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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. :

- - - - - x

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

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-462, DIRECTV v. Imburgia.
5 Mr. Landau.

6 ORAL ARGUMENT OF CHRISTOPHER LANDAU

7 ON BEHALF OF THE PETITIONER

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

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

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

20 The court below interpreted the reference to
21 State law to mean inoperative State law preempted by the
22 FAA. But neither respondents nor the court below
23 identified a single case in the history of California or
24 American law adopting that interpretation for any
25 Contract. And it would be --

1 JUSTICE BREYER: What about the problem that
2 this is California law and a California court said
3 that's what the Contract means under California law? In
4 other words, I can't find a case that we're supposed to
5 say -- or we have the power to say that they're wrong,
6 even if they were to say the words "do not turn on the
7 light" mean turn on all the lights.

8 MR. LANDAU: Your Honor.

9 JUSTICE BREYER: So -- so they may have done
10 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 contracts act, but there is a Federal Arbitration Act
17 that Congress passed specifically because a particular
18 kind of contract was not getting enforced by the courts,
19 and Congress was concerned about that. So what
20 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 the 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 in
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 trumps State law, the reference to State law is
4 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 the 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 or, I mean, that the California appellate court said the
15 intent of the parties was to interpret the law to mean
16 A. And -- and "A" meant this superseded or preempted
17 State law.

18 How can we reverse that determination if
19 it's a matter of State laws interpreting a Contract made
20 by two people? I -- that was the question and I'm not
21 quite sure what 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
25 any further if you didn't have something called the

1 Federal Arbitration Act. And the Federal Arbitration
2 Act says that this particular kind of Contract, an
3 arbitration agreement, is not solely a question of State
4 law. There is Federal substantive law created under the
5 Act.

6 To be sure as this Court said in Volt -- and
7 I'm quoting from Volt: "The interpretation of private
8 contracts is ordinarily a question of State law which
9 this Court does not sit to review."

10 And we have no quarrel with that
11 proposition. But the key word there is "ordinarily,"
12 and this case shows that "ordinarily" does not mean
13 "exclusively." Because the Court in Volt went on to
14 say -- and I think this is critical, and I think you
15 could quote this passage from Volt and be finished with
16 this case. It says, "In applying general State
17 principles of Contract interpretation to the
18 interpretation of an arbitration agreement within the
19 scope of the Act, due regard must be given to the
20 Federal policy favoring arbitration and ambiguities as
21 to the scope of the arbitration clause itself resolved
22 in favor of arbitration."

23 JUSTICE ALITO: Does that mean that whenever
24 there is a dispute about the scope of an arbitration
25 clause and a State court says that it includes a certain

1 subject or doesn't -- it doesn't include a certain
2 subject, that there is, then, the question of Federal
3 law because insufficient weight has been given to the
4 presumption of arbitrability?

5 MR. LANDAU: Yes, Your Honor. There is a
6 Federal question. Again, ordinarily you start out with
7 the proposition that contracts are governed by State
8 law. And we should be very -- let me be very clear: We
9 are not by any means saying that the Federal Arbitration
10 Act federalizes this entire area. We are kind of saying
11 the opposite, that it generally is a matter of State
12 law, but there is a Federal toll. So you always have a
13 Federal question to be a check on the State court's
14 application of law for cases like this when it is
15 perfectly clear what is going on.

16 JUSTICE ALITO: Well, this may be an extreme
17 case, but where -- how do you define the borderline?

18 MR. LANDAU: Again, Your Honor, I think in
19 the average case, the State court can interpret State
20 law as it sees fit, but then this Court's responsibility
21 in reviewing State law -- this Court obviously can
22 decide what cases it wants to take to decide State law.
23 This Court's responsibility is to basically do what Volt
24 said it would do, which is did the State Court in
25 applying State law principles give due record to the

1 Federal policy favoring arbitration and construed out in
2 fair arbitration?

3 JUSTICE BREYER: And I found no case ever
4 that's done that. And I have exactly the same problem
5 that Justice Alito has.

