No. 09-893

IN THE
Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,

v.

VINCENT AND LIZA CONCEPCION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ARBITRATION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are arbitration law professors who teach and write about arbitration, including the Federal Arbitration Act's ("FAA") preemptive power over state law.[1]

Amici have an interest in the thoughtful vetting and resolution of important but overlooked FAA preemption issues—issues that continue, in our view, to confound the law of FAA § 2 preemption. Our primary objective in filing this brief is to place the case at bar in the context of these issues, in order to assist the Court in reaching the best possible decision for the development of FAA preemption law.

The views expressed in this brief are our own and do not reflect the beliefs of the institutions with which we are affiliated.

SUMMARY OF ARGUMENT

This brief is limited to addressing a central argument advanced by Petitioner and its *Amici*: namely, that the FAA preempts the *Discover Bank* rule because the rule applies only to dispute resolution clauses and not "all contracts," (Pet. Br. 17, 31), and thus fails to "place[] arbitration agreements on equal footing with all other contracts." (*Id.* at 28.)

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[1] The parties have filed letters consenting to the filing of any *Amicus Curiae* brief with the Clerk of the Court. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or its counsel made a monetary contribution to the preparation or submission of this brief.

We contend that the argument is fundamentally flawed for two independent reasons.

First, the FAA's purpose to make arbitration *agreements* as enforceable as any other contract is a means to an end, not an end in itself. That end has always been understood as enabling the arbitration *process* to compete on a level playing field with litigation, free of the artificial legal impediments that had once stood in its way. The problem that the FAA sought to address was not the problem of states having different rules for the enforcement of predispute arbitration agreements than they did, say, for exculpatory clauses or marriage contracts. Although contracts all share common elements, the law necessarily treats them differently (and for good reason): Some are entitled to the special remedy of specific performance; some are unenforceable because their subject matter is contrary to public policy; others must be in writing in order to be enforced.

The true purpose of the FAA was therefore not to make all contracts enforceable in the same way, for enforceability plainly differs from contract to contract. Instead, it was to overcome the early "judicial hostility to *arbitration*," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (emphasis added), so that the arbitral process could emerge as a genuine "alternative to litigation." (Pet. Br. at 26.) We agree with Petitioner that this is, in effect, a type of antidiscrimination principle. (*Id.* at 28, 29.) But it is a principle primarily directed at arbitration *qua* process, not *qua* contract.

Second, even if the FAA's antidiscrimination principle seeks to eliminate the law's differential

treatment of arbitration agreements *vis-à-vis* other agreements—rather than, as we argue, its treatment of arbitration *vis-à-vis* litigation—a state law need not be preempted just because it fails to apply universally to "all" contracts. (Pet. Br. at 3, 17, 31, 40.) Such a requirement is not just logically incoherent, it is detrimental to any national policy that seeks the legitimate, balanced development of arbitration.

ARGUMENT

I. THE TRUE MEANING OF THE FAA'S NONDISCRIMINATION PRINCIPLE IS TO ENSURE "EQUAL FOOTING" BETWEEN ARBITRATION AND LITIGATION

Petitioner is correct to note that FAA § 2 expresses a "fundamental nondiscrimination principle." (Pet. Br. at 28; *see id.* at 27, 29, 36, 37, 42.) Numerous courts and commentators have likewise grasped the nondiscrimination underpinnings of FAA § 2 preemption.[2] So, too, have several *Amici* who support Petitioner. But Petitioner is incorrect to contend that the end of that principle is to treat arbitration agreements equally with other contracts.

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[2] *See, e.g.*, *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426 (5th Cir. 2004); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112-13 (Cal. 2005); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Resol. 469, 483 (2006); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1955 & n.171 (2003); Joshua Ratner & Christian Turner, *Origin, Scope, and Irrevocability of the Manifest Disregard of the Law Doctrine: Second Circuit Views*, 24 Quinnipiac L. Rev. 795, 797–98 (2006).

True, abrogating the ancient ouster and revocability doctrines that had disadvantaged pre-dispute arbitration agreements more so than other contracts was an important part of the FAA's antidiscrimination purpose. This is why the Court was correct to observe that "placing arbitration agreements 'upon the same footing as other contracts'" is a critical purpose of the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984). But it is not the only or even the overriding purpose, as the Court well knows. *See, e.g., Wilko v. Swan*, 346 U.S. 427, 431 (1953) (describing the FAA's purpose as furthering "the need for avoiding the delay and expense of litigation" but no where citing importance of treating arbitration agreements the same as other agreements), *overruled by Rodriguez de Quijas*, 490 U.S. at 484 (1989).

None of the Court's decisions hinges on the purported equality between arbitration agreements and all other agreements—something that is anyhow impossible given the sheer heterogeneity of contracts. Instead, the Court's opinions stand for the proposition that states may not treat arbitration agreements worse than other agreements simply because of unwarranted "prejudice," (Brief of the U.S. Chamber of Commerce as *Amicus Curiae* [hereinafter Chamber *Amicus* Br.] at 20), against the arbitral *process*.[3] The substance of the FAA's nondiscrimina-

[3] *See, e.g.,* Transcript of Oral Argument, *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 2007 WL 3283181 at *44, (No. 06–989) (Stevens, J.) ("[T]he whole premise of the [FAA] . . . [was that] there was bias against arbitration."); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 Brook. L. Rev. 1381, 1384 (1996).

tion mandate—notwithstanding the way in which it has come to be expressed over time—is to ensure that arbitration is placed on an "equal footing" with litigation.

Prior to the case at bar, no case before the Court has necessitated clarifying this distinction. This case presents the ideal vehicle for doing so, and not one day too soon. Lower courts are increasingly being asked to predict how the Court would decide whether FAA § 2 preempts state statutes and judicial decisions that, like the *Discover Bank* standard, (i) treat arbitration and litigation equally but (ii) do not literally treat arbitration agreements the same as all other agreements. Because such laws do not offend the FAA's core nondiscrimination principle, we argue that they are not preempted.

