters, the question here is not, as the state appellate court approached it, the meaning of the phrase "the law of your state" in the abstract. Rather, the question here is the meaning of that phrase in the context of an arbitration agreement governed by the FAA where the parties manifested an unmistakable intent to arbitrate their disputes unless they would be forced into class arbitration. *See* 2007 Customer Agreement § 9, JA128-29. It is a "fundamental principle of ... construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also Bowers Hydraulic Dredging Co. v. United States*, 211 U.S. 176, 188 (1908) ("To separate the words [of a phrase] from all the other provisions of the contract in order to give them an assumed or proven abstract ... meaning, repugnant to their significance in the contract, would be to destroy, and not to sustain and enforce, the contract requirements."); *see generally* 5

Arthur L. Corbin *et al.*, *Corbin on Contracts* § 24.21 (rev. ed. 2014); *Restatement (Second) of Contracts* § 202(2) (1981).

The California Court of Appeal wholly ignored the fact that it was construing the phrase "the law of your state" in the context of an arbitration agreement governed by the FAA where the parties manifested an unmistakable intent to arbitrate their disputes unless they would be forced into class arbitration. *See* 2007 Customer Agreement § 9, JA128-29. In this context, there is no reason to suppose that the parties intended to nullify their arbitration agreement where, as here, they would *not* be forced into classwide arbitration.

Indeed, it is fanciful to suppose that the parties would have specified that, "[n]otwithstanding" the general choice-of-law provision in the Customer Agreement, their arbitration agreement "shall be governed by the [FAA]," *id.* § 10(b), JA129, if they intended for the enforcement of that agreement to be foreclosed by state law *preempted* by the FAA. Given the parties' expectation that the FAA would govern their arbitration agreement, "it would be remarkable for a court to erase that expectation" by resurrecting state law inconsistent with, and thus preempted by, the FAA. *American Express,* 133 S. Ct. at 2309.

Far from embracing state law preempted by the FAA, thus, the parties here "did exactly the opposite" by agreeing that their arbitration argument "shall be governed by" the FAA. *Murphy*, 724 F.3d at 1228. They sought to *prevent* the application of state law inconsistent with the FAA, "not ... to *rely* on state law that 'creates a scheme inconsistent with the FAA.'" *Id.* at 1226 (emphasis added; quoting

Concepcion, 131 S. Ct. at 1748). In this context, the California Court of Appeal's conclusion "that the parties intended for state law to govern the enforceability of DirecTV's arbitration clause, even if the state law in question contravened [the FAA], is nonsensical." *Id.*

Indeed, wholly apart from context, the state court's interpretation of the phrase "the law of your state" to refer to state law immune from the ordinary preemptive force of federal law is plainly unreasonable. Under the Supremacy Clause of the Federal Constitution, U.S. Const. art. VI, cl. 2, state law is *always* subject to the preemptive force of federal law. Thus, it is "a fundamental principle in our system of complex national polity" that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879); *see also Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 157 n.12 (1982) ("[T]he 'law of the jurisdiction' includes federal as well as state law."); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) ("The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are."); *People v. Sischo*, 144 P.2d 785, 791-92 (Cal. 1943) (*per curiam*) ("The Constitution of the United States and all laws enacted pursuant to the powers conferred by it on the Congress are the supreme law of the land to the same extent as though expressly written into every state law.") (internal citation omitted).

There is no such thing, in other words, as state law immune from the ordinary preemptive effect of

federal law. Rather, "it has long been settled that state laws that conflict with federal law are *without effect*." *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (emphasis added; internal quotation omitted); *see also De la Cuesta*, 458 U.S. at 153 (state law preempted by federal law is "nullified"). The preempted state law does not lurk in the shadows, only to emerge when unsuspecting parties invoke state law in their private dealings. State law preempted by federal law does not exist any more than state law that has been repealed; it is not "law" in any sense of the word. *See*, *e.g.*, *Murphy*, 724 F.3d at 1226 (in light of *Concepcion*, "the *Discover Bank* rule is not, and indeed never was, California law.").

Contracting 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 by reference to the rules of a board game. But it is entirely unrealistic to suppose that they would undertake so idiosyncratic an obligation absent some affirmative indication to that effect. *See, e.g.*, *Mount Diablo Med. Ctr. v. Health Net of Cal., Inc.*, 124 Cal. Rptr. 2d 607, 616 (Cal. Ct. App. 2002) (contract should not be construed to refer to preempted state law, "at least in the absence of unambiguous language in the contract making the intention to do so unmistakably clear"). A mere reference to "the law of your state," absent any evidence that the parties agreed to ignore the ordinary rules of preemption, cannot do the trick. In *any* context, but particularly in *this* context, the intent of the parties in referring to "the law of your state" is quite obviously to refer to the "the law of your state" in force at any given time, not

hypothetical state law immune from the ordinary preemptive force of federal law, or for that matter state law that has been repealed.