6 MR. LANDAU: Well --

7 JUSTICE BREYER: I mean, once we start with
8 this case, even if this is a not too difficult under
9 State law, we've got every arbitration Contract in the
10 world where one lawyer or another will suddenly be
11 saying, oh, the interpretation of the Contract here by
12 the State Court judge is not favorable enough to
13 arbitration or hostile to the act. And suddenly we have
14 Federalized, if not every area, a huge area of State
15 Contract law.

16 MR. LANDAU: Your Honor --

17 JUSTICE BREYER: There is another way to do
18 it. We could just ask the California Supreme Court now.
19 What about that?

20 MR. LANDAU: Well --

21 JUSTICE BREYER: Or come with -- with an
22 answer to what Justice Alito just asked.

23 MR. LANDAU: No, your Honor. Again, you
24 wouldn't ask the California Supreme Court because
25 ultimately this is a Federal law question.

1 JUSTICE BREYER: Ultimately, it's a State
2 law question, what the Contracts mean. And the
3 Contract, on reading it, seems to me that it's applies
4 to laws that are laws, not laws that have been held
5 unconstitutional. So what I've looked at, I've looked
6 at Civil Rights cases, for all kinds of cases. I can't
7 find any.

8 MR. LANDAU: Even if this case came from the
9 California Supreme Court, and the California Supreme
10 Court said we -- again, it has never done that, and
11 that's one of the odd things about this case. But even
12 if the California Supreme Court were to say, we as a
13 matter of California law say that this -- a reference to
14 State law means preempted or repealed or otherwise
15 inoperative State law -- again, I think that's hard to
16 imagine, but let's say they said that, you as a Supreme
17 Court of the United States would still have a
18 responsibility to make sure that that comports with the
19 Federal policy of arbitration.

20 JUSTICE BREYER: Maybe that's so, but if the
21 California Supreme Court had said this, I would look --
22 they would read the Contract as if it said, if there is
23 a law in the state of California, a State law, or if
24 there ever has been, whether that law is constitutional
25 or not constitutional, whether it violates the Supremacy

1 Clause or not, if they ever wrote those words in the
2 State legislature into a law, there is no arbitration
3 Contract. Okay? I guess parties have the right to do
4 that. And if the California court said as a matter of
5 California law they did it right here, I don't know that
6 we'd have a ground to stand on.

7 MR. LANDAU: That's, Your Honor, where
8 respectfully, the Federal arbitration --

9 JUSTICE SCALIA: You need a test, Mr.
10 Landau. You're -- I sympathize with Justice Breyer's
11 point. You need some test.

12 MR. LANDAU: Your Honor --

13 JUSTICE SCALIA: Where does it stop? We're
14 going to reinterpret every State interpretation of -- of
15 State law that ends up invalidating an arbitration
16 agreement? Certainly not. So what's the test?

17 MR. LANDAU: The test is --

18 JUSTICE SCALIA: Can't you say that at least
19 in this case where -- where the State court's
20 interpretation flouts well-accepted universal Contract
21 law principles, the most important of which is you
22 interpret a Contract in a manner that makes it valid
23 rather than invalid. And they went out of their way to
24 interpret this in a manner that causes the whole
25 agreement to be thrown out?

1 MR. LANDAU: Correct, Your Honor. That is
2 why this --

3 JUSTICE SCALIA: So give us a test. Say
4 that, you know.

5 MR. LANDAU: The test --

6 JUSTICE SCALIA: You don't have to go any
7 further than that, where it flouts standard Contract
8 interpretation principles.

9 MR. LANDAU: Well, certainly, Your Honor,
10 that is clearly one way to look at illustrate.

11 JUSTICE SOTOMAYOR: Do you really think that
12 the parties here -- this is something that I don't know
13 whether to quarrel with or not.

14 The California court said, we don't know
15 what the parties even thought about preemption. And it
16 was three years into litigation that preemption was
17 settled by this Court. Do you really think they would
18 have said that, one of the parties would have said, your
19 adversary oh, yes, now I'll go into arbitration after
20 three years of litigation?