A. The FAA's Foundational Purpose Was To Prevent Unjustified Discrimination Against Arbitration So That It Could Emerge As A Bona Fide Alternative To Litigation

The FAA was first and foremost a response to the ancient common law "hostility" toward arbitration *qua* process, not *qua* contract. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (emphasis added). The pre-dispute agreement to arbitrate was the object of that hostility only insofar as it made possible the resolution of disputes out of court.

1. Historically, English judges had crafted artificial rules such as the revocability doctrine because they sought to "retain, if not extend, their

jurisdiction" over that of their private sector competitors—not because they had an interest in privileging other agreements over arbitration agreements.[4] Early twentieth century commercial reformers likewise did not lobby for the FAA because they believed there was something intrinsically unfair about enforcing pre-dispute arbitration agreements with less vigor than, say, plumbing contracts. Rather, they did so because they sought a viable alternative to the perceived "evil[s]" of litigation. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Judiciary*, 68th Cong. 34–35

[4] *See U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915); Sterling, *To Make Valid and Enforceable Certain Agreements for Arbitration*, S. Rep. No. 68–536, at 2-3 (1924); Transcript of Oral Argument at *47, *Hall Street*, 128 S. Ct. 1396 (Ginsburg, J.) (describing the pre-FAA "distrust of arbitrators" in terms of a fear by judges that "arbitrators are stepping on our turf").

(1924) [**hereinafter 1924 hearings**] (brief of Julius Henry Cohen).[5]

2. The text of the FAA is also inconsistent with the goal of placing arbitration agreements on the same footing as other contracts. First, the statute guarantees specific performance for breaches of arbitration agreements, 9 U.S.C. § 4 (2009), a special remedy denied to the vast majority of contracts.[6] Second, it provides an expedited procedure whereby arbitration agreements and arbitral awards may be enforced in court on a motion, without the need to initiate a separate cause of action for breach of the

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[5] *See also American Airlines, Inc. v. Louisville & Jefferson County Air Bd.*, 269 F.2d 811, 816 (6th Cir. 1959) (noting that the reason for making arbitration agreements "as effective enforceable [sic] as any other contract" was to enable "contracting parties thereby to avoid . . . the 'delay and expense of litigation'"); *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 8–9, 14 (1923) (describing one of the benefits of the FAA as "reduc[ing] litigation" but no where mentioning the goal of treating arbitration agreements the same as other agreements); Graham, *To Validate Certain Agreements for Arbitration*, H.R. Rep. No. 68–96, at 2 (1924) (urging passage of the FAA because "there is so much agitation at the costliness and delays of litigation"); S. Rep. No. 68–536 at 3 (describing FAA § 2's purpose in terms of enforcing arbitration agreements like any contract, but acknowledging the fundamental business interest driving this purpose as a "desire to avoid the delay and expense of litigation"); 66 Cong. Rec. 984 (1924) (describing the underlying reason for making arbitration agreements as enforceable as other contracts in terms of advancing "business interests [in avoiding] . . . so much delay attending the trial of lawsuits in courts").

[6] *See* Restatement (Second) of Contracts § 359 (1981).

arbitration agreement.[7] Third, because the FAA has been interpreted as preempting any state legislation that "singl[es] out arbitration provisions for suspect status," *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996), it effectively immunizes arbitration agreements from the contract defense of illegality—a defense that may be invoked to deny enforcement of most (if not all) other agreements. Finally, a fundamental tenet of domestic and international arbitration law—the so-called "separability doctrine"—applies only to arbitration agreements and no other agreement.[8] This doctrine indulges the fiction that arbitration clauses are "separable" from the container contract, such that even where the latter has been shown to be the product of duress or fraud in the inducement, the former remains enforceable in principle. *See Preston v. Ferrer*, 128 S. Ct. 978, 984 (2008). Far from securing "equal footing" among contracts, these features of the FAA unabashedly *favor* arbitration agreements.[9]

The special solicitude that the FAA expresses toward the agreement to arbitrate *is*, however, consistent with "rais[ing] arbitration to the status

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[7] *See* 9 U.S.C. § 4 (2009) (setting forth streamlined procedure for specific enforcement of arbitration agreements); *id.* at § 9 (setting forth streamlined procedure for enforcement of arbitral awards); *id.* at § 16 (denying interlocutory appeal of orders to compel arbitration).

[8] *See*, *e.g.*, 9 U.S.C. § 4; Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1010 (1996).

[9] *See, e.g.,* Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 Pepp. Disp. Resol. L.J. 197, 210 (2006); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract*: *A Convoluted Confluence of Contract and Public Procedure in Need of Congressional Control*, 35 U. Rich. L. Rev. 1085, 1088 (2002).

and dignity of judicial process."[10] According to the FAA's original proponent, Julius Henry Cohen, the pre-FAA legal climate was biased in favor of litigation.[11] The FAA would therefore need to make arbitration agreements robustly enforceable—perhaps even *more* than other contracts—in order to enable the arbitral process to compete on a level playing field with courtroom adjudication.

3. Ensuring that arbitration agreements would be treated just like any other contract is certainly an important step toward leveling the dispute resolution playing field in this way. If arbitration agreements continued to be saddled with arbitrary common law restrictions, the FAA could scarcely make good on its purpose of "provid[ing] a [*bona fide*] . . . alternative to litigation." (Pet. Br. at 26.)[12] But that is not to say that the FAA's mission begins and ends with making arbitration agreements literally "as enforceable as other contracts, but not more so." *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Contracts are by definition heterogeneous. Consider the endless variety of standards for contract enforcement that prevail in most jurisdictions:

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[10] Joseph Wheless, *Arbitration as a Judicial Process of Law*, 30 W. Va. L. Q. 210, 216 (1924); Comm. on Commerce, Trade and Commercial Law, 11 A.B.A. J. 153, 154 (1925) (noting the FAA's innovation of allowing arbitral awards to be "docketed as though rendered in an action" so as to have "the same force and effect and [be] subject to the same provisions of law as judgments in an action").