The California Court of Appeal proved nothing by invoking the maxim that "when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." Pet. App. 8-9a (internal quotation omitted). That maxim is perfectly fine as a general tool of interpretation, but has absolutely no bearing here, where there is no inconsistency between a general and a specific provision. The court below purported to discern an inconsistency between the arbitration agreement's specific reference to "the law of your state" and "the arbitration agreement's general adoption of the FAA." Pet. App. 9a (emphasis omitted). "That is, although the agreement provides that in general section 9 is governed by the FAA, section 9 itself provides that the specific issue of the enforceability of the class action waiver shall be governed by 'the law of your state.'" *Id.*

But that approach begs the question, as there is no inconsistency between the reference to "the law of your state" and the choice-of-law provision adopting the FAA *unless* the reference to "the law of your state" is construed to mean "the law of your state" immune from the ordinary preemptive effect of federal law. Thus, the maxim in no way advances the ball in resolving the interpretive issue presented here. *See Murphy*, 724 F.3d at 1228 ("[T]here is no conflict between the reference to 'the law of your state' in Section 9 of the Customer Agreement and the reference to the FAA in Section 10."). The

maxim, after all, is a tool for *resolving* contractual inconsistency, and certainly does not require courts to *create* inconsistency where none would otherwise exist. Indeed, interpreting "the law of your state" to refer to state law subject to the ordinary preemptive force of federal law (including the FAA) *harmonizes* the two provisions, as opposed to driving them into conflict. *Cf. Mastrobuono*, 514 U.S. at 63-64 (applying the "cardinal principle of contract construction" that provisions should be "harmonize[d]," not set up "in conflict").

Equally unavailing is the California Court of Appeal's invocation of "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." Pet. App. 10a (internal quotation omitted). That rule is a tool for *resolving* contractual ambiguity, not for *creating* it. As noted above, in the context of this arbitration agreement, there is absolutely nothing ambiguous about the meaning of the phrase "the law of your state." Thus, the rule that ambiguous contractual provisions must be construed against the drafter has no bearing here. *See, e.g.*, *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423 (2001).

But even if the California Court of Appeal were correct that the arbitration agreement here is ambiguous, the court would have been constrained to compel arbitration. As a matter of substantive federal arbitration law, "'ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration.'" *Mastrobuono*, 514 U.S. at 62 (quoting *Volt*, 489 U.S. at 476); *see also Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."); *Moses H. Cone,* 460 U.S. at 24-25 ("The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Thus, "where ambiguity in agreements involving arbitration exists, ... the strong presumption in favor of arbitration applies instead." *Huffman v. Hilltop Cos.,* 747 F.3d 391, 396-97 (6th Cir. 2014). In purporting to resolve the alleged "ambiguity" against arbitration, however, the state court below failed even to *mention*—much less *apply*—the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi*, 473 U.S. at 631.

* * *

This case vividly illustrates why Congress enacted the FAA. The California Court of Appeal went out of its way to thwart, not enforce, the parties' written arbitration agreement, which is precisely what the FAA forbids. At bottom, thus, this case is about the supremacy of federal law. Precisely because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration[,] … [i]t is a matter of great importance … that state ... courts adhere to" their obligations under that federal statute. *Nitro-Lift*, 133 S. Ct. at 501; *see also Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) ("State courts ... have a prominent role to play as enforcers of agreements to arbitrate."). State courts may not always like federal law, but they are

duty-bound to enforce it. *See, e.g.*, *Testa v. Katt*, 330 U.S. 386, 389-94 (1947). The state court below manifestly breached that duty by embracing a "nonsensical" interpretation of the parties' arbitration agreement to thwart their federal arbitration rights. *Murphy*, 724 F.3d at 1226. This Court—which alone can vindicate the supremacy of federal law in state court—should neither encourage nor tolerate such manifest defiance.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

MELISSA D. INGALLS
ROBYN E. BLADOW
SHAUN PAISLEY
KIRKLAND & ELLIS LLP
333 S. Hope St.
Los Angeles, CA 90071
(213) 680-8400

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com