21 MR. LANDAU: Absolutely, Your Honor, because
22 the only reason that they were not arbitrating from the
23 git-go was because --

24 JUSTICE SOTOMAYOR: Was because California
25 law said --

1 MR. LANDAU: Correct.

2 JUSTICE SOTOMAYOR: -- you don't.

3 MR. LANDAU: Correct.

4 JUSTICE SOTOMAYOR: That's what they wanted.
5 If California law said no, they wouldn't.

6 MR. LANDAU: Right. Right. And so once it
7 is clear that the thing that would have forced them into
8 class arbitration is gone, either because the California
9 Supreme Court repealed it or because this Court held it
10 to be preempted, then it -- again, it's nonsensical to
11 say --

12 JUSTICE GINSBURG: But when they entered --
13 when they entered the agreement, both parties
14 contemplated that State law meant California law.
15 That's why you did not object to the lawsuit being
16 brought in court. So the parties' intent at the time
17 they entered the agreement and at the time that the
18 lawsuit in court was started was clear. The parties
19 intended that the arbitration agreement would be out
20 because the no class action was unenforceable in
21 California. That's what they intended at the time they
22 made the Contract; isn't that so?

23 MR. LANDAU: No, Your Honor. What they
24 intended was that this would turn by reference to State
25 law. At that time State law was as, Your Honor,

1 describes. You are absolutely correct. But they didn't
2 say, if State law as it exists today requires
3 arbitration. In other words, there is nothing in the
4 Contract that freezes this in a particular point in
5 time, that it takes a snapshot.

6 JUSTICE GINSBURG: If we're trying to find
7 out what the parties meant, why wouldn't we look to see
8 what they meant at the time the Contract was formed?

9 MR. LANDAU: Well, because, again, it's --
10 what the Contract that they chose used an important
11 verb. We've been talking about the noun in the
12 sentence, the law the clause of the State. But then the
13 verb said if the law of the State would find, not if the
14 law of your State today finds. A.

15 And imagine, Your Honor, if California had
16 repealed its CLRA, which has the anti-waiver provision
17 that they are relying on. Well, I don't think anybody
18 would say, well, because the CLRA was in effect at the
19 time this thing was enacted, that if a CLRA is later
20 repealed, we still have disclaimed arbitration.

21 JUSTICE KAGAN: So, Mr. Landau, let's assume
22 that you're right, that this is a really bad mistake
23 when it comes to arbitration. So just to take you back
24 to Justice Alito's point and Justice Scalia's point, you
25 know, usually we don't fix bad mistakes --

1 MR. LANDAU: Correct.

2 JUSTICE KAGAN: -- when State courts
3 interpret State laws. I mean, there are a lot of
4 mistakes when it comes to interpretation of contracts,
5 including arbitration agreements.

6 So, again, what's the standard? There's
7 nothing on the face of this opinion that indicates
8 hostility to arbitration. To the extent that you can
9 find reasoning in this opinion, which you have to search
10 to find, but to the extent that you can find reasoning,
11 it's about interpreting form contracts, interpreting --
12 whenever you see an ambiguity in a form Contract, you
13 interpret it against the drafter. And that's a
14 principle of Contract interpretation that, as far as I
15 can see, has been used hundreds of times in California.
16 It appears to be a very common principle of Contract
17 interpretation in California whenever California courts
18 look at a Contract of adhesion.

19 So why isn't that just what they did, and is
20 what they did?

21 MR. LANDAU: Fair enough. But even by its
22 terms, the predicate for that is some ambiguity. You
23 can't just say, well, guess what, Contract of adhesion
24 immediately we go to construing against the drafter.
25 You have to have an ambiguity. There is no antecedent

1 ambiguity. And the court really didn't identify
2 anything other than the totally question begging
3 assertion that the specific governs the general.

4 Again, Your Honors, 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 on construed doubts in favor of arbitration?
16 Here, you see the opposite. And, you know, with respect
17 to Your Honor, you can't see on the face of it that they
18 say it's hostile, but how --

19 JUSTICE SOTOMAYOR: How do you draw the line
20 between --

21 MR. LANDAU: Excuse me, Your Honor.

22 JUSTICE SOTOMAYO: How to 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 from 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: Back to my point. I looked
9 in Civil Rights cases, the south passed statutes after
10 statutes like the City in statutes and so forth to try
11 to prevent the equal protection clause from being
12 implemented. So I looked at a few of those that my law
13 clerk got. In none could I find this matter of State
14 law where it isn't itself unconstitutional, you know,
15 what is a trespass and so forth. There -- it violates
16 the Federal law, what they'd say is we interpret the
17 State law.