[11] Julius Henry Cohen, *Commercial Arbitration and the Law* 15 (1918).

[12] *See* Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 20 (1992).

Gambling, bribery, and usurious contracts are generally unenforceable as contrary to public policy. 7 Richard A. Lord, *Williston on Contracts* §§ 16:1, 17:1 (4th ed. 2009); 9 *id.* § 20:38. Non-compete, exculpatory, assignment, forum selection, and choice-of-law clauses are enforceable but only within reason. *See* Restatement (Second) of Contracts §§ 186–88, 195, 317; Restatement (Second) of Conflict of Laws §§ 80, 187 (1971). Marriage contracts, suretyship agreements, and contracts for the sale of securities are enforceable only if in writing. *See* Restatement (Second) of Contracts §§ 112, 124; Uniform Commercial Code § 8-319 (2009). Real estate, adoption, and insurance contracts are typically enforceable through the remedy of specific performance, while contracts for personal services or the sale of goods generally are not. *See* Restatement (Second) of Contracts § 367; 25 *Williston on Contracts* §§ 67:61, 67:87, 67:94. And so on.

The upshot is that there is no uniform standard of contract enforceability to which arbitration agreements could possibly aspire. Nor would such a standard be desirable, as different enforcement rules for different types of contracts helps further other public policies, such as promoting free markets, policing fraud and sharp dealing, or deterring tortuous and anti-social behavior. The FAA's purpose was simply to ensure that arbitration agreements were not denied enforcement because of unjustified considerations such as the historic "mistrust" or "suspicion" of arbitration—considerations that generally did not inure to the detriment of other contracts. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 231 (1987); *Mitsubishi Motors Corp. v. Soler Chrys-*

ler–Plymouth, Inc., 473 U.S. 614, 627 (1985). This is the sense in which FAA § 2 directs courts "to enforce . . . agreements to arbitrate, like other contracts, in accordance with their terms"—that is, according to their merits. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

4. Outside of the preemption context, the resounding antidiscrimination message of the Court's seminal FAA decisions has been that arbitration must be considered litigation's equal, even with respect to the resolution of federal statutory claims. This was not always the case: It used to be that the Court regarded the arbitration process as positively "inferior to judicial processes." *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974). As compared with a judicial forum, for instance, arbitration affords a less robust factfinding process. *See id.* at 57–58. Without legal training, arbitrators were considered prone to misinterpret and misapply governing law. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981); *cf. Prima Paint*, 388 U.S. at 407 (Black, J., dissenting) (considering it "fantastic" that arbitrators could "decide legal issues"). The very same qualities that made arbitration "efficient, inexpensive, and expeditious" for merchants, *Gardner-Denver*, 415 U.S. at 57–58, were thought to render it inappropriate to adjudicate rights under federal statutes such as Title VII and the 1933 Act that embody important public values. *See*, *e.g.*, *id.* at 49–50; *Wilko*, 346 U.S. at 438. For these and other reasons, the Court had long held that arbitration was *not* "merely a form of trial."

Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956).

By the mid-1980s, however, the Court began to chart a dramatically different course. It came to see its earlier assessments of arbitration as ""pervaded by . . . 'the old judicial hostility to arbitration.'" *Rodriguez de Quijas*, 490 U.S. at 480; *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 n.9 (2009). On closer inspection, it found little evidence to suggest that arbitrators were "[in]capable of handling the factual and legal complexities" of statutory claims. *See McMahon*, 482 U.S. at 232. And notwithstanding the other structural differences between arbitration and litigation, there was no reason to assume at the outset that the arbitral process was incapable of adequately resolving such claims. Whereas the Court had previously viewed the election to arbitrate as a substantive waiver of "the parcel of rights behind a cause of action," *Bernhardt*, 350 U.S. at 203, it now came to see the election as little more than a tradeoff between comparable dispute resolution forums. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause.").

The Court's later nonarbitrability jurisprudence therefore stands for the more enlightened proposition that lower courts may no longer treat arbitration as inferior to litigation based on "outmoded presumptions" that were now "far out of step" with modern realities. *Rodriguez de Quijas*, 490 U.S. at 481. Instead, arbitration is to be pre-

sumed an "adequate substitute for [courtroom] adjudication." *McMahon*, 482 U.S. at 229.

This presumption does not completely foreclose treating arbitration and litigation differently in circumstances where they are, in fact, fundamentally different. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (leaving open the possibility that an arbitration agreement will not be enforced where a party would be unable "effectively [to] vindicat[e] her federal statutory rights in the arbitral forum"). It only forbids such disparate treatment based on biases against arbitration—"generalized attacks" that "rest on suspicion of arbitration as a method of . . . resolving disputes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

In the almost forty years of this Court's FAA jurisprudence from *Wilko* to *Gilmer*, therefore, the relevant comparison has always been between arbitration and litigation—not arbitration agreements and other agreements. The refusal to enforce arbitration agreements *per se* was never the problem; rather, it was the refusal to do so based on misconceptions about the arbitration process.

