No. 09-893

In The Supreme Court of the United States

AT&T MOBILITY, LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF FEDERAL JURISDICTION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

Amici curiae listed in the Appendix are professors of federal jurisdiction who teach and write about arbitration, preemption, and/or the proper allocation of interpretive authority between the state and federal courts. Although *amici* hold a range of views as to the normative desirability of arbitration as a method of dispute resolution, the proper distribution of power between state and federal courts, and the appropriateness *vel non* of putative class-action bans such as the one at issue here, *amici* have common cause when it comes to the proper respect due to state courts in their interpretation of state contract law. To that end, *amici* offer two modest observations with regard to the question presented in this case:

First, *amici* all agree that section 2 of the Federal Arbitration Act, 9 U.S.C. § 2,[2] was not meant to

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[1] The parties have each filed blanket consent letters with regard to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] In full, § 2 provides:

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

(Continued on following page)

displace "generally applicable" rules of state contract law, but was intended (and drafted) only as an anti-discrimination provision, barring states from subjecting arbitration agreements to harsher rules than other contracts. As such, the FAA does not – and was not meant to – preempt any state-law contract rule of general applicability.

Second, *amici* agree that state courts are generally entitled to deference in determining the substance and scope of state contract law, including whether particular rules apply only to agreements to arbitrate, or are instead rules of general applicability. This interpretive discretion is critical, because under the "savings clause" of § 2, state contract rules are not preempted as applied to arbitration agreements so long as they constitute "grounds . . . at law or in equity for the revocation of any contract." Thus, whereas the question whether the FAA's savings clause is satisfied *is* technically a question of federal law, that question turns almost entirely on the scope of a particular rule of contract interpretation under *state* law, an issue that both federal statutes and constitutional design commit to the state's court of last resort.

> existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

As set forth below, although such deference to state courts is not – and should not be – absolute, *amici* believe that there are compelling federalism-based reasons to place a high burden on the party seeking to contest the state court's characterization of state law. Where, as here, the state court has specifically concluded that the relevant principle of contract law is "generally applicable," the party claiming preemption must convincingly demonstrate that the state court is either mischaracterizing or misapplying its own state law – that it is engaged in "obvious subterfuge" to avoid the FAA's preemptive effects. Any other rule would invite courts to federalize state contract law as applied to arbitration agreements, which would not only be irreconcilable with both the language and purpose of the FAA, but would more generally infringe upon the proper respect due to state courts within our constitutional system.

Because Petitioner cannot meet that burden here, this Court should affirm the decision below, or, in the alternative, dismiss the writ of certiorari as improvidently granted.

ARGUMENT

I. The Federal Arbitration Act Does Not Preempt Generally Applicable Rules of State Contract Law.

Section 2 of the Federal Arbitration Act, which "intended to foreclose state legislative attempts to

undercut the enforceability of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984), provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has consistently construed that language to mean what it says, *i.e.*, that arbitration agreements should be enforceable to the same extent as any other contract under the governing law of the relevant jurisdiction. *See*, *e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). Thus, "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions," whereas "generally applicable contract defenses, such as fraud, duress, or unconscionability, *may* be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

As a result, the effect of § 2 "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Critically, though, the FAA did not purport to create a body of substantive federal *contract* law, or to delegate to federal judges the authority to fashion common-law rules of contract interpretation to govern disputes implicating the FAA. Instead, to the extent that state law *does* provide "grounds . . . at law or in equity for the revocation of any contract," such state

law governs by virtue of § 2 of the FAA. *See*, *e.g.*, *Arthur Anderson, LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

Congress's choice in § 2 of the FAA to leave intact generally applicable rules of state contract law is wholly consistent with the broader policy underlying the Act – "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the *same footing* as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citation omitted) (emphasis added). To that end, § 2 does not privilege agreements to arbitrate, but is instead an anti-discrimination provision, preempting only those rules of state contract law "that take [their] meaning precisely from the fact that a contract to arbitrate is at issue." *Perry*, 482 U.S. at 492 n.9; *see also Casarotto*, 517 U.S. at 687 ("Congress precluded States from singling out arbitration provisions for suspect status . . . "). Where a rule of state contract law applies to any contract governed by that state's law, there is no preemption under § 2.

II. A State Court's Interpretation of the Scope of State Contract Law is Entitled To Considerable Deference.

As the above discussion suggests, the critical question in this case is whether the relevant state-law contract rule – here, the defense of unconscionability – is a ground for revoking *any* contract under state law. If it is not such a "generally applicable" rule, then it is preempted by § 2 of the FAA as applied to agreements to arbitrate. If it *is* generally applicable, then the FAA has no bearing, other than to confirm that the defense also applies to arbitral agreements.

Although there is a dearth of case law on the subject, it should follow that state courts are entitled to considerable deference in determining whether "grounds . . . exist at law or in equity for the revocation of any contract" within the meaning of § 2 of the FAA. Whereas that question technically arises under federal law, it is necessarily answered by reference to state law, since its resolution turns directly on the substantive scope of the underlying state-law rule. As a matter of state policy, it is for state lawmakers (and courts) in the first instance to decide how broadly state contract law – including defenses – applies. Moreover, as noted above, § 2 of the FAA deliberately turns on, rather than supplants, the state's policy choice.