18 MR. LANDAU: Well --

19 JUSTICE BREYER: They've gone that far,
20 because we think the State would interpret the State law
21 this way. But I can't find an analogy to what you're
22 saying.

23 MR. LANDAU: Again, Your Honor --

24 JUSTICE BREYER: We'd have to say an
25 interpretation of a Contract where that interpretation

1 is -- is what?

2 MR. LANDAU: Please go back to Volt.

3 JUSTICE BREYER: What -- I'm looking for the
4 standard.

5 MR. LANDAU: Not --

6 JUSTICE BREYER: You read me the words. It
7 didn't say what to do.

8 MR. LANDAU: Okay.

9 JUSTICE BREYER: It said they have to
10 conform with Federal --

11 MR. LANDAU: It said they must read it with
12 a -- with the --

13 JUSTICE BREYER: That's like we're the
14 supervisor of all State Contract interpretation judges.

15 MR. LANDAU: Your Honor, again, what --
16 again, what Volt says, it's ordinarily a question of
17 State law. Your -- your role as under the Federal --
18 there is substantive Federal law under the Federal
19 Arbitration Act that has been clear and established for
20 more than 50 years. The State -- the Federal
21 Arbitration Act applies in State Court, that has been
22 clear for more than 30 years. If you say --

23 JUSTICE BREYER: My other suggestion --
24 we're not going to make too much progress on finding a
25 standard, but California does accept requests from us,

1 or other Federal courts, to explain what California law
2 is. I've looked at that statute. And if this is so
3 outrageous as a matter of Contract interpretation of
4 State law, why don't we just ask them?

5 MR. LANDAU: Because, again, Your Honor --

6 JUSTICE BREYER: They have not considered
7 this case.

8 MR. LANDAU: They denied certiorari over one
9 of the justices. But, again, what Your Honor's role is
10 is to interpret this as a matter of Federal law, so
11 the -- again, it would go away if -- if they were to
12 change the rule as a matter of State law. But,
13 ultimately, the Federal issue is always present here.
14 If he had -- again, there is always a Federal issue just
15 to make sure that the State court hasn't gone too far.

16 Again, I understand exactly what the Court
17 is grappling with. Where do you draw the line on where
18 it goes too far?

19 Again, our point is this case is so far on
20 one side of the line.

21 JUSTICE SCALIA: Why -- give us all the
22 reasons why this case is on the wrong side of the line.

23 Justice Breyer has -- has mentioned the --
24 the rules of contra proferentem, that you interpret a
25 Contract against -- against the person who drafted it.

1 Now, that's on the other side. What are the
2 rules of Contract law that so clearly outweigh that?

3 MR. LANDAU: I think, Your Honor, you
4 started out by, one, that you want a Contract to be
5 valid. They went out of their way to look for a way to
6 make this unenforceable. If you take a step back --

7 JUSTICE SOTOMAYOR: Make what unenforceable?

8 MR. LANDAU: The arbitration agreement.

9 JUSTICE SOTOMAYOR: No, the arbitration
10 agreement was enforceable in lots of situations.

11 MR. LANDAU: No, Your Honor --

12 JUSTICE SOTOMAYOR: There was no agreement
13 to arbitrate class actions.

14 MR. LANDAU: Right. But their --

15 JUSTICE SOTOMAYOR: There was an agreement
16 to arbitrate other disputes.

17 MR. LANDAU: That's not their --

18 JUSTICE SOTOMAYOR: And single disputes.

19 MR. LANDAU: Their position is that the
20 arbitration provision is entirely unenforceable in this
21 case. This arbitration is entirely unenforceable with
22 respect to California.

23 Again, what is going on here? It's clear
24 the parties say we want to arbitrate our disputes,
25 unless State law forces us into arbitration. Once State

1 law can no longer force you into arbitration, they don't
2 have any plausible narrative for why the parties would
3 have agreed to move along and get some their arbitration
4 rights if nobody is forcing them into arbitration.

