1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DIRECTV, INC., :

4 Petitioner : No. 14-462

5 v. :

6 AMY IMBURGIA, ET AL. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Tuesday, October 6, 2015

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:04 a.m.

14 APPEARANCES:

15 CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf

16 of Petitioner.

17 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf of

18 Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in Case 14-462, DIRECTV v. Imburgia.

5 Mr. Landau.

6 ORAL ARGUMENT OF CHRISTOPHER LANDAU

7 ON BEHALF OF THE PETITIONER

8 MR. LANDAU: Thank you, Mr. Chief Justice,

9 and may it please the Court:

10 The court below violated the Federal

11 Arbitration Act by refusing to enforce the parties'

12 arbitration agreement on grounds the Ninth Circuit

13 characterized as "nonsensical."

14 The agreement provides for individual

15 arbitration and expressly precludes class arbitration.

16 And just to underscore that point, it specifies that if

17 State law would force the parties into class

18 arbitration, then the entire arbitration agreement would

19 be unenforceable.

20 The court below interpreted the reference to

21 State law to mean inoperative State law preempted by the

22 FAA. But neither respondents nor the court below

23 identified a single case in the history of California or

24 American law adopting that interpretation for any

25 contract. And it would be --

1 JUSTICE BREYER: What about the problem that
2 this is California law and a California court said
3 that's what the contract means under California law? In
4 other words, I can't find a case that we're supposed to
5 say -- or we have the power to say that they're wrong,
6 even if they were to say the words "do not turn on the
7 light" mean turn on all the lights.
8 MR. LANDAU: Your Honor.
9 JUSTICE BREYER: So -- so -- and they may
10 have done that in this case.
11 MR. LANDAU: Here --
12 JUSTICE BREYER: Nonetheless, what do we do
13 about it?
14 MR. LANDAU: What you do about it is look to
15 the Federal Arbitration Act. There is not a general
16 Federal contracts act, but there is a Federal
17 Arbitration Act that Congress passed specifically
18 because a particular kind of contract was not getting
19 enforced by the courts, and Congress was concerned about
20 that. So what Congress --
21 JUSTICE SOTOMAYOR: The principle of
22 contract interpretation -- I -- I beg to differ with
23 Justice Scalia, the -- I thought that what the court
24 asked itself is what did the parties intend when they
25 used the words "State law"?

1 MR. LANDAU: Correct.

2 JUSTICE SOTOMAYOR: Is that correct?

3 MR. LANDAU: That's what the court purported

4 to answer.

5 JUSTICE SOTOMAYOR: That's the interesting

6 part. You used the word "purported." What California

7 law did it apply --

8 MR. LANDAU: Correct.

9 JUSTICE SOTOMAYOR: -- that disfavors

10 arbitration? What contract principle did they use?

11 MR. LANDAU: Well, again, a lot of cases,

12 you have courts that are -- are bringing in some

13 principle external to the contract, and those are kind

14 of easy cases. This Court has now made clear that

15 courts can't rely on principles external to the contract

16 that are hostile to arbitration.

17 But courts also, under the Federal

18 Arbitration Act, have a responsibility to enforce the

19 contract according to its terms with a reference to the

20 Federal substantive law -- for more than 50 years, the

21 court has made clear that the Federal Arbitration Act

22 creates Federal substantive law. What is the content of

23 that Federal substantive law?

24 JUSTICE GINSBURG: What was the point of

25 putting State law in at all? If Federal law applies,

1 then it makes no sense to have any reference to State
2 law. If State law means State plus Federal law and
3 Federal law trumps State law, the reference to State law
4 is just inexplicable.
5 MR. LANDAU: No, Your Honor. It's to the
6 contrary, Your Honor, with respect. The reference to
7 State law was a recognition of the concern -- the
8 problem that the parties were confronting, which is
9 State laws were being enacted, as in California in their
10 Discover Bank rule, that would force the parties into
11 class arbitration against their will.
12 JUSTICE SCALIA: And we had not yet held at
13 the time this contract was made that those laws are
14 invalid.
15 MR. LANDAU: Precisely, Your Honor. And so
16 at that point, the problem they were focusing on was
17 State law. They could have also said, you know, if this
18 is unenforceable or used the passive voice. But here,
19 they chose to take the bull by the horns and be honest
20 about what was actually the problem, and they said State
21 law.
22 But the use of the term "State law" does not
23 indicate a recognition or a desire to -- to have
24 inoperative State law that's been preempted by the
25 Federal Arbitration Act. As the Ninth Circuit said,

1 that --

2 JUSTICE KENNEDY: I'm still not sure that I

3 understood your answer to Justice Breyer's question.

4 His question was, this Court purported, and did, give an

5 interpretation of the intent the two parties had when

6 they entered into a contract. And that is a matter of

7 State law.

8 MR. LANDAU: Your Honor.

9 JUSTICE KENNEDY: I -- I understand the

10 problem of preemption. I understand the problem that

11 preemption is -- that a judicial decision is

12 retroactive. This was not the State law. But the --

13 let's assume that the trial court in the California --

14 pardon me -- that the California appellate court said

15 the intent of the parties was to interpret the law to

16 mean A. And -- and "A" meant this superseded or

17 preempted State law. How can we reverse that

18 determination if it's a matter of State laws

19 interpreting a contract made by two people? I -- I --

20 that was the question and I'm -- I'm not quite sure what

21 your answer is.

22 MR. LANDAU: I'm sorry. I'll try to be as

23 clear as I can.

24 The answer is because -- you wouldn't go any

25 further if you didn't have something called the Federal

1 Arbitration Act. And the Federal Arbitration Act says
2 that this particular kind of contract, an arbitration
3 agreement, is not solely a question of State law. There
4 is Federal substantive law created under the Act.
5 To be sure as this Court said in Volt -- and
6 I'm quoting from Volt: "The interpretation of private
7 contracts is ordinarily a question of State law which
8 this Court does not sit to review."
9 And we have no quarrel with that
10 proposition. But the key word there is "ordinarily,"
11 and this case shows that ordinarily does not mean
12 exclusively. Because the Court in Volt went on to
13 say -- and I think this is critical, and I think you
14 could quote this passage from Volt and be finished with
15 this case. It says, "In applying general State
16 principles of contract interpretation to the
17 interpretation of an arbitration agreement within the
18 scope of the Act, due regard must be given to the
19 Federal policy favoring arbitration and ambiguities as
20 to the scope of the arbitration clause itself resolved
21 in favor of arbitration."
22 JUSTICE ALITO: Does that mean that whenever
23 there is a dispute about the scope of an arbitration
24 clause and a State court says that it includes a certain
25 subject or doesn't -- it doesn't include a certain

1 subject, that there is, then, the question of Federal
2 law because insufficient weight has been given to the
3 presumption of arbitrability?
4 MR. LANDAU: Yes, Your Honor. There is a
5 Federal question. Again, ordinarily you start out with
6 the proposition that contracts are governed by State
7 law. And we should be very -- let me be very clear. We
8 are not by any means saying that the Federal Arbitration
9 Act federalizes this entire area. We are kind of saying
10 the opposite, that it generally is a matter of State
11 law, but there is a Federal toll. So you always have a
12 Federal question to be a check on the State court's
13 application of law for cases like this when it is
14 perfectly clear what is going on.
15 JUSTICE ALITO: Well, this may be an extreme
16 case, but where -- how do you define the borderline?
17 MR. LANDAU: Again, Your Honor, I think in
18 the average case, the State court can interpret State
19 law as it sees fit, but then this Court's responsibility
20 in reviewing State law -- this Court obviously can
21 decide what cases it wants to take to review State law
22 has -- this Court's responsibility is to basically do
23 what Volt said it would do, which is did the State
24 court, in applying State law principles, give due regard
25 to the Federal policy favoring arbitration and construed

1 out in favor of arbitration?