5. In the preemption context this basic principle of nondiscrimination between arbitration and litigation has come to be conflated with the purpose of "plac[ing] arbitration agreements upon the same footing as other contracts." (Pet. Br. at 2.) Even in the preemption area, however, the Court's precedents reflect a core understanding of the FAA's "equal footing" mandate as primarily designed to combat unwarranted discrimination against arbitra-

tion as a process rather than a contract. As articulated by *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and its progeny, the fundamental preemptive message of FAA § 2 is that states may not, without good reason, require a judicial forum when federal law allowed the parties to contract for judicial alternatives. *See id.* at 10; *see also Preston*, 128 S. Ct. at 987 (extending *Southland* to administrative proceedings); *Perry v. Thomas*, 482 U.S. 483, 489 (1987). In other words, from a federalism perspective the trouble with the states was that they were anti-arbitration (or pro-litigation)—not that they privileged other agreements at the expense of arbitration agreements.[13]

B. Published Lower Court Decisions Recognize The FAA's Primary Purpose Of Placing Arbitration On The Same Footing As Litigation, Even Though They Continue To Describe This In Terms of Nondiscrimination Between Arbitration Agreements And Other Agreements

The court below correctly held that FAA § 2 did not preempt the *Discover Bank* rule because the rule treats collective action waivers with respect to arbitration and litigation equally, and thus could not

[13] *See Mitchell v. Am. Fair Credit Ass'n., Inc.*, 122 Cal. Rptr. 2d 193, 201 (Cal. App. 2002); *see also Fosler v. Midwest Care Ctr. II, Inc.*, 911 N.E.2d 1003, 1012 (Ill. App. Ct. 2009) (holding that any "pro-judicial forum" state legislation is necessarily "anti-arbitration" and therefore preempted by the FAA); Stephen J. Ware, *The Alabama Story*, 7 Disp. Resol. Mag. 24, 27 (2001).

possibly re-enact judicial hostility toward the arbitral process. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009). Many courts have similarly grasped FAA § 2's core purpose of leveling the playing field between arbitration and litigation, even though they continue to express this purpose in terms of placing arbitration agreements on the same footing as other *agreements*.[14]

For instance, in *Carbajal v. H&R Block Tax Services, Inc.*, 372 F.3d 903 (7th Cir. 2004) (Easterbrook, J.), the Seventh Circuit understood the basic point that a general contract defense such as unconscionability might be preempted by the FAA if it were applied in a way that discriminated against arbitration. The "cry of 'unconscionable!'" it explained, may not be used to "disparage[] the [arbitration process] as second-class adjudication." *Id.* at 906. In the same breath, however, it invoked the familiar comparison with other contracts: "It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms." *Id.*

Courts other than the Seventh Circuit (and the Ninth Circuit below) have similarly refused to preempt state unconscionability rules on the quite sensible ground that those rules did not treat arbitration any differently from the way they treated litigation. Thus, the reason why the Second Circuit held

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[14] *See, e.g.*, *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 990 (9th Cir. 2007); *Mitchell*, 122 Cal. Rptr. 2d at 201 (describing the "common chord" of FAA preemption cases in terms of ensuring that the arbitration process is not "treated . . . as a disfavored method of resolving disputes," while nonetheless describing the FAA's goal as "putting arbitration clauses on an equal footing with other contracts").

that FAA § 2 does not preempt the *Discover Bank* rule is that the rule applies "*whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration.*" *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 134 (2d Cir. 2010) (quotation omitted). Although the court described this in terms of "plac[ing] arbitration *agreements* with class action waivers on the exact same footing as *contracts* that bar class action litigation outside the context of arbitration," *id.* (emphasis altered, quotation omitted), its underlying rationale was that the *Discover Bank* rule treated arbitration and litigation equally.

Similarly, in *Homa v. American Express Co.*, 558 F.3d 225, 230 (3d Cir. 2009), the Third Circuit held that New Jersey's equivalent of the *Discover Bank* rule was not preempted by the FAA because it applied equally to class action waivers "'whether in arbitration or in court litigation.'" *Id.* at 230. Nonetheless, the court portrayed this rule as a "general contract defense" that treated arbitration agreements the same as all other agreements, even though the rule did nothing of the sort: It applied only to dispute resolution agreements.

The same is true of *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004), a case Petitioner mistakenly cites in its favor. There, the Fifth Circuit correctly held that the lower court's use of the unconscionability defense to invalidate an arbitration clause was not preempted by FAA § 2. The Fifth Circuit's rationale was that the use of the defense did not "discriminate against arbitration" in the sense that it did not "necessarily ex-

press the impermissible view that arbitration is inferior to litigation." *Id.* at 170. Despite this, the court invoked the familiar mantra that "Section 2 of the FAA puts arbitration agreements on the same footing as other contracts," which it understood as requiring arbitration agreements to be enforced "*unless* they are invalid under principles of state law that govern all contracts." *Id.* at 166.

In these and other examples, judges and commentators[15] betray a consistent understanding of the FAA § 2's purpose as ensuring "equal footing" between arbitration and litigation, even though they have continued to describe this in terms of "plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

Up to this point, there has simply been no need for the Court to address this tension.[16] As the instant case suggests, however, this tension is quietly building up in the lower courts. And judging from the numerous petitions for *certiorari* that have

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[15] *See*, *e.g.*, 1 Ian R. Macneil et al., *Federal Arbitration Law* §10.7.2, at 10:52 (1999) (arguing that a law is "generally applicable" if it "applie[s] equally to judicial and arbitral proceedings"); Jane VanLare, Comment, *From Protection to Favoritism? The Federal Policy Toward Arbitration Vis-à-Vis Competing State Policies*, 11 Harv. Negot. L. Rev. 473, 490–91 (2006) (describing the FAA's purpose on the one hand as "mak[ing] arbitration agreements equal in strength to other contractual provisions" and on the other as placing "arbitration on an equal footing with litigation"); Ware, *supra*, at 1026 (arguing that if punitive damages waivers are not unconscionable in the litigation context, neither should they be in the arbitration context, but justifying this in terms of "'placing arbitration agreements upon the same footing as other contracts'").