5 JUSTICE BREYER: Go back to Justice Scalia,
6 please. What I understood this to be is -- one reason
7 this interpretation from your perspective is an
8 unreasonable really weird one is because the statute
9 basically says, go to arbitration unless you are in a
10 State where the law would require class arbitration.
11 And if that's the State you're in, dump the whole
12 arbitration --

13 MR. LANDAU: Right.

14 JUSTICE BREYER: -- business. Okay.
15 Now, one reason that's a bad interpretation
16 is that probably what they meant is valid State law.

17 JUSTICE SCALIA: Of course --

18 JUSTICE BREYER: All right. That's one.
19 Now is there another?

20 MR. LANDAU: There is another one. In
21 Section 10 here there is a choice of law provision
22 specifically addressing the arbitration clause. And the
23 general choice of law provision is in Section 9 of the
24 agreement, but -- excuse me, in Section 10 -- but it
25 says, "notwithstanding the foregoing." In other words,

1 the fact that State law and FCC law applies. With
2 respect to the arbitration provision, the FAA shall
3 govern. So our position is, it is nonsensical to say
4 that when the Contract goes out of its way to say the
5 FAA shall govern the arbitration provision, that you
6 would take a reference to the law of your State in the
7 arbitration provision and say the law of your State
8 completely is unaffected by the FAA.

9 JUSTICE KAGAN: Mr. Landau, I completely
10 take your point as to what the parties must have wanted,
11 and it does make this State court opinion unsatisfying,
12 would be a kind word for it, but -- but, you know, in
13 fairness to the State court, part of the problem was the
14 way this Contract was worded. Everybody else finds ways
15 to word Contract provisions like this so that there
16 isn't a problem. If the Contract had said, you know, if
17 class action waivers are invalid in your State, then
18 Section 9 is unenforceable, there would have not have
19 been this problem. This -- it's a very unusual Contract
20 provision. Most companies use very clear ones. This
21 one did not.

22 And so the -- the State court had to sort of
23 puzzle over what it meant and, as you say, probably got
24 the answer wrong. Strike the "probably." Got the
25 answer wrong. But, you know, wrongness is just not what

1 we do here.

2 MR. LANDAU: Your Honor, but, again,
3 wrongness is not what you do here, but this is an
4 arbitration Contract. And, again, I think this is why
5 you have to --

6 JUSTICE SCALIA: Did you draft this
7 provision, Mr. Landau?

8 MR. LANDAU: I did not, Your Honor. But,
9 again, I -- I am not defensive, by the way, this is
10 drafted.

11 JUSTICE GINSBURG: How --

12 MR. LANDAU: They said State.

13 JUSTICE GINSBURG: How has the provision
14 changed? Now, this provision is no longer in DIRECTV
15 contracts; is that right?

16 MR. LANDAU: That's correct, Your Honor.

17 JUSTICE GINSBURG: And what -- it was taken
18 out. And what was put in instead?

19 MR. LANDAU: The new provision, Your Honor,
20 which I have here, it says -- it just -- it takes out
21 the word "State law" and just says "if this is
22 unenforceable."

23 And, again, the reason it said State law was
24 not to suggest that inoperative State law should do it.
25 It was recognizing the fact that the evil against which

1 the clause was being put in was State laws that would
2 force you into class arbitration against your will.

3 JUSTICE GINSBURG: Do we have someplace that
4 has the change that was made in the language of the
5 Contract?

6 MR. LANDAU: I do, Your Honor, I have the
7 new -- here it is, Your Honor. It says, "The a Court
8 may serve any provision of Section 9 that it finds to be
9 unenforceable except for the provision on class
10 representative and private attorney general
11 arbitration." That's in Respondent's brief on Page 36.

12 Again, I'm not saying there aren't other
13 ways to write it, but the fact that there are other ways
14 to write doesn't mean it's ambiguous. Again, I'm sure
15 this Court construes many statutes that could have been
16 written in other ways, but that doesn't make them
17 ambiguous.