2 JUSTICE BREYER: And I found no case ever

3 that's done that. And I have exactly the same problem

4 that Justice Alito has.

5 MR. LANDAU: Well --

6 JUSTICE BREYER: I mean, once we start with

7 this case, even if this is not too difficult under State

8 law, we've got every arbitration contract in the world

9 where one lawyer or another will suddenly be saying, oh,

10 the interpretation of the contract here by the State

11 court judge is not favorable enough to arbitration or

12 hostile to the act. And suddenly we have Federalized,

13 if not every area, a huge area of State contract law.

14 MR. LANDAU: Your Honor --

15 JUSTICE BREYER: Now, there's another way to

16 do it. We could just ask the California Supreme Court.

17 Now, what about that?

18 MR. LANDAU: Well --

19 JUSTICE BREYER: Or -- or come up with an

20 answer to what Justice Alito just asked.

21 MR. LANDAU: No, your Honor. Again, you

22 wouldn't ask the California Supreme Court because

23 ultimately this is a Federal law question.

24 JUSTICE BREYER: Why not ask. No.

25 Ultimately, it's a State law question, what does the

1 contract mean. And the contract, on reading it, seems
2 to me that it applies to laws that are laws, not laws
3 that have been held unconstitutional. So what I've
4 looked at, I've looked at civil rights cases, for all
5 kinds of cases. I can't find any.
6 MR. LANDAU: Even if this case came from the
7 California Supreme Court, and the California Supreme
8 Court said we -- again, it has never done that, and
9 that's one of the odd things about this case. But even
10 if the California Supreme Court were to say, we as a
11 matter of California law say that this -- you know,
12 State -- a reference to State law means preempted or
13 repealed or otherwise inoperative State law -- again, I
14 think that's hard to imagine, but let's say they said
15 that, you as the Supreme Court of the United States
16 would still have a responsibility to make sure that that
17 comports with the Federal policy of arbitration.
18 JUSTICE BREYER: Maybe that's so. But if
19 the California Supreme Court had said this, I would
20 look -- they would read the Contract as if it said, if
21 there is a law in the State of California, a State law,
22 or if there ever has been, whether that law is
23 constitutional or not constitutional, whether it
24 violates the Supremacy Clause or not, if they ever wrote
25 those words in the State legislature into a law, there

1 is no arbitration contract. Okay? I guess parties have
2 the right to do that. And if the California court said
3 as a matter of California law they did it right here, I
4 don't know that we'd have a ground to stand on.
5 MR. LANDAU: And that's, Your Honor, where,
6 respectfully, the Federal Arbitration Act, again --
7 JUSTICE SCALIA: But you -- you need a test,
8 Mr. Landau. You're -- you're -- I -- I sympathize with
9 Justice Breyer's point. You need some test.
10 MR. LANDAU: Your Honor --
11 JUSTICE SCALIA: Where does it stop? We're
12 going to reinterpret every State interpretation of -- of
13 State law that -- that ends up invalidating an
14 arbitration agreement? Certainly not. So what's the
15 test?
16 MR. LANDAU: The test is --
17 JUSTICE SCALIA: Can't you say that at least
18 in this case where -- where the State court's
19 interpretation flouts well-accepted universal contract
20 law principles, the most important of which is you
21 interpret a contract in a manner that makes it valid
22 rather than invalid. And they went out of their way to
23 interpret this in a manner that causes the whole
24 agreement to be thrown out.
25 MR. LANDAU: Correct, Your Honor. That is

1 why this --

2 JUSTICE SCALIA: So give us a test. Say

3 that, you know.

4 MR. LANDAU: The test --

5 JUSTICE SCALIA: You don't have to go any

6 further than that, where it -- where it flouts standard

7 contract interpretation principles.

8 MR. LANDAU: Well, certainly, Your Honor,

9 that is clearly one way to look at --

10 JUSTICE SOTOMAYOR: Do you really think that

11 the parties here -- this is something that I don't know

12 whether to quarrel with or not.

13 The California court said, we don't know

14 what the parties even thought about preemption. And it

15 was three years into litigation that preemption was

16 settled by this Court. Do you really think they would

17 have said that -- one of the parties would have said,

18 your adversary, oh, yes, now I'll go into arbitration

19 after three years of litigation?

20 MR. LANDAU: Absolutely, Your Honor, because

21 the only reason that they were not arbitrating from the

22 get-go was because --

23 JUSTICE SOTOMAYOR: Was because California

24 law said --

25 MR. LANDAU: Correct.

1 JUSTICE SOTOMAYOR: -- you don't.
2 MR. LANDAU: Correct.
3 JUSTICE SOTOMAYOR: That's what they wanted.
4 If California law said no, they wouldn't.
5 MR. LANDAU: Right. Right. And so once it
6 is clear that the thing that would have forced them into
7 class arbitration is gone, either because the California
8 Supreme Court repealed it or because this Court held it
9 to be preempted, then it -- again, it's nonsensical to
10 say --
11 JUSTICE GINSBURG: But when they entered --
12 when they entered the agreement, both parties
13 contemplated that State law meant California law.
14 That's why you did not object to the lawsuit being
15 brought in court. So if the parties' intent at the time
16 they entered the agreement and at the time the lawsuit
17 in court was started was clear, the parties intended
18 that the arbitration agreement would be out because the
19 no class action was unenforceable in California. That's
20 what they intended at the time they made the contract;
21 isn't that so?
22 MR. LANDAU: No, Your Honor. What they
23 intended was that this would turn by reference to State
24 law. At that time, State law was as Your Honor
25 describes. You are absolutely correct. But they didn't

1 say, if State law as it exists today requires
2 arbitration. In other words, there's nothing in the
3 contract that freezes this in a particular point in
4 time. It takes a snapshot --
5 JUSTICE GINSBURG: If we're trying to find
6 out what the parties meant, why wouldn't we look to see
7 what they meant at the time the contract was formed?
8 MR. LANDAU: Well, because, again, it's --
9 what the contract that they chose used an important
10 verb. We've been talking a lot about the noun in the
11 sentence, the clause "the law of the State." But then
12 the verb says if the law of the State would find, not if
13 the law of your State today finds.
14 And imagine, Your Honor, if California had
15 repealed its CLRA, which has the anti-waiver provision
16 that they are relying on. Well, I don't think anybody
17 would say, well, because the CLRA was in effect at the
18 time this thing was -- was enacted, that if a CLRA is
19 later repealed, we still have disclaimed arbitration.
20 JUSTICE KAGAN: So, Mr. Landau, let's assume
21 you're right, that this is a really bad mistake when it
22 comes to arbitration. So just to take you back to
23 Justice Alito's point and Justice Scalia's point, you
24 know, usually we don't fix bad mistakes --
25 MR. LANDAU: Correct.