To be sure, state courts may not frustrate the purpose of the FAA by bestowing the "generally

applicable" label upon a rule of contract law that in fact discriminates against arbitration agreements. As Justice Marshall warned in *Perry*,

> A court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

482 U.S. at 492 n.9. *Perry* thereby suggests that a "generally applicable" rule of state contract law does not exist simply because a state court *says* that it does. But it is equally true that federal courts are bound by both statute and constitutional tradition to defer to state courts in their interpretation of state law. *See*, *e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law, and . . . we are bound by their constructions except in extreme circumstances . . . ") (citations omitted); 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

In the analogous context of the independent and adequate state grounds doctrine, this Court long has struck a comparable balance between the deference due to state courts in interpreting state law and the need to ensure that state courts are not using that authority to frustrate the enforcement of federal rights. *See*, *e.g.*, *Beard v. Kindler*, 130 S. Ct. 612, 617-18 (2009). To that end, this Court has held that "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question," *Douglas v. Alabama*, 380 U.S. 415, 422 (1965), and has analyzed, in dozens of cases, whether state procedural rules purportedly precluding federal review have been "firmly established and regularly followed," *see*, *e.g.*, *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). *See generally Mullaney*, 421 U.S. at 691 n.11 ("On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.'") (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945)).

In all of these decisions, this Court has treated the scope of the state procedural bar as a question of state law, even where it has seen the adequacy of the bar as a matter for federal review. And in all of these cases, the burden has been on the party seeking review to demonstrate the *inadequacy* of the state's reliance on state law, not the other way around. *See*, *e.g.*, *South Dakota v. Neville*, 459 U.S. 553, 569 n.4 (1983).

Moreover, although this burden carries jurisdictional significance in the context of appeals from state courts, *see* 28 U.S.C. § 1257, the existence of appellate jurisdiction in other cases has not relieved this Court of its responsibility to respect state courts' autonomy over state law, *see*, *e.g.*, *Volt*, 489 U.S. at 474 ("[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review."). Indeed, this Court even defers to the interpretation of state law by the lower federal courts. *See*, *e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) (noting the "presumption of deference given the views of a [lower] federal court as to the law of a State within its jurisdiction").

Amici submit that the same principles should guide this Court's resolution of the question presented in this case: where – as here[3] – a state court

[3] As the Court of Appeals in this case explained, the California Supreme Court has specifically resolved the state-law question here at issue. *See Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005) ("[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally."); *see also id.* ("In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements."). *See generally Laster v. AT&T Mobility, LLC*, 584 F.3d 849, 854-59 (9th Cir. 2009) (relying upon *Discover Bank*), *cert. granted*, 130 S. Ct. 3322 (2010) (No. 09-893). And the Ninth Circuit is hardly the only Court of Appeals to look to *Discover Bank* as the governing statement of California law on

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has spoken to the scope of a particular rule of state contract law,[4] the burden must be on the party arguing for preemption to demonstrate that the rule of state contract law at issue is *not* in fact "generally applicable," and that the state court is thereby frustrating the purpose and language of the FAA – an "obvious subterfuge" to evade the effect of § 2.

Recognizing such a burden in cases arising under § 2 serves two distinct purposes: *First*, it vindicates Congress's central goal in enacting the FAA in general (and § 2 in particular), *i.e.*, to ensure that arbitration agreements are on equal footing under state law as compared to other private contracts. Congress could have chosen to create a special body of federal contract law to govern arbitration agreements, or to delegate to the federal courts the power to fashion common-law rules of contract interpretation. *Cf. Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957). Instead, though, it chose only to bar unequal treatment of arbitration agreements by state courts, leaving state law otherwise intact. In

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the scope of the unconscionability defense. *See*, *e.g.*, *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 132-40 (2d Cir. 2010).

[4] Of course, where the state court of last resort has yet to address the issue, there is no decision to which deference is owed. Even in that context, though, deference is still ordinarily due to what the federal court *thinks* the state court of last resort would say. *See*, *e.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.).

contrast, encouraging federal courts to routinely second-guess state court interpretations of state contract law *only* in the context of arbitration agreements would perpetuate the inequality that the FAA was enacted to obviate, since it would likely produce two distinct bodies of contract law within an individual state: one for arbitration agreements, and one for everything else.

Second, and separate from vindicating Congress's specific intent in enacting the FAA, the recognition of such a burden would strike the same balance that this Court has routinely achieved in analogous contexts between the respect due to state law as the product of a distinct sovereignty within our constitutional system, and the need to ensure that state courts do not use their power to interpret state law in a manner intended to frustrate federal remedies. Respect for the states as sovereign entities must include a default respect for the processes of their courts absent some evidence of invidious intent, with any doubt resolved in favor of the state courts. *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2608 n.9 (2010) (plurality opinion). Any imputation of intent to obstruct federal law on the part of state courts absent such a showing would be fundamentally inconsistent with the respect to which those tribunals are due.

Finally, although *amici* take no position on the particular objective indicia that might establish such

nefarious conduct on the part of state courts, it should go without saying that, at a minimum, a party arguing for preemption under § 2 should have to identify non-arbitration contract disputes in which the same principle of state contract law was *not* applied.[5] Absent a clear showing to that effect, the considerations outlined above indicate that the state court should be taken at its word.

CONCLUSION

Because Petitioner has failed to meet its burden in this case, *amici* respectfully suggest that the decision below be affirmed. In the alternative, because this Court does not generally sit in judgment of a state court's interpretation of state law, *amici*

[5] It would appear difficult, if not impossible, for Petitioner to satisfy this requirement here since California state courts in fact *have* applied the state-law principle at issue to invalidate a class action ban provision that appeared not in an arbitration clause, but in a *judicial* forum-selection and choice of law clause. *See America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 18 (2001).

respectfully suggest that the writ of certiorari be dismissed as improvidently granted.

Respectfully submitted,

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