18 Let me underscore one other point. If --
19 the California Supreme Court said, if the law of your
20 State is governed by the FAA, if that would have been in
21 Section 9, then they would have had no problem enforcing
22 the arbitration provision. But it's not in 9. It says
23 that in Section 10. Section 10, the choice of law
24 provision, specifically says that the FAA shall govern
25 Section 9, the arbitration provision. The law of your

1 State language in Section 9 is governed by the FAA. So,
2 in fact, it is right there on the Contract.

3 And, again, at the end of the day, we know
4 that Congress had a -- Congress was concerned because of
5 this kind of gym I can where courts were coming up with
6 strained interpretations to avoid enforcing arbitration
7 provisions. This is FAA 101. We are not asking this
8 Court to make any new law, but just to reinforce what
9 you said in Volt, which is ordinarily it is a matter of
10 State law.

11 And, Your Honor, Justice Breyer, you said
12 that you couldn't find any case. Well, Volt is a case
13 where the Court went on to examine. The Court didn't
14 say we defer to California State law and it is,
15 therefore, unsaleable to use the word Respondents word.

16 Volt said, to the contrary, we are going to
17 consider the interpretation proffered by the State court
18 and decide whether we think it is consistent with the
19 Federal policy acts in the FAA. So there is a Federal
20 component.

21 JUSTICE KAGAN: Mr. Landau says the law of
22 the place interprets the law of the place exactly in the
23 way -- or allows that interpretation exactly in the way
24 that this State court interpreted it.

25 MR. LANDAU: Volt your --

1 JUSTICE KAGAN: The law of the place was
2 just the law of the State unmodified by possibly
3 preempting Federal law.

4 MR. LANDAU: Right. But in Volt -- of
5 course, the issue in Volt was that the Court there did
6 not refuse to enforce arbitration. The Court in Volt
7 said we don't have a problem with -- this is all about
8 the efficient process in arbitration. And the Court in
9 Volt said we find this favors the possibility of /TPOFRG
10 arbitration.

11 And that interpretation in Volt insisted on
12 it in. Mastrobuono, cas rod oh and Preston. In other
13 words, Volt took pains to say that in the interpretation
14 that we upheld there was a pro arbitration provision
15 that gave effect to the Federal arbitration.

16 I'd like to reserve the balance of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Goldstein.

19 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN
20 ON BEHALF OF RESPONDENT

21 MR. GOLDSTEIN: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 This case is a reprise of Oxford Health.
24 The argument of the party that wanted arbitration in
25 oxytocin, the arbitrator got it wrong in Stolt-Nielsen.

1 And this Court may well have had sympathy for that, but
2 the Court realized it was going to have to write an
3 opinion about the courts in later cases. And the
4 difficulty is that if you interject Federal law here,
5 you are going to have just a wealth of DIRECTV
6 challenges, because in every instance in which the State
7 court announces, here's how we understand this language
8 which is State law language in our Contract, it will be
9 open to the party proposing arbitration to say no
10 actually. If there is an ambiguity in the -- in the
11 law -- excuse me -- in the Contract, then you are
12 obliged to apply a presumption in favor of arbitration,
13 and this is always a Federal question.

14 CHIEF JUSTICE ROBERTS: No, but that's --

15 JUSTICE BREYER: So if you said that --

16 CHIEF JUSTICE ROBERTS: If -- that may be a
17 problem with the FAA. But the FAA was adopted because
18 State courts were hostile to arbitration, and Congress
19 didn't like that. Now, how were they hostile to
20 arbitration? They were hostile to arbitration by
21 adopting special rules of Contract interpretation that
22 this favored arbitration. And in those instances, what
23 the FAA says is that that's what they wanted to stop:
24 special rules of Contract interpretation, ordinarily a
25 matter of State law, but not when it's hostile to the

1 FAA.

2 And what could be more hostile to the FAA
3 than to interpret a phrase that says nothing about the
4 FAA to dispense with our holdings about -- as they came
5 about -- our holdings about what the FAA has to say.
6 And to do that even though there's a provision in the
7 Contract that says this is governed by the FAA.

8 MR. GOLDSTEIN: So, sir --

9 CHIEF JUSTICE ROBERTS: In other words, I
10 understand -- I'm sympathetic to the notion that this is
11 a matter of State contract interpretation, but that is
12 precisely what the FAA was getting after, State judges
13 interpreting contracts under special rules hostile to
14 arbitration.