1 JUSTICE KAGAN: -- when State courts
2 interpret State law. I mean, there are a lot of
3 mistakes when it comes to interpretation of contracts,
4 including arbitration agreements.
5 So, again, what's the standard? There's
6 nothing on the face of this opinion that indicates
7 hostility to arbitration. To the extent that you can
8 find reasoning in this opinion, which you have to search
9 to find, but to the extent that you can find reasoning,
10 it's about interpreting form contracts, interpreting --
11 whenever you see an ambiguity in a form contract, you
12 interpret it against the drafter. And that's a
13 principle of contract interpretation that, as far as I
14 can see, has been used hundreds of times in California.
15 It appears to be a very common principle of contract
16 interpretation in California whenever California courts
17 look at a contract of adhesion.
18 So why isn't that just what they did, and is
19 what they did?
20 MR. LANDAU: Fair enough. But even by its
21 terms, the predicate for that is some ambiguity. You
22 can't just say, well, guess what, contract of adhesion,
23 immediately we go to construing against the drafter.
24 You have to have an ambiguity. There's no antecedent
25 ambiguity. And the court really didn't identify

1 anything other than to totally question begging
2 assertion that the general -- specific governs the
3 general.
4 Again, Your Honor, I want to be very clear
5 here, our rule is very narrow. And this Court does not
6 have to go any further than it went in Volt to say,
7 generally, contract interpretation, even if it's
8 erroneous, is a matter of State law. But -- and we're
9 not saying that every mistaken contract interpretation
10 gives rise to a Federal question.
11 What we are saying, though, is just that the
12 Federal court's role is to make sure -- to look at what
13 the State court did and say, can we see that this court
14 gave effect to the healthy Federal policy regarding
15 arbitration and construed doubts in favor of
16 arbitration? Here, you see the opposite. And, you
17 know, with respect, Your Honor, you can't see on the
18 face of it that they say it's hostile, but how --
19 JUSTICE SOTOMAYOR: How do we draw the line
20 between --
21 MR. LANDAU: Excuse me, Your Honor.
22 JUSTICE SOTOMAYO: How do we draw the line
23 between wrong and the standards you're arguing?
24 MR. LANDAU: Your Honor, again, I think -- I
25 was quoting to you the language from Volt. That has

1 worked for the last 30 years that it's been on the
2 books. I think -- this case, again, is not a great case
3 for saying how wrong does wrong have to be. I mean,
4 clearly, here, it's nonsensical. Again, I think there
5 may be cases that will have -- and I think you have a
6 standard. If I were to come -- I could use other words
7 like unreasonable or manifestly wrong.
8 JUSTICE BREYER: I'm back to my point. I
9 looked in civil rights cases.
10 MR. LANDAU: Right.
11 JUSTICE BREYER: The south passed statute
12 after statute like the city in the statutes and so forth
13 to try to prevent the equal protection clause from being
14 implemented. So I looked at a few of those that my law
15 clerk got. In none could I find the court saying this
16 matter of State law where it isn't itself
17 unconstitutional, you know, what -- what is a trespass
18 and so forth. There -- it violates the Federal law,
19 what they'd say is we interpret the State law.
20 MR. LANDAU: Well --
21 JUSTICE BREYER: They've gone that far,
22 because we think the State would interpret the State law
23 this way. But I can't find an analogy to what you're
24 saying.
25 MR. LANDAU: Well, again, Your Honor --

1 JUSTICE BREYER: We'd have to say an
2 interpretation of a contract where that interpretation
3 is -- is what?
4 MR. LANDAU: Please go back to Volt.
5 JUSTICE BREYER: What -- I'm looking for the
6 standard.
7 MR. LANDAU: Is not --
8 JUSTICE BREYER: You read me the words. It
9 didn't say what to do.
10 MR. LANDAU: Okay.
11 JUSTICE BREYER: It said they have to
12 conform with Federal --
13 MR. LANDAU: Well, no. It said -- it said
14 they must read it with a -- with the --
15 JUSTICE BREYER: That looks like we're the
16 supervisor of all State contract interpretation judges.
17 MR. LANDAU: No, Your Honor. Again, what --
18 again, what Volt says, it's -- ordinarily, it's a
19 question of State law. Your -- your role as under the
20 Federal -- there is substantive Federal law under the
21 Federal Arbitration Act. That has been clear and
22 established for more than 50 years. The State -- the
23 Federal Arbitration Act applies in State Court. That
24 has been clear for more than 30 years. If you say --
25 JUSTICE BREYER: My other suggestion --

1 we're not going to make too much progress on finding the
2 standard, but California does accept requests from us,
3 or other Federal courts, to explain what California law
4 is. I've looked at that statute. And if this is so
5 outrageous as a matter of contract interpretation of
6 State law, why don't we just ask them?
7 MR. LANDAU: Because, again, Your Honor --
8 JUSTICE BREYER: They have not considered
9 this case.
10 MR. LANDAU: They -- they denied certiorari
11 over the -- one of the justices. And -- but, again,
12 what Your Honor's role is is to interpret this as a
13 matter of Federal law. So the -- again, it would go
14 away if -- if they were to change the rule as a matter
15 of State law. But ultimately, the Federal issue is
16 always present here. The -- again, there's always a
17 Federal issue just to make sure that the State court
18 hasn't gone too far.
19 Again, I understand exactly what the Court
20 is grappling with. Where do you draw the line on where
21 it goes too far. Again, our point is this case is so
22 far on one side of the line. And -- for instance --
23 JUSTICE SCALIA: Why -- give us all the
24 reasons why this case is on the wrong side of the line.
25 Justice Breyer has -- has mentioned the --

1 the rule of contra proferentem, that you interpret a --
2 a contract against -- against the person who drafted it.
3 Now, that's on the other side. What are --
4 what are the rules of contract law that -- that so
5 clearly outweigh that?
6 MR. LANDAU: I think, Your Honor, you
7 started out by, one, that you want a contract to be
8 valid. They went out of their way to look to a way to
9 make this unenforceable. And if you just take a step
10 back and look. It is --
11 JUSTICE SOTOMAYOR: Make what unenforceable?
12 MR. LANDAU: The arbitration agreement.
13 JUSTICE SOTOMAYOR: No, the arbitration
14 agreement was enforceable in lots of situations.
15 MR. LANDAU: No, Your Honor --
16 JUSTICE SOTOMAYOR: There was no agreement
17 to arbitrate class actions.
18 MR. LANDAU: Right. But their --
19 JUSTICE SOTOMAYOR: But there was an
20 agreement to arbitrate other disputes.
21 MR. LANDAU: That's not their --
22 JUSTICE SOTOMAYOR: And single disputes.
23 MR. LANDAU: Their position is that the
24 arbitration provision is entirely unenforceable in this
25 case. This arbitration is entirely unenforceable with

1 respect to California.

2 Again, what is going on here? It's clear

3 the parties say we want to arbitrate our disputes,

4 unless State law forces us into arbitration. Once State

5 law can no longer force you into arbitration, they don't

6 have any plausible narrative for why the parties would

7 have agreed to blow up and jettison their arbitration

8 rights if nobody is actually forcing them into

9 arbitration.

10 JUSTICE BREYER: Go back to Justice Scalia,

11 please. What I understood this to be is one reason this

12 interpretation from your perspective is an unreasonable

13 really weird one is because the statute basically says

14 go to arbitration unless you are in a State where the

15 law would require class arbitration. And if that's the

16 State you're in, dump the whole arbitration --

17 MR. LANDAU: Right.

18 JUSTICE BREYER: -- business. Okay.

19 Now, one reason that's a bad interpretation

20 is that probably what they meant is valid State law.

21 JUSTICE SCALIA: Of course.

22 JUSTICE BREYER: All right. That's one.

23 MR. LANDAU: Right.

24 JUSTICE BREYER: Now, is there any another?

25 MR. LANDAU: There's another one, Your Honor

1 that in Section 10 here, there's a choice of law
2 provision specifically addressing the arbitration
3 clause. And the general choice of law provision is in
4 Section 9 of the agreement, but -- excuse me, in Section
5 10 -- but it says, "notwithstanding the foregoing." In
6 other words, the fact that State law and FCC or other
7 law applies. With respect to the arbitration provision,
8 the FAA shall govern.
9 So our position is, it is nonsensical to say
10 that when the contract goes out of its way to say the
11 FAA shall govern the arbitration provision, that you
12 would take a reference to the law of your State in the
13 arbitration provision and say the law of your State
14 completely unaffected by the FAA.
15 JUSTICE KAGAN: Mr. Landau, I completely
16 take your point as to what the parties must have wanted,
17 and it does make this State court opinion unsatisfying,
18 would be a kind word for it, but -- but, you know, in
19 fairness to the State court, part of the problem was the
20 way this contract was worded. Everybody else finds ways
21 to word contract provisions like this so that there
22 isn't a problem. If the contract had said, you know, if
23 class action waivers are invalid in your State, then
24 Section 9 is unenforceable, there would have not have
25 been this problem. This is -- it's a very unusual

1 contract provision. Most companies use very clear ones.
2 This one did not.
3 And so the -- the State court had to sort of
4 puzzle over what it meant and, as you say, probably got
5 the answer wrong. Strike the "probably." Got the
6 answer wrong. But, you know, wrongness is just not what
7 we do here.
8 MR. LANDAU: Your Honor, but, again,
9 wrongness is not what you do here, but this is an
10 arbitration contract. And, again, I think this is why
11 you have to --
12 JUSTICE SCALIA: Did you draft this
13 provision, Mr. Landau?
14 MR. LANDAU: I did not, Your Honor.
15 (Laughter.)
16 MR. LANDAU: But, again, I -- I -- I am not
17 defensive about the way this was drafted.
18 JUSTICE GINSBURG: How --
19 MR. LANDAU: They said State --
20 JUSTICE GINSBURG: How was the provision
21 changed? Now, this provision is no longer in DIRECTV
22 contracts; is that right?
23 MR. LANDAU: That's correct, Your Honor.
24 JUSTICE GINSBURG: And what -- what -- it
25 was taken out and what was put in instead?