[16] This is for some of the same reasons explained in section II.C, *infra*.

implicitly grappled with it in recent years,[17] the issue is likely to recur if left unresolved. We therefore urge the Court to clarify that FAA § 2's central nondiscrimination mandate is to reverse unjustified hostility against arbitration as a process (and only secondarily as a contract) so that arbitration can compete on a level playing field with litigation.

C. The Goal Of Non-Discrimination Between Arbitration And Litigation Is Not A Slippery Slope To Making Arbitration And Litigation Identical

Petitioner argues that interpreting FAA § 2's antidiscrimination principle so as to place arbitration and litigation on the same footing would 1) give the states license to transform arbitration into litigation, and 2) conflict with this Court's decision in *Preston v. Ferrer*, 128 S. Ct. 978 (2008). Both arguments are without merit.

1. The FAA's goal of nondiscrimination between arbitration and litigation should not be confused with the very different goal of casting arbitration in litigation's image—one that we are united with Peti-

[17] See, for instance, *certiorari* petitions filed in: *Cellco Partnership v. Litman*, 2010 WL 3700269 (No. 10–398); *Beverly Enters.-Ill. v. Mitchell*, 130 S. Ct. 1698 (2009) (No. 09–747); *Beverly Enters.-Ill., Inc. v. Blazier*, 130 S. Ct. 1698 (2009) (No. 09–746); *Athens Disposal Co. v. Franco*, 130 S. Ct. 1050 (2009) (No. 09–272); *Circuit City Stores, Inc. v. Gentry*, 128 S. ct. 1743 (2008) (07–998); *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (No. 07–976); *County Bank of Rehoboth Beach v. Muhammad*, 127 S. Ct. 2032 (2007) (06–907); *Cingular Wireless LLC v. Mendoza*, 126 S. Ct. 2353 (2006) (05–1119).

tioner in rejecting. Some of arbitration's chief virtues inhere in those very differences: streamlined discovery and review, confidentiality, and the selection of private neutrals, to name a few.[18] But there is no inconsistency in applauding those distinctions while nonetheless insisting that states may not discriminate improperly against arbitration.

The operative distinction here is between simple equality and equality of opportunity. FAA § 2, like the vast majority of antidiscrimination regimes, represents a rule of equal opportunity. Equal opportunity does not require all persons or things to be treated exactly the same in all ways. Title VII, for example, prohibits discrimination on the basis of religion but also requires employers to "reasonably accommodate" religious differences. *See* 42 U.S.C. §§ 2000e(j), 2000e-2 (2002); *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 615–16 (9th Cir. 1988). In certain circumstances, Title IX and the Equal Protection Clause not just permit, but may also require, government-funded educational institutions to offer athletic teams segregated by gender. *See*, *e.g.*, *Clark v. Arizona Interscholastic Ass'n.*, 695 F.2d 1126, 1131–32 (9th Cir. 1982); *O'Connor v. Board of Educ. of Schools Dist. No. 23*, 645 F.2d 578, 582 (7th Cir. 1981). In these and other examples, antidiscrimination law recognizes that perfect equality is sometimes not just impossible but also positively undesirable, and thus that equal opportunity may in certain

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[18] *See*, *e.g.*, 14 *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

instances require unequal treatment.[19] The point of an antidiscrimination regime is not to erase all "'[i]nherent differences,'" for some may instead be "cause for celebration." *See United States v. Virginia*, 518 U.S. 515, 533 (1996). Rather, it is to ensure that those differences are not used to "create or perpetuate the legal, social, and economic inferiority" of certain persons or things. *See id.* at 534.

The law has tended to capture this insight with the notion that nondiscrimination only requires persons or things that are "similarly situated [to] be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). By the same token, "things which are different in fact" need not "be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Thus, the Court has upheld gender classifications based on sex if they are "not invidious, but rather realistically reflect[] the fact that the sexes are not similarly situated." *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981). The rationale is that if there are legitimate differences between men and women, it is at least as likely that their disparate treatment is a function of those differences rather than of unjustified criteria

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[19] *See*, *e.g.*, 42 U.S.C. § 2000e-2(e) (2002) (permitting employer to discriminate intentionally if a protected characteristic other than race is a "bona fide occupational qualification"); General Agreement on Tariffs and Trade ("GATT") art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (permitting member states to discriminate against goods of other contracting states, *inter alia*, in order to "protect human, animal, or plant life"); Laurence Tribe, *American Constitutional Law* § 16-1, at 1437 (2d. ed. 1988) (arguing that the "right to equal treatment" guaranteed by the equal protection clause is not a "universal demand for sameness").

such as "old boy" networks or negative stereotypes about women.

In the same vein, the basic antidiscrimination message of the Court's nonarbitrability jurisprudence is that arbitration and litigation are similarly situated in their capacity to resolve adequately the vast majority of civil disputes. States ignore this message when, for no reason other than mistrust of the arbitral process, they treat arbitration and litigation differently in this respect.

But arbitration and litigation are generally *not* similarly situated in terms of the availability of juries, the need to publish opinions, the scope of discovery, and the applicability of rules of courtroom procedure. (*See* Pet. Br. at 29, 41, 50.) For these are the very "evils" of litigation that the FAA was designed to help merchants avoid.[20] Imposing them on arbitration thereby treats similarly two dispute resolution processes that are essentially different with respect to those "evils." This is no less an instance of discrimination. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("[S]ometimes the grossest discrimination can lie in treating things that are

[20] *See* 1924 hearings, *supra*, at 34–35 (identifying among such "evils": expense, procedural delay caused by motions and "other steps taken by litigants," and the jury's lack of familiarity with business realities).

different as though they were exactly alike.").[21] Petitioner reaches essentially the same conclusion when it argues that if a state were to require the use of juries or published awards in arbitration, this would raise an inference of precisely the type of "hostility" and "anti-arbitration" sentiment that the FAA was designed to reverse. (Pet. Br. at 29, 40.)