15 MR. GOLDSTEIN: So Mr. Chief Justice, if I
16 could deal with your real concern about where this
17 statute comes from, the idea that this is kind of the
18 core discrimination against arbitration that the statute
19 is after kind of structurally, and then what exactly
20 happened in this case.

21 The root of the FAA -- and it's reflected in
22 the -- in the statutory text -- it's in Section 2 -- is
23 that State courts were adopting doctrines that were
24 hostile to arbitration. Discover Bank is one of them,
25 this Court concluded. What the FAA is not concerned

1 with -- and Congress could well pass a law that would
2 be -- is the threshold question of whether there's an
3 arbitration agreement in the first place. That is, we
4 have been unable to locate in this Court or any other
5 Court a time when the Courts overturned the
6 determination under State law whether the parties had
7 agreed to arbitrate voice-mail non. That's an
8 antecedent question.

9 It may well be that Congress could conclude
10 that there is a problem like that and adopt a statute
11 like it. But to do that here is to really open up an
12 enormous can of worms. What you have is the --

13 JUSTICE SCALIA: I'm not sure that I
14 understand what you're arguing.

15 MR. GOLDSTEIN: Sure.

16 JUSTICE SCALIA: You're arguing that the --
17 the FAA does not cover State gimmicks that disfavor
18 arbitration so as long as what they say is there is no
19 arbitration agreement in the first place.

20 MR. GOLDSTEIN: No, Justice Scalia, don't --
21 don't misunderstand me. If the Court were to --

22 JUSTICE SCALIA: That's what you said.

23 MR. GOLDSTEIN: I apologize, then.

24 If the Court were to conclude that this is
25 just an effort to discriminate against arbitration, then

1 I think the Court has doctrines and the lower courts
2 have doctrines. We are not saying that you have to turn
3 entirely a blind eye to the idea and let a State court
4 get away with anything.

5 My point is different. And that is that
6 this is not a doctrine that is intended to discriminate
7 against arbitration. It is not an indicia of a
8 pattern --

9 CHIEF JUSTICE ROBERTS: So if we were to
10 look to determine whether it is --

11 MR. GOLDSTEIN: Yeah.

12 CHIEF JUSTICE ROBERTS: -- surely, that's a
13 Federal question.

14 MR. GOLDSTEIN: Yes, if you were -- we agree
15 that there is a backstop here, and it's an important
16 backstop. And that is, if you conclude that a court is
17 just, you know, making it up and discriminating against
18 arbitration, we think that's an important role for the
19 Court to play. But the difference here is that the
20 argument is that the State court really got this wrong
21 and had an obligation to kind of presume that the
22 parties wanted to engage in arbitration.

23 That is a very, very, very different
24 proposition of law because it asks the Federal courts to
25 interject and the State courts to interject --

1 JUSTICE KENNEDY: That's exactly what Volt
2 says, what Mr. Landau quoted, is due regard must be
3 given to the Federal -- in interpreting a contract.
4 We're talking about interpreting the intent of the
5 parties -- "Due regard must be given to the Federal
6 policy favoring arbitration and ambiguities" -- we
7 could ask whether or not this clause is -- this statute
8 is ambiguous -- "and so the scope of the arbitration
9 agreement must be resolved in favor of arbitration."

10 MR. GOLDSTEIN: Okay. There are two points
11 about that.

12 JUSTICE KENNEDY: Now, if this was a State
13 law contract looking at State law principles, but there
14 is a Federal law that must be followed in -- in making
15 that interpretation, and that is a matter for us to
16 review.

17 MR. GOLDSTEIN: Okay. There are two things
18 about that. The first is, Justice Kennedy, the language
19 that kind of trailed off in your sentence is that the
20 Court has been very clear that ambiguities in the scope
21 of an arbitration agreement have to be construed in
22 favor of arbitration, and here's the reason. And that
23 is if we know these parties have agreed to arbitrate --
24 this is in the first option. It's in lots of cases --
25 if we know you and I have agreed to arbitrate so that

1 there's an arbitration agreement, we're going to assume
2 that all of the cases fall into the bucket of
3 arbitrability, and that's a fair common-sense
4 presumption.