1 MR. LANDAU: The new provision, Your Honor,
2 which I have here, it says -- it just -- it takes out
3 the word "State law" and just says "if this is
4 unenforceable."
5 And, again, the -- but the reason it said
6 State law was not to suggest that inoperative State law
7 should do it. It was recognizing the fact that the evil
8 against which it -- the clause was being put in was
9 State laws that would force you into class arbitration
10 against your will.
11 JUSTICE GINSBURG: Do we have -- do we have
12 someplace that has the change that was made in the
13 language of the contract?
14 MR. LANDAU: I do, Your Honor. I have the
15 new -- here it is, Your Honor. The current version of
16 the DIRECTV contract says, "A court may sever any
17 provision of Section 9 that it finds to be unenforceable
18 except for the provision on class representative and
19 private attorney general arbitration." That's in
20 Respondent's brief on Page 36.
21 Again, I'm not saying there aren't other
22 ways to write it, but the fact that there are other ways
23 to write it doesn't mean that it's ambiguous. And
24 again, I'm sure this Court construes many statutes that
25 could have been written in other ways, but that doesn't

1 make them ambiguous.

2 Let me just please underscore one more

3 point. If the contract -- and the California Court of

4 Appeals said, if in Section 9 the law of your State is

5 governed by the FAA, if that had been in Section 9, then

6 they would have had no problem with this enforcing the

7 arbitration provision. But it does say that. It just

8 says that in Section 10. Section 10, the choice of law

9 provision, specifically says that the FAA shall govern

10 Section 9, the arbitration provision. The law of your

11 State language in Section 9 is governed by the FAA. So,

12 in fact, it is right there on the contract.

13 And, again, at the end of the day, we know

14 that Congress had a -- Congress was concerned because of

15 this kind of gimmick where courts were coming up with

16 strained interpretations to avoid enforcing arbitration

17 provisions. This is FAA 101. We are not asking this

18 Court to make any new law, but just to reinforce what

19 you said in Volt, which is ordinarily, it is a matter of

20 State law.

21 And, Your Honor, Justice Breyer, you said

22 that you couldn't find any case. Well, Volt is a case

23 where the Court went on to examine. The Court didn't

24 say we defer to California State law and it is,

25 therefore, unassailable to use the words that

1 Respondents would.

2 To the contrary, Volt said we are going to

3 consider the -- the interpretation proffered by the

4 State court and decide whether we think it is consistent

5 with the Federal policy favoring arbitration in the FAA.

6 So there is a Federal component. It isn't --

7 JUSTICE KAGAN: But the -- Volt says the law

8 of the place interprets the law of the place exactly in

9 the way -- or allows that interpretation exactly in the

10 way that this State court interpreted it.

11 The law of the place was just the law of the

12 State unmodified by any possibly preempting Federal law.

13 MR. LANDAU: Right. But in Volt, of

14 course -- the issue in Volt was that the court there did

15 not refuse to enforce arbitration. The Volt court said,

16 you know, we don't have a problem with this, because

17 this is all about the efficient process in terms of

18 arbitration. And the Volt court went out of its way to

19 say we find that this favors the Federal policy

20 fostering arbitration.

21 And the court reiterated that specific

22 interpretation of Volt and insisted on it in

23 Mastrobuono, Casarotto and Preston. In other words,

24 Volt took pains to say that the interpretation that we

25 upheld there was a pro arbitration provision that gave

1 effect to the Federal policy favoring arbitration.
2 I'd like to reserve the balance of my time.
3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Goldstein.
5 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN
6 ON BEHALF OF THE RESPONDENT
7 MR. GOLDSTEIN: Thank you, Mr. Chief
8 Justice, and may it please the Court:
9 This case is a reprise of Oxford Health.
10 The argument of the party that wanted arbitration in
11 Oxford Health, the arbitrator had just gotten it
12 terribly wrong under this Court's decision in
13 Stolt-Nielsen. And this Court may well have had
14 sympathy for that, but the Court realized that it was
15 going to actually have to write an opinion about the
16 case, an opinion that the lower courts were going to
17 have to apply in later cases. And the difficulty is
18 that if you interject Federal law here, you are going to
19 have just a wealth of DIRECTV challenges, because in
20 every instance in which the State court announces here's
21 how we understand this language, which is State law
22 language in our contract, it will be open to the party
23 proposing arbitration to say no, actually, if there is
24 an ambiguity in the -- in the law -- excuse me -- in the
25 contract, then you are obliged to apply a presumption in

1 favor of arbitration, and this is always a Federal
2 question.
3 CHIEF JUSTICE ROBERTS: No, but that's --
4 JUSTICE BREYER: So if you said that --
5 CHIEF JUSTICE ROBERTS: If -- that may be a
6 problem with the FAA. But the FAA was adopted because
7 State courts were hostile to arbitration and Congress
8 didn't like that. Now, how were they hostile to
9 arbitration? They were hostile to arbitration by
10 adopting special rules of contract interpretation that
11 disfavored arbitration. And in those instances, what
12 the FAA says is that that's what they wanted to stop,
13 special rules of contract interpretation, ordinarily a
14 matter of State law, but not when it's hostile to the
15 FAA.
16 And what could be more hostile to the FAA
17 than to interpret a phrase that says nothing about the
18 FAA to dispense with our holdings about -- as they came
19 about -- our holdings about what the FAA has to say.
20 And to do that even though there's a provision in the
21 contract that says this is governed by the FAA.
22 MR. GOLDSTEIN: So, sir --
23 CHIEF JUSTICE ROBERTS: In other words, I
24 understand -- I'm sympathetic to the notion that this is
25 a matter of State contract interpretation, but that is

1 precisely what the FAA was getting after, State judges
2 interpreting contracts under special rules hostile to
3 arbitration.
4 MR. GOLDSTEIN: So, Mr. Chief Justice, if I
5 could deal with your real concern about where this
6 statute comes from, the idea that this is kind of the
7 core discrimination against arbitration that the statute
8 is after kind of structurally and then what exactly
9 happened in this case.
10 The root of the FAA -- and it's reflected in
11 the -- in the statutory text in Section 2 -- is that
12 State courts were adopting doctrines that were hostile
13 to arbitration. Discover Bank's one of them this Court
14 concluded. What the FAA is not concerned with -- and
15 Congress could well pass a law that would be -- is the
16 threshold question of whether there's an arbitration
17 agreement in the first place; that is, we have been
18 unable to locate in this Court or any other court a time
19 when the courts overturned the determination under State
20 law whether the parties had agreed to arbitrate vel non.
21 That's an antecedent question.
22 It may well be that Congress could conclude
23 that there is a problem like that and adopt a statute
24 like it. But to do that here is to really open up an
25 enormous can of worms. What you have is the --

1 JUSTICE SCALIA: I'm not sure that I
2 understand what you're arguing.
3 MR. GOLDSTEIN: Sure.
4 JUSTICE SCALIA: You're arguing that the --
5 the FAA does not cover State gimmicks that disfavor
6 arbitration so as long as what they say is there is no
7 arbitration agreement in the first place.
8 MR. GOLDSTEIN: No, Justice Scalia, don't --
9 don't misunderstand me. If the Court were to --
10 JUSTICE SCALIA: That's what you said.
11 MR. GOLDSTEIN: I apologize, then.
12 If the Court were to conclude that this is
13 just an effort to discriminate against arbitration, then
14 I think the Court has doctrines and the lower courts
15 have doctrines. We are not saying that you have to turn
16 entirely a blind eye to the idea and let a State court
17 get away with anything.
18 My point is different. And that is, that
19 this is not a doctrine that is intended to discriminate
20 against arbitration. It is not an indicia of a
21 pattern --
22 CHIEF JUSTICE ROBERTS: So if we were to
23 look to determine whether it is --
24 MR. GOLDSTEIN: Yeah.
25 CHIEF JUSTICE ROBERTS: -- surely, that's a

1 Federal question.

2 MR. GOLDSTEIN: Yes. If you were to -- we

3 agree that there is a backstop here, and it's an

4 important backstop. And that is, if you conclude that a

5 court is just, you know, making it up and discriminating

6 against arbitration, we think that's an important role

7 for the court to play. But the difference here is that

8 the argument is that the State court really got this

9 wrong and had an obligation to kind of presume that the

10 parties wanted to engage in arbitration.

11 That is a very, very, very different

12 proposition of law because it asks the Federal courts to

13 interject and the State courts to interject --

14 JUSTICE KENNEDY: That's exactly what Volt

15 says, what Mr. Landau quoted, is "Due regard must be

16 given to the Federal" -- in interpreting a contract.

17 We're talking about interpreting the intent of the

18 parties -- "Due regard must be given to the Federal

19 policy favoring arbitration and ambiguities" -- we

20 could ask whether or not this clause is -- this statute

21 is ambiguous -- "and so the scope of the arbitration

22 agreement must be resolved in favor of arbitration."

23 MR. GOLDSTEIN: Okay. There are two points

24 about that.

25 JUSTICE KENNEDY: Now, if this was a State

1 law contract looking at State law principles, but there
2 is a Federal rule that must be followed in -- in making
3 that interpretation, and that is a matter for us to
4 review.
5 MR. GOLDSTEIN: Okay. There are two things
6 about that. The first is, Justice Kennedy, the language
7 that kind of trailed off in your sentence is that the
8 Court has been very clear that ambiguities in the scope
9 of an arbitration agreement have to be construed in
10 favor of arbitration, and here's the reason. And that
11 is, if we know these parties have agreed to arbitrate --
12 this is in the first options. It's in lots of cases --
13 if we know you and I have agreed to arbitrate so that
14 there's an arbitration agreement, we're going to assume
15 that all of the cases fall into the bucket of
16 arbitrability, and that's a fair common-sense
17 presumption.
18 But what the Court said in Justice Thomas's
19 opinion for the Court in Granite Rock is that the
20 question of whether there's an enforceable arbitration
21 agreement at all is not -- is a State law question, not
22 a Federal law question, and here's the reason. There
23 are two interpretive principles under the Federal
24 Arbitration Act. Number one is, we want to only require
25 people to arbitrate when they have -- we are convinced

1 under their State law contract they did intend to
2 arbitrate. We can't presume that you and I intend to
3 arbitrate because that's the question we're asking.
4 And the most important thing for you to
5 understand about the nature of this Section 9 in the
6 contract is that it does determine whether there is
7 going to be any arbitration at all in California. That
8 is to say, is there any agreement between DIRECTV and
9 its California consumers to arbitrate?
10 And I can point to -- it's very important
11 that you understand that.
12 JUSTICE KAGAN: I guess I just don't
13 understand, then, Mr. Goldstein -- and maybe it's the
14 same question that Justice Scalia asked -- I don't see
15 why it's better somehow to discriminate against
16 arbitration by declaring arbitration agreements
17 unenforceable writ large than it is by narrowing the
18 scope of arbitration agreements unfairly.
19 MR. GOLDSTEIN: Okay. There are two just --
20 there are two rules at stake. When it comes to the
21 question of whether you and I have an arbitration
22 agreement at all, what the court has said is two things.
23 One is, this is going to be a matter of State law. But,
24 of course, if all you're doing is -- this is a game.
25 You're just trying to evade enforcing the Federal

1 Arbitration Act. That's a -- you know, that's a role
2 for the Federal courts.
3 What Mr. Landau is relying on and what the
4 language that's quoted from Volt that comes from Moses
5 H. Cone is talking about is something quite different.
6 And that is, construe every ambiguity in favor of
7 arbitration. That's what I'm resisting, not --
8 JUSTICE BREYER: What he'll say, I think, is
9 -- we certainly pressed him on it enough -- is that
10 the -- read the sentence, the relevant sentence. "If
11 the law of your State would find the agreement to
12 dispense with class action procedure unenforceable, then
13 the entire Section 9 is unenforceable." All right.
14 That's what it says.
15 Now, would the law of California find the
16 agreement "dispense with class action" procedure
17 unenforceable? The answer to that question is clearly
18 no. Because they did have a law like that, but it was
19 invalid. So in order to read this in your favor, you'd
20 have to say these words: If, however, the law of your
21 State would find this agreement, you have to read it as
22 saying, if, however the invalid law of your State would
23 find this agreement to dispense with class action
24 unenforceable, then.
25 Now, nobody -- it's very hard to say that

1 the parties meant if the invalid law of your State would
2 find it and, therefore, contract interpretation is a
3 question of law, this question of law was decided by
4 California to read the word "law" as "invalid law,"
5 there is no case in California or anywhere else, to our
6 knowledge, that has interpreted contracts in such way
7 out of the arbitration context, and therefore, this rule
8 of law interpreting this word this way is discriminating
9 against arbitration. That's something like what the
10 argument he's making. Your answer to that is?
11 MR. GOLDSTEIN: First, is that there is no
12 administrable line that he can identify between
13 something that's wrong and really, really wrong. But in
14 any event, it's not -- it's not correct that the
15 contract is improperly interpreted.
16 Here are the reasons: The first is that,
17 Justice Breyer, if you and I have a contract that says
18 if California law would prevent us from having a class
19 action waiver, we will not arbitrate at all. That is
20 not preempted. That's the second holding of Volt.
21 Remember, all AT&T versus Concepcion is, is a rule that
22 says, if California forces us to engage in class action
23 arbitration. But you and I can agree to anything at
24 all.
25 This contract, when it says, "If the law of

1 your State would find the class action waiver invalid"
2 is a perfectly fine thing for us to agree to. That's
3 State law and even accounts for preemption because the
4 FAA does not preempt California law in that
5 circumstance.
6 JUSTICE BREYER: But does California have a
7 law, a valid law that would find the agreement to
8 dispense with class action unenforceable? Does it or
9 doesn't it?
10 MR. GOLDSTEIN: It does. It does.
11 JUSTICE BREYER: It does. In other words,
12 California now has a law that makes it okay to dispense
13 with class action procedures.
14 MR. GOLDSTEIN: In several respects. The
15 first is there are several cases -- there are an array
16 of cases that aren't subject to the Federal Arbitration
17 Act. And the second is if you and I agree to follow
18 that law, it is not preempted.
19 Let me also point to some other indicia
20 that's going to make it very hard for --
21 JUSTICE KENNEDY: But you have to agree with
22 Justice Breyer -- or do you not -- that California
23 interpreted this contract as saying if there is an
24 invalid State law that prohibits arbitration, then
25 that's binding on us.

1 MR. GOLDSTEIN: Okay.

2 JUSTICE KENNEDY: That's what you're saying.

3 MR. GOLDSTEIN: We don't, Your Honor.

4 So remember, my point is this: If you and I

5 have a contract to follow that State law, which is this

6 is a contract, then it's not invalid because Concepcion

7 and preemption only apply when the State forces you to

8 do something. But in all events --

9 JUSTICE KAGAN: Well, sure. The parties can

10 do anything they want. But the question is, did the

11 parties do what they want -- did the parties do that

12 here?

13 MR. GOLDSTEIN: Right. And, Your Honor, my

14 problem is that that's going to be the question in every

15 case. And if we say we're going to reverse this

16 decision, then every time there's going to be a Federal

17 question about whether this is really what the parties

18 intended, that every time that the contract is -- is

19 ambiguous under State law.

20 But I did have a couple of other things --

21 JUSTICE SCALIA: That's one horrible, and

22 the horrible on the other side is if we -- if we agree

23 with you, the States can do whatever they want to -- to

24 invalidate arbitration agreements so long as they're

25 doing it under the guise of contract interpretation. Is

1 that not also a horrible?

2 MR. GOLDSTEIN: It is -- is a possible

3 horrible, Justice Scalia. So let me just give you the

4 choice between the two of them. There is no evidence

5 that the latter is actually happening, and you do have

6 the backstop. And that is, we fully agree that if you

7 conclude that a State court is just making it up and

8 discriminating against arbitration, the FAA has a role

9 to play.

10 What I'm saying to you is that they do, in

11 truth, want a different legal rule, and that is, you've

12 got to construe these in favor of arbitration. That's

13 the principle that he's trying to derive from Volt, Your

14 Honor. That's a whole other kettle of fish than the

15 backstop that you and I are talking about.

16 JUSTICE ALITO: Well, if we could see a

17 State court opinion that doesn't say anything that is

18 explicitly against arbitration, but it interprets a

19 contract in such a strange way that the only possible

20 explanation for the interpretation is hostility to

21 arbitration, can that be invalidated?

22 MR. GOLDSTEIN: I think so, Your Honor.

23 And --

24 JUSTICE ALITO: So that's the question.

25 Does this case fall to that category?

1 MR. GOLDSTEIN: All right. If that's what
2 the question is, because that is not the Volt principle.
3 That is the idea that this is just wildly out of bounds.
4 It's the incredibly fact-bound question about whether
5 this one decision is wildly out of bounds. So let me
6 talk about the other reasons it's not remotely wildly
7 out of bounds. Because if you write an opinion about
8 anything other than legal rule you just articulated,
9 Justice Alito, we are going to be in an incredible way.
10 JUSTICE KENNEDY: Well, you say that's not
11 the Volt principle. Why isn't it the Volt principle?
12 Ambiguities. I mean, this is even more than an
13 ambiguity. Even ambiguities have to be interpreted --
14 resolved in favor of arbitration. And this is more than
15 an ambiguity.
16 MR. GOLDSTEIN: Okay, Justice Kennedy.
17 Because in my -- I may be mistaken, but I think that you
18 and Justice Alito are describing two different legal
19 rules. Justice Alito is saying, as I understand it --
20 and I don't purport to speak for the Justice,
21 obviously -- is that if this is a crazy decision, it's
22 invalid under the FAA. The ambiguities construed in
23 favor of arbitration principle is an ordinary
24 interpretive principle. And the reason, Justice
25 Kennedy, just to bracket this, why the Volt principle,

1 the Moses H. Cone principle doesn't apply here, and that
2 is that it's ambiguities in the scope of an arbitration
3 agreement. Here the question is whether the parties had
4 an arbitration agreement whatsoever.
5 So we -- I think we've now agreed on the
6 legal rule perhaps. And so let me tell you, if I could,
7 why I don't think you can write an opinion that says
8 this is nuts.
9 JUSTICE ALITO: And add to that, what did
10 the Ninth Circuit say about this? The Ninth Circuit
11 said it was absurd. Was that the word?
12 MR. GOLDSTEIN: Yeah, it was --
13 JUSTICE ALITO: Right.
14 MR. GOLDSTEIN: -- nonsensical.
15 JUSTICE ALITO: Nonsensical.
16 If we agreed with the Ninth Circuit that it
17 was nonsensical, we --
18 MR. GOLDSTEIN: I mean, I just don't want to
19 -- I don't want to play around with words, Your Honor,
20 about nonsensical or not. I think you and I are
21 basically on the same page about the FAA principle.
22 Here's what I have in terms of why this is
23 not remotely outside the bounds, why, if you write an
24 opinion reversing here, you are going to invite an
25 enormous amount of second-guessing of State law contract

1 interpretation. The first is that Section 10 of the
2 contract expressly contrasts State and Federal law; that
3 is, it says the law of your State, and then
4 distinguishes Federal law from that.
5 The second is, as Justice Ginsburg says, why
6 is it the parties even referred to State law at all if
7 what they are talking about is just "it would be
8 invalid."
9 The third is both before this contract and
10 after this contract, DIRECTV wrote this contract very
11 differently in the way that it now says this contract
12 means, and it says if it would be found invalid, and as
13 was mentioned in the first half hour, every other
14 Fortune 500 company wrote it that way as well. So there
15 are a whole series of very good contrasts for us.
16 I also have what I think is the pushback to
17 the intuition that DIRECTV really must have always
18 intended for the contract to pick up Federal preemption
19 law. And here's the reason why that's not right:
20 DIRECTV claims and has applied the power to unilaterally
21 change this contract, and that is a huge deal in the --
22 in the context of a national form contract.
23 Here's what happened here: DIRECTV put this
24 into the contract in 2006 before AT&T v. Concepcion was
25 a glimmer in anyone's eye at all. And it referred to

1 State law, and everybody agrees at that time that
2 California's Consumer Legal Remedies Act was going to
3 control and was going to prevent any arbitration in
4 California whatsoever. DIRECTV filed an amicus brief in
5 Concepcion saying we will not arbitrate with anyone in
6 California before the court's decision in Concepcion.
7 And the way that DIRECTV intended to account
8 for changes in the law is that they would change the
9 contract unilaterally when the law changed, and I can
10 prove it. In the wake of Concepcion, DIRECTV rewrote
11 the contract. It did it before the California Court of
12 Appeals' decision in this case.
13 DIRECTV had another mechanism fully
14 available to it that would account for the idea that
15 now, under the Federal Arbitration Act, the State can't
16 forbid class action waivers. It didn't need this
17 contract to do anything other than to pick up existing
18 California law.
19 And I will add a couple of other points just
20 about whether, as a matter of Federal law, you would
21 want to say that right now we have to go to arbitration.
22 Remember, DIRECTV's position is in the teeth of the
23 efficiency of the Federal Arbitration Act. Its view is
24 that the parties intended that three years into the
25 litigation, what they would want is to blow up the

1 litigation and send everybody to thousands of individual
2 arbitrations. That is an extremely implausible
3 interpretation of what the parties would want if their
4 goal was to have an efficient dispute resolution
5 mechanism.
6 And so what I'm -- the point that I'm trying
7 to make, Your Honors, is while I am sympathetic to the
8 concern, and it may be a concern directed at California
9 in particular, that we need to be attentive to whether
10 or not those courts are discriminating against
11 arbitration. My point to you is that you may believe
12 this is wrong, like you were concerned in Oxford Health
13 that the arbitrator had got it wrong, but you have to
14 adopt a legal rule here. And there are too many points
15 in favor of the California Court of Appeals' decision to
16 say that this is wildly out of bounds and have an
17 administrable legal rule that the lower courts can
18 actually apply. You can say it's way out of bounds; you
19 could say it's nonsensical. But then the lower courts
20 are going to look at what happened here, and they are
21 not going to view it as something that is just wildly
22 impossible.
23 CHIEF JUSTICE ROBERTS: I guess I don't
24 understand why it's a question of way out of bounds or
25 slightly out of bounds. It's a question of whether it

1 demonstrates hostility to arbitration. And I think the
2 way you show that is you say, well, look, here they
3 found a number of provisions illegal, and they struck
4 the whole thing. Here, every other case that's not
5 about arbitration, when they find a couple of provisions
6 illegal, they just sever those; they keep -- you know,
7 try to keep in effect the rest of the agreement.
8 That's a different rule for arbitration
9 contracts than other contracts. It's not a question of
10 way out of bounds or way in bounds. It may be a hard
11 question in some cases; it may be easy in others. But
12 it's a very simple question of -- of what the rule is.
13 The rule is does it demonstrate hostility to arbitration
14 contracts?
15 MR. GOLDSTEIN: Okay. Mr. Chief Justice,
16 let me just distinguish this case from the one that you
17 granted in the Long Conference, which is the factual
18 scenario that you just described. In that context, what
19 you have is an arbitration agreement. You know that the
20 parties have agreed to arbitrate and what you then do is
21 assume that they intend the arbitration to be effective.
22 This is importantly, doctrinally a very different case.
23 CHIEF JUSTICE ROBERTS: That's -- I
24 understand the point and -- but, as I understand the
25 arbitration law, if you have an arbitration agreement,

1 says you're going to arbitrate workplace disputes, but
2 not safety disputes --
3 MR. GOLDSTEIN: Yes.
4 CHIEF JUSTICE ROBERTS: -- and if there's an
5 issue, is this a safety dispute or not, that's covered
6 by the arbitration agreement. The arbitrator decides
7 that.
8 If you have a contract that says you agree
9 to arbitrate with all of our subsidiaries except the one
10 that does this, that's not for the arbitrator because
11 you have to decide if that other subsidiary has agreed
12 or not.
13 Now, this one talks about methods of
14 arbitration. It doesn't seem to me to be covered by
15 either of those two paradigms.
16 MR. GOLDSTEIN: Excellent. So you've just
17 described Prima Paint and the assignment between the
18 court and the arbitrator. Here is why it is in the
19 paradigm of not favoring -- not presuming arbitration,
20 and that is, the effect of this contract, Your Honor.
21 The effect of Section 9 is not to determine -- this was
22 Justice Sotomayor's question about whether there'd be
23 some arbitration in California, but just not class
24 arbitration. The effect of this provision is to mean
25 that there will be no arbitration between DIRECTV and

1 any of its customers in California at all. There is no
2 agreement to arbitrate any dispute.
3 And let me just give you the proofs of that.
4 They filed an --
5 CHIEF JUSTICE ROBERTS: Well, but just clear
6 up, there is an agreement to arbitrate some disputes
7 between DIRECTV and its customers.
8 MR. GOLDSTEIN: Your Honor --
9 CHIEF JUSTICE ROBERTS: It's the arbitration
10 agreement.
11 MR. GOLDSTEIN: Your Honor, so -- if I could
12 just distinguish. There is an agreement on the subject
13 of arbitration, that is to say, Section 9 is in the
14 contract. What Section 4 of the Federal Arbitration Act
15 asks is, is there an agreement with -- to resolve any
16 disputes by arbitration? And what Section 9 tells you
17 in the States where it is effective, where the -- what
18 we call the blowup clause takes effect, is that in all
19 of those States, DIRECTV will not arbitrate with
20 individuals, it will not arbitrate with respect to class
21 arbitration.
22 If I could just give you the reasons we know
23 that's true. DIRECTV filed an amicus brief in
24 Concepcion saying we do not arbitrate with anybody in
25 California. It then -- and you can see this in the

1 Stevens declaration in opposition to the motion to
2 compel arbitration said we have gotten 215 small claims
3 requests related to these early termination fees, which
4 is -- and in court, which is the subject matter of our
5 complaint. And we have arbitrated with one party.
6 So what was going on -- and so there -- in
7 California, DIRECTV was arbitrating with no one
8 whatsoever because of this contractual provision. And
9 that brings it not within the Volt principle, Your
10 Honor. We interpret -- when we have an arbitration
11 agreement, we're going to put things into the bucket,
12 your argument -- your -- your point, Your Honor, about
13 scope when it comes to safety disputes. But rather,
14 within Granite Rock, which said quite expressly, what we
15 are -- when we are talking about the antecedent
16 question, we're trying to figure out if you and I have
17 agreed to arbitrate any subjects whatsoever. When we're
18 in that circumstance, we can't presume that we are
19 arbitrating, because the first principle of the Federal
20 Arbitration Act is to not force people to arbitrate when
21 they haven't intended, and to require people to
22 arbitrate when they have.
23 So, Justice Kennedy, the distinction I was
24 drawing with Justice Alito is if we had an arbitration
25 agreement and we were trying to figure out if, say,

1 class cases were in and individual cases were out, it
2 would make a little bit more sense to say we're going to
3 presume and resolve ambiguities in favor of putting
4 class cases in.
5 But this is not that situation. It is the
6 question whether we are going to arbitrate with anyone.
7 Now, that is not to say that Federal --
8 JUSTICE SCALIA: It may be, but that's quite
9 different from the question of whether there was an
10 arbitration agreement. Certainly, whether there was an
11 agreement in the first place is quite different from
12 what the meaning of the agreement is. And the -- the
13 courts decide the -- the first thing, and it's -- and
14 not the arbitrator. But this is not a -- there is no
15 doubt here that there was an agreement.
16 MR. GOLDSTEIN: I --
17 JUSTICE SCALIA: There is no doubt that
18 there was an agreement. The only issue was a matter of
19 interpretation of that agreement, whether a provision of
20 the agreement blew it up.
21 MR. GOLDSTEIN: Okay.
22 Justice Scalia, what I am saying is you --
23 I -- you and I agree, but the consequence of the place
24 we disagree is important; that is, you and I agree that
25 this is in the contract. We have a contract on the

1 subject of arbitration. When this Court has said that
2 we will construe arbitration agreements and their scope
3 to include all the subject matter, that is, we will
4 construe them in favor of arbitration, it has been doing
5 so when we not only have an agreement on the subject of
6 arbitration, but we have an agreement to arbitrate some
7 disputes.
8 JUSTICE BREYER: It may have. They may
9 have. And I just don't want -- I want to give you one
10 other issue.
11 MR. GOLDSTEIN: Yeah.
12 JUSTICE BREYER: Because it's in my mind,
13 and I'd like you to respond to it, if you wish. Because
14 I think there's some pretty good arguments that this
15 particular interpretation, consciously or unconsciously,
16 is flying in the face of an opinion of this Court, which
17 I disagreed with. That was an opinion that -- that said
18 that this particular provision of California law is
19 invalid. I dissented.
20 All right. So we have, on the one hand, the
21 risks that we'll get into, too many State law cases, if
22 we take their side. On the other hand, there is the
23 risk that they'll run around our decisions. Now, when
24 you get to that second thing, even though I dissented, I
25 think it's an extremely important thing in a country

1 which has only nine judges here and thousands of judges
2 in other places who must follow our decisions -- and
3 think of the desegregation matters, et cetera -- that we
4 be pretty firm on saying you can't run around our
5 decisions, even if they're decisions that I disagree
6 with, okay?
7 Now, I raise that because I think it is a
8 factor, and so I would like you to -- to say whatever
9 you want.
10 (Laughter.)
11 MR. GOLDSTEIN: Justice Breyer, there's one
12 threshold point that needs to be made, and that is five
13 members of the Court in Concepcion, as I understand
14 their opinions, would not have applied Concepcion in
15 this circumstance. They would not extend it here
16 whatsoever, because the four members of the Court who --
17 you and the other members of the Court who agreed with
18 it would not extend it to the circumstance in which the
19 parties have agreed by contract.
20 And Justice Thomas explained in his opinion
21 in that case that the opinion there -- that the -- the
22 principle opinion depended on obstacle preemption, and
23 there is no argument here that this case implicates
24 obstacle preemption because it's a question of contract
25 law. So at the threshold, I don't think Concepcion

1 would apply here at all.

2 But your question is bigger. And that is,

3 look, I'm concerned that if we, as the Supreme Court --

4 U.S. Supreme Court articulate a question of Federal law,

5 particularly on a statute that's as important as the

6 Federal Arbitration Act, particularly on a statute that

7 is -- is rooted in a concern about hostility of the

8 State courts, we have to show people that we're serious.

9 A couple of things about that.

10 First is, we know the California courts are

11 serious in the wake of -- excuse me. We have filed a

12 supplemental brief. The California Supreme Court has

13 decided a case called Sanchez. And Sanchez dealt with

14 the contract that is written like every other Fortune

15 500 contract is. And it talks about if the -- the

16 provision barring class action waivers would be deemed

17 invalid. And the California Supreme Court said that's

18 controlled by Concepcion. That is an enforceable

19 arbitration agreement right there. And so now we are

20 dancing on the head of the pin about one contract that's

21 entirely defunct, and the question of whether the

22 reference to State law, when contrasted in another

23 provision of the contract with Federal law, is so far

24 out of bounds.

25 I think that what you have to do is compare

1 two prospects, Justice Breyer. One is the concern. And
2 we recognize the concern that if you write in an opinion
3 that says, nah, we're not going to take too hard a look,
4 that the State courts will run wild. All I can tell you
5 is that there really isn't evidence of that happening at
6 all. And the Court has doctrines like discrimination
7 against arbitration that can handle it.
8 The second is a reality. We know for a fact
9 that if you announce an opinion that says, this
10 interpretation of State law -- because we know what the
11 California law is here. The California Court of Appeals
12 has told us. This interpretation of State law is just
13 too bad and invalidated my arbitration agreement, that's
14 now a question of Federal law, and we are going to
15 relitigate what State law means. That is a boundless
16 rule that is going to be invoked in every single
17 arbitration case. And so you just have to choose
18 between those two prospects.
19 One is you know what will happen. You will
20 be going against the very first principle of Federal
21 arbitration law, which is that we look to State law in
22 determining whether an arbitration agreement is formed,
23 or you have the hypothetical prospect. And what I can
24 say to Your Honor is we have a legislature that is there
25 in the event that the hypothetical prospect comes to

1 pass. We have doctrines to deal with this. I am just
2 terribly worried about how it is that you write an
3 opinion that says this is not just wrong, it's really
4 really wrong, and explain why in the face of the other
5 things in this contract, the contrast with other
6 contracts that I have given you are out there. You do
7 retain the possibility, of course, of not deciding the
8 case at all in the wake of Sanchez, why it is that we
9 need to have an opinion about this, given that this is a
10 contract that doesn't exist anymore, and the California
11 Court of Appeals has resolved it is a question that --
12 that is, you know, very difficult to answer.
13 But if you are going to write an opinion in
14 the case, please do not do it in a way that just invites
15 litigation upon litigation upon litigation because you,
16 as in Oxford Health, are concerned that this Court got
17 it wrong, just like you were concerned that the
18 arbitrator got it wrong. It is an unfortunate cost of
19 the Federal system that Congress decided this is the job
20 of the Federal courts. Not everything is a Federal
21 case.
22 If there are no further questions.
23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 Mr. Landau, you have three minutes
25 remaining.

1 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU
2 ON BEHALF OF THE PETITIONER
3 MR. LANDAU: Thank you, Your Honor. I'd
4 like to make three very quick points. First, the fact
5 that opposing counsel, my friend, started with Oxford
6 Health is very telling because Oxford Health was a very
7 different case about the scope of this Court's review of
8 an arbitrator's decision. Everyone there agreed that
9 the parties had delegated the question of the
10 interpretation of the clause to the arbitrator. And
11 that's a very different question. We don't have that
12 here. We are -- in this case, this Court is reviewing
13 what a court did. You're not reviewing it under the
14 arguable standard. It's a very different standard.
15 Second, my friend said that, well, no
16 question that special rules for arbitration would be
17 preempted is discriminatory. And again, those tend to
18 be easy cases. You're not probably seeing as many of
19 those cases anymore. But now this case in a sense shows
20 that there's a new frontier, when a court will just
21 basically reach the same goal by saying black means
22 white. Guess what? I haven't done any different rule.
23 I'm just applying State court principles of
24 interpretation. But at some point, you can't just have
25 a rule --

1 JUSTICE SOTOMAYOR: Excuse me. Why --
2 everybody is assuming that this is just a crazy
3 interpretation, but if you start with the proposition
4 that it's the intent of the parties, and everybody's
5 framing this as invalid State law, or valid State law,
6 but your own company decided before Concepcion that it
7 was okay, they would litigate everything, they would
8 take the words as they stood.
9 MR. LANDAU: Because prior to Concepcion,
10 State law was valid. The question is --
11 JUSTICE SOTOMAYOR: No, it wasn't. If it
12 was preempted, it was preempted back then.
13 MR. LANDAU: Well, Your Honor, but it's hard
14 --
15 JUSTICE SOTOMAYOR: And -- and it's
16 preempted forever.
17 MR. LANDAU: And it would have been futile
18 to make that argument. In fact, we would have been
19 subject to punitive damages. I mean, we were just
20 taking it at its --
21 JUSTICE SOTOMAYOR: Probably could have done
22 what happened here and bring it up to the Supreme Court.
23 MR. LANDAU: Well, again, you know, hats off
24 to AT&T for doing that, but there are futility doctrines
25 that recognize that not everybody has to do that.

1 JUSTICE SOTOMAYOR: And how far does this
2 go? When do we make this judgment?
3 MR. LANDAU: Again, Your Honor, you could
4 decide this case on the ground, as the Chamber of
5 Commerce urged in its amicus brief, that this is so far
6 beyond the pale as an interpretation, that it can only
7 be explained as discrimination. Again, discrimination
8 is -- you know, it is an existing category for knocking
9 these out. It's not the exclusive category. And I
10 think discrimination becomes a hard principle to apply
11 when you have individual contracts. Somebody can always
12 say well, you know, my -- you know, discrimination
13 anticipates you have two things that are similarly
14 situated. So how can you say you're discriminating?
15 Again, I --
16 JUSTICE SOTOMAYOR: So why -- why is it that
17 it's so farfetched --
18 MR. LANDAU: It's so farfetched --
19 JUSTICE SOTOMAYOR: -- to place the
20 legitimacy of this action at the time the complaint is
21 filed as opposed to three years later or the day before
22 a trial or the day after a trial before judgment is
23 entered?
24 MR. LANDAU: Because the parties use --
25 JUSTICE SOTOMAYOR: You could come in and

1 make a motion at any of those times. Why does the
2 interpretation of the contract --
3 MR. LANDAU: They use --
4 JUSTICE SOTOMAYOR: -- have to be at the
5 time that you make your --
6 MR. LANDAU: Because they use the verb tense
7 "would find," Your Honor. They didn't say State law
8 right now. They didn't freeze it in place. There's
9 nothing -- and they have no way of saying when it would
10 be frozen in place. Just a line -- in a sense, this is
11 the ultimate gotcha kind of case. And the question
12 before this Court is, is this Court going to basically
13 give a stamp of approval to a gotcha?
14 The last point I want to make is that the
15 other -- my friend says that there's a question here
16 about whether there was an arbitration agreement in the
17 first place. There is absolutely no question that
18 there's an arbitration agreement. The California Court
19 of Appeal acknowledged that there was an arbitration
20 agreement and construed it to be self-defeating,
21 construed there to be a blowup provision that destroyed
22 what the parties were trying to accomplish.
23 Thank you, Your Honors.
24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 The case is submitted.

1 (Whereupon, at 12:01 p.m., the case in the
2 above-entitled matter was submitted.)
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