Moreover, it is far from clear that certain benefits or burdens that apply to litigation should not apply equally well to arbitration. For better or worse, in the past several decades arbitration has evolved into something of a "civil court of general jurisdiction."[22] To that end, if judges hearing a particular case would be entitled to award certain forms of relief such as punitive damages, the law has evolved to enable arbitrators to do so, too. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 n.7 (1995). If judges are immune from suit, so, too, were arbitrators. *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993).

By emphasizing the ways in which arbitration and litigation are different, Petitioner ignores the equally important ways in which they are the same.

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[21] *See also United States. v. Booker*, 543 U.S. 220, 252-53 (2005) (Breyer, J.) (holding that different criminal conduct should not receive same punishment under U.S. Sentencing Guidelines); Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 164, WT/DS58/AB/R (Oct. 20, 1998) (adopted Nov. 6, 1998) (finding a violation of GATT art. XX's non-discrimination principle where the U.S. required all shrimp exporting countries to adopt "essentially the same" measures for the protection of sea turtles "without taking into consideration different conditions which may" prevail in those countries).

[22] Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 Nw. U. L. Rev. 1, 6, 8 (1997).

There can be no worse outcome for arbitration if states are entitled to regulate litigation for the public good but the FAA disables them from regulating arbitration in exactly the same way where the two are similarly situated. This will only exacerbate the perception of arbitration as a forum in which the usual rules do not apply—a dubious version of litigation rigged in favor of corporate interests. It will defeat the overriding mission of all good arbitration law and policy—the FAA included—which is to enable arbitration to stand on its own two feet as a "legitimate," "credibl[e], and "true" alternative to litigation.[23]

2. In its petition for *certiorari*, Petitioner incorrectly argued that the Court's recent decision in *Preston*, 128 S. Ct. 978, "forecloses" an interpretation of FAA § 2's nondiscrimination principle as requiring arbitration to be placed on the same footing as litigation. (Pet. Cert. at 28-29.)

The California Talent Agency Act ("TAA") that was held preempted in *Preston* vested exclusive jurisdiction in the California Labor Commissioner to decide disputes involving talent agents and their clients—even those disputes the parties had agreed to arbitrate. Because the TAA thereby withheld such jurisdiction equally from both arbitration *and* courts of law, Petitioner reasons that FAA preemption cannot turn on whether arbitration and litigation are treated the same.

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[23] *See Securities Indus. Assoc. v. Connolly*, 883 F.2d 1114, 1115 (1st Cir. 1989) (Selya, J.); Revised Uniform Arbitration Act §§ 6 cmt., 23 cmt. b (2000).

Petitioner's argument hinges on drawing a sharp distinction between judicial and administrative proceedings—a distinction whose salience is questionable for at least two reasons. First, both the administrative and judicial forums in *Preston* were state-sponsored. The same danger that states would discriminate in favor of their own dispute resolution processes is no less pertinent in the administrative than in the litigation context. Second, even though the TAA gave the Labor Commissioner original jurisdiction to hear talent agent disputes, it provided a right of *de novo* review solely to the Superior Court. *See id.* at 985-86 & n.6. The administrative forum in *Preston* was therefore intimately linked to the judicial system—so much so that the Court explicitly "disapprove[d] the distinction between judicial and administrative proceedings." *Id.* at 987. Instead, it held that "state laws lodging primary jurisdiction in another forum, *whether judicial or administrative*," are preempted by the FAA.[24] *Id.* at 981 (emphasis added). Consistent with *Preston*, in this brief we use the term "litigation" broadly to include administrative proceedings.

[24] This is consistent with lower court precedents as well. *See*, *e.g.*, *Connolly*, 883 F.2d at 1120 n.4 ("That the restriction is administrative . . . [is irrelevant]. The gravamen of the FAA is to preserve the arbitral bargain against [any] external onslaughts manifesting hostility to arbitration."); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 274 n.6 (Cal. Ct. App. 2003) ("Court decisions on the preemptive effect of the FAA do not distinguish between . . . administrative regulations and judicial decisions that burden arbitration agreements.").

II. EVEN IF THE FAA'S PURPOSE IS TO ENSURE EQUAL TREATMENT BETWEEN ARBITRATION AGREEMENTS AND OTHER AGREEMENTS, IT IS NOT NECESSARY FOR A LAW TO APPLY TO "ALL" AGREEMENTS IN ORDER TO AVOID PREEMPTION

Petitioner contends that "'as a matter of federal law, arbitration agreements and clauses are to be enforced *unless* they are invalid under principles of state law that govern all contracts.'" (Pet. Br. at 3.) On this view, the *Discover Bank* standard is preempted simply because it is "a rule applicable only to dispute-resolution agreements," not a rule that "appl[ies] universally to 'any' and *every* contract." (Chamber *Amicus* Br. at 25; *see also* Pet. Br. at 3, 17, 31, 40 (emphasis added).)

The "all contracts" standard relied on by Petitioner cannot be correct for at least two reasons. First, it is logically incoherent. Second, it makes for unsound policy in the "mandatory" binding arbitration area. Thus, even if the FAA's organizing purpose were to place arbitration agreements on the same footing as other *agreements*, this plainly cannot mean *all* other agreements.

A. The "All Contracts" Standard Is Logically Incoherent

As a logical matter, no law can apply to all contracts except by distorting beyond all recognition the common-sense meaning of the term "apply." A law "applies" in any meaningful sense only to agreements whose enforceability it has the power to

affect. It fails to apply to agreements that it leaves unaffected.

1. Contrary to popular orthodoxy in this area, not even native contract law principles apply to all contracts. Take the unconscionability defense. Even in its "pure" form, the defense only has the ability to affect the enforceability of agreements tainted by indicia of unconscionability. It is irrelevant to, and leaves completely intact, all other conscionable agreements.

For this reason, "generally applicable" contract law doctrines quite clearly fail to "place[] arbitration agreements on equal footing with *all* other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 477 (2006) (emphasis added). In fact, their very purpose is to enforce *in*equalities among contracts based on defects such as the existence of unconscionable terms or conduct. Consider that the unconscionability defense does not even manage to place all *arbitration* agreements on the same footing because it properly refuses enforcement to some arbitration agreements but grants it to others. And given any pair of agreements—one arbitration and one non-arbitration—the doctrine has no qualms treating them unequally depending on the presence of certain impermissible procedural and substantive factors.

Because neither the so-called "ordinary" unconscionability rule nor the *Discover Bank* standard (even assuming they are different) applies to "all" contracts, FAA § 2 preemption simply cannot turn on this standard.

2. *Amici* American Banker's Association *et al.* nonetheless insist that ordinary contract law doctrines (which tend to be directed at procedural defects in contract formation) apply to all contracts regardless of subject matter, while the *Discover Bank* standard is limited to contracts relating to the subject of dispute resolution. But the strength of this retort hinges on maintaining a bright-line distinction between procedure and substance—a distinction that falls apart on further scrutiny.

First, the unconscionability defense depends at least in part on proving that the substance of the agreement—not just the process of its formation—"shocks the conscience." 2A Lary Lawrence, *Anderson on the Uniform Commercial Code* § 2–302:27 (3d ed. 2009). The same goes for other contract doctrines such as impossibility or frustration of purpose, which have nothing to do with contract formation and much to do with the substance of the agreement struck (and the effect that future events or circumstances have on them). *Cf. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 556 (1995) (Stevens, J., dissenting) (describing impossibility as a generally applicable contract defense that avoids preemption by the FAA).

Second, the FAA is itself limited to certain subject matters insofar as it is inapplicable, *inter alia*, to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 2 (2009). Why should a law be procedural—and hence saved from preemption—if it regulates *all unconscionable agreements* falling within these subject matters, but

substantive—and hence preempted—just because it regulates only *unconscionable dispute resolution agreements* falling within those same subject matters?

3. Generic contract law defenses such as unconscionability seem as if they have universal application because they are *potentially* relevant to any contract regardless of subject matter: Any and all contracts, no matter what their content, must pass the unconscionability test. But the same can be said of the following hypothetical statute: "Any and all contracts that contain an arbitration clause must so indicate in underlined capital letters on the front page of the contract." By its terms, all contracts must comply with this requirement regardless of subject matter. But this simply cannot be what it means for a law to be a "ground[] . . . for the revocation of any contract," 9 U.S.C. § 2, and thus to avoid preemption by the FAA. For our hypothetical law is scarcely distinguishable from the state law at issue in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), which the Court correctly held was preempted by the FAA because it "singl[ed] out arbitration provisions for suspect status." *Id.* at 687. The upshot is that virtually any law can be re-described as *potentially* applicable to all contracts—even one that singles out arbitration.[25]

Potentially applicability, however, is not the same as *actual* applicability. No matter how it is re-

[25] Notable examples include *Fosler v. Midwest Care Center II, Inc.*, 911 N.E.2d 1003, 1015 (Ill. App. Ct. 2009) (O'Malley, J., concurring); Brief in Opposition at 3, *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008) (No. 07–998) (quoting Cal. Civ. Code § 1668 (West 2007)).

worded, we know that the law at issue in *Casarotto* does not actually extend to all contracts. This is not just because the statute is irrelevant to all contracts lacking arbitration clauses, but more importantly because it is easily discernible whether or not a contract does in fact contain such a clause. But the same is not true for contract defenses such as unconscionability. Here, it is rarely immediately obvious that a given agreement will be found unconscionable or that facts extrinsic to the agreement will not later be discovered that reveal other defects in contract formation, such as fraud in the inducement. This is why generic contract defenses appear applicable, in principle, to any contract. But like all laws, those defenses unavoidably classify according to the type of misconduct they seek to police. *See Clements v. Fashing*, 102 S. Ct. 2836, 2845 (1982). Therefore, they actually apply only to contracts tainted by such misconduct and have no applicability whatsoever to all other contracts. As such, the reason why they avoid preemption, while other laws do not, cannot be that they apply to "all" contracts.

B. Sound Policy Militates Against The "All Contracts" Standard

1. The "all contracts" standard should be rejected for the further reason that it makes for bad policy in the "mandatory" binding arbitration area. Because legislatures rarely (if ever) pass legislation that governs "all" or even substantially all contracts, the standard has the effect of preempting practically *any* state law that happens to interfere with the enforcement of a challenged arbitration agreement.

This results in *de facto* field preemption—something the Court has explicitly rejected in the arbitration area.[26]

It is difficult to overstate the detriment of such a result. Many statutes and judicial decisions that are currently preempted under the "all contracts" standard seek to protect the weak and untutored rather than to revivify the ancient hostility toward arbitration. *See*, *e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998); *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 725 (4th Cir. 1990). The *Discover Bank* standard, for example, helps curb wrongful or exploitative conduct that might go unpoliced if left to the logic of the market. Any possible threat it poses to arbitration would appear to be outweighed by the considerable public good that it accomplishes.

2. Rather than to effectuate the voluntary self-governance of disputing parties, the inevitable consequence of the "all contracts" rule is to turn arbitration into a device for evading state governance. States will continue to regulate oppressive provisions in contracts that contemplate litigation for the resolution of disputes, FAA § 2 preemption notwithstanding. But where the contract drafter has been clever enough to insert an arbitration clause, the FAA will step in to displace the state regulation. Thus, the *Discover Bank* standard will continue to

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[26] It is well-settled that preemption based on FAA § 2 is a species of implied obstacle preemption rather than field preemption. *See*, *e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

protect consumers from class action waivers. But if Petitioner is correct, the standard will be preempted as to class *arbitration* waivers. The same will be true of virtually any other law that applies equally to arbitration and litigation, such as a law that gives franchisees a non-waivable right to collect attorneys' fees in certain disputes with franchisors, *see* Cal. Corp. Code Ann. §§ 31302.5, 31512 (West 2009), legislation that protects borrowers from waiving their right to punitive damages in lending agreements, *see* N.M. Stat. Ann. § 58–15–34(L)(4) (2009), or a statute that voids any provision in construction-related contracts requiring in-state adherents "to bring [any] suit or arbitration proceeding" in an out-of-state forum." *See* 9 La. Rev. Stat. Ann. § 2779 (West 2009). These laws will achieve their intended effect with respect to agreements that anticipate litigation, but the FAA will render them useless as to agreements that provide for arbitration.

In these circumstances, drafters of form contracts would be foolish *not* to insist on arbitration for the resolution of all disputes. For by doing so, they will manage to insulate themselves from just about any state measure that happens to interfere (in whole or in part) with the enforcement of an arbitration agreement. In an era in which arbitration has come under increasing criticism and scrutiny, this cannot be a positive development for the "national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

C. This Court Has Never Held That A State Law Must Apply To "All Contracts" In Order To Avoid Preemption By The FAA

To its credit, the Court has never explicitly held that the FAA preempts state laws unless they apply to "all contracts," even though it has used the "all contracts" language in several prior decisions.[27]

This is largely because the Court's seminal FAA preemption decisions have all involved state laws that either (i) clearly singled out arbitration[28] or (ii) did not single out arbitration but whose unavoidable consequence was to force into a judicial or administrative forum disputes that were otherwise destined for arbitration.[29] The first category of laws is preempted under current law because it runs afoul of the rule that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Casarotto*, 517 U.S. at 687. The second category is also preempted because it, too, expresses the old common-law suspicion toward arbitration as an inferior method of resolving disputes.

The *Discover Bank* rule falls into neither of these categories. Rather, it raises the hitherto unan-

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[27] *See Hall Street Assocs. LLC v. Mattel, Inc.* 128 S. Ct. 1396, 1402 (2008); *Buckeye*, 546 U.S. at 443. In neither of these cases, however, was the Court asked to determine whether the FAA preempts a law that applies to some, but not all, contracts. Accordingly, their references to "all contracts" are *dicta*.

[28] *See Casarotto*, 517 U.S. 681; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) *Perry*, 482 U.S. 483.

[29] *See Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

swered question of whether a law that applies to some, but not literally all, contracts is nonetheless preempted by the FAA.

To be sure, the Court has held that "[s]tates may regulate . . . arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). It has also held that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9. But from neither of these pronouncements does it follow that a state law avoids FAA preemption *only if* it is completely general—that is, only if it (purportedly) applies to "all" contracts.

For these reasons, if the Court were to repudiate the "all contracts" standard in this case, it would not be overturning its own prior precedent.

III. FOR THE FOREGOING REASONS, FAA § 2 DOES NOT PREEMPT THE *DISCOVER BANK* STANDARD

The central issue in this case is whether the *Discover Bank* rule discriminates against arbitration so as to warrant preemption by FAA § 2 *even though* it treats arbitration and litigation exactly the same.

As explained by the court below, the underlying rationale behind the *Discover Bank* standard is that "when the potential for individual gain is small, very few plaintiffs, if any, will pursue individual arbitra-

tion or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers." *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854 (9th Cir. 2009). The standard was therefore designed to address the perceived unfairness of, and disincentives created by, collective action waivers—a problem as to which arbitration and litigation are similarly situated.

A law that treats arbitration and litigation similarly where they are similarly situated presents little danger of unthinkingly re-enacting the anti-arbitration hostility that the FAA was intended to

reverse.[30] Petitioner has not offered any alternative basis from which to infer discrimination other than to claim that *Discover Bank* is a "distortion" of ordinary unconscionability principles. (Pet. Br. at 47.) But the fact that the *Discover Bank* rule represents a "unique" breed of unconscionability, (*see id*. at 3, 4), even if true, does not compel the much more ambitious claim that the rule improperly *discriminates* against arbitration in the way that FAA § 2 forbids.

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[30] Several commentators cited by *Amici* in support of Petitioner only reinforce this conclusion. *See*, *e.g.*, F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 Cardozo J. Conflict Resol. 369, 391 (2009) (arguing that the *Discover Bank* standard is not preempted because it applies equally to arbitration and litigation); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 52 (2006) (arguing that a different California unconscionability standard should have been preempted by the FAA because it is "premised on the inferiority of arbitration as compared with litigation."); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1449-52 (2008) (questioning whether discrimination can be inferred from disparate unconscionability rulings, but considering such rulings only as to arbitration- and litigation-related agreements); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All The Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 78, 81 (2005) ("distill[ing]" a rule that an application of the unconscionability should be preempted if it "presume[s] that arbitration in and of itself is inferior to a court proceeding"); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 198–220 (2004) (inferring hostility in the application of the unconscionability defense only from disparate outcomes in cases involving arbitration and other dispute resolution agreements).

At most, Petitioner has shown that the California Supreme Court erroneously applied its own state's unconscionability rules in formulating the *Discover Bank* standard. But this in itself does not, and should not, create a federal issue.

CONCLUSION

The Court should hold that the *Discover Bank* rule is not preempted by FAA § 2 because the rule treats arbitration and litigation equally, and thus fails to discriminate against arbitration in the way the Court's jurisprudence forbids.

Respectfully submitted,

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