5 But what the Court said in Justice Thomas's
6 opinion for the Court in Granite Rock is that the
7 question of whether there's an enforceable arbitration
8 agreement at all is not -- is a State law question, not
9 a Federal law question, and here's the reason. There
10 are two interpretive principles under the Federal
11 Arbitration Act. Number one is, we want to only require
12 people to arbitrate when they have -- we are convinced
13 under their State law contract they did intend to
14 arbitrate. We can't presume that and you and I intend
15 to arbitrate because that's the question we're asking.

16 And the most important thing for you to
17 understand about the nature of this Section 9 in the
18 Contract is that it does determine whether there is
19 going to be any arbitration at all in California. That
20 is to say, is there any agreement between DIRECTV and
21 its California consumers to arbitrate?

22 And I can point to -- it's very important
23 that you understand that.

24 JUSTICE KAGAN: I guess I just don't
25 understand, then, Mr. Goldstein -- and maybe it's the

1 same question that Justice Scalia asked -- I don't see
2 why it's better somehow to discriminate against
3 arbitration by declaring arbitration agreements
4 unenforceable at large than it is by narrowing the scope
5 of arbitration agreements unfairly.

6 MR. GOLDSTEIN: Okay. There are two just --
7 there are two rules at stake. When it comes to the
8 question of whether you and I have an arbitration
9 agreement at all, what the Court has said is two things:
10 One is, this is going to be a matter of State law. But,
11 of course, if all you're doing is -- this is a game.
12 You're just trying to evade in enforcing the Federal
13 Arbitration Act. That's a -- you know, that's a role
14 for the Federal courts.

15 What Mr. Landau is relying on and what the
16 language that's quoted from Volt that comes from Moses
17 H. Cone is talking about is something quite different.
18 And that is, construe every ambiguity in favor of
19 arbitration. That's what I'm resisting, not --

20 JUSTICE BREYER: What he'll say, I think, is
21 -- we certainly pressed him on it enough -- is that
22 the -- read the sentence, the relevant sentence. "If
23 the law of your State would find the agreement to
24 dispense with class action procedure unenforceable, then
25 the entire Section 9 is unenforceable." All right.

1 That's what it says.

2 Now, would the law of California find the
3 agreement "dispense with class action" procedure
4 unenforceable? The answer to that question is clearly
5 no. Because they did have a law like that but it was
6 invalid. So in order to read this in your favor, you'd
7 have to say these words: If, however, the law of your
8 State would find this agreement, you have to read it as
9 saying, if, however the invalid law of your State would
10 find this agreement to dispense with class action
11 unenforceable, then.

12 Now, nobody -- it's very hard to say that
13 the parties meant if the invalid law of your State would
14 find it and, therefore, contract interpretation is a
15 question of law, this question of law was decided by
16 California to read the word "law" as "invalid law,"
17 there is no case in California or anywhere else, to our
18 knowledge, that has interpreted contracts in such way
19 out of the arbitration context, and therefore, this rule
20 of law interpreting this word this way is discriminating
21 against arbitration. That's something like what the
22 argument he's making. Your answer to that is?

23 MR. GOLDSTEIN: First, is that there is no
24 administerial line that he can identify between
25 something that's wrong and really, really wrong. But in

1 any event, it's not -- it's not correct that the
2 Contract is improperly interpreted.

3 Here are the reasons: The first is that,
4 Justice Breyer, if you and I have a contract that says
5 if California law would prevent us from having a class
6 action waiver, we will not arbitrate at all. That is
7 not preempted. That's the second holding of Volt.
8 Remember all AT&T versus Concepcion is, is a rule that
9 says, if California forces us to engage in class action
10 arbitration. But you and I can agree to anything at
11 all.

12 This Contract, when it says "if the law of
13 your State would find the class action waiver invalid"
14 is a perfectly fine thing for us to agree to. That's
15 State law and even accounts for preemption because the
16 FAA does not preempt California law in that
17 circumstance.

18 JUSTICE BREYER: But does California have a
19 law, a valid law that would find the agreement to
20 dispense with class action unenforceable? Does it or
21 doesn't it?

22 MR. GOLDSTEIN: It does. It does.

23 JUSTICