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IN THE SUPREME COURT OF THE UNITED STATES

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DIRECTV, INC., :

Petitioner : No. 14-462

v. :

AMY IMBURGIA, ET AL. :

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Washington, D.C.

Tuesday, October 6, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf of Petitioner.

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

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 14-462, DIRECTV v. Imburgia.

Mr. Landau.

ORAL ARGUMENT OF CHRISTOPHER LANDAU

ON BEHALF OF THE PETITIONER

MR. LANDAU: Thank you, Mr. Chief Justice, and may it please the Court:

The court below violated the Federal Arbitration Act by refusing to enforce the parties' arbitration agreement on grounds the Ninth Circuit characterized as "nonsensical."

The agreement provides for individual arbitration and expressly precludes class arbitration. And just to underscore that point, it specifies that if State law would force the parties into class arbitration, then the entire arbitration agreement would be unenforceable.

The court below interpreted the reference to State law to mean inoperative State law preempted by the FAA. But neither respondents nor the court below identified a single case in the history of California or American law adopting that interpretation for any 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 mean 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 SOTOMAYOR: 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 sit-in statutes and so forth to  
13 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 other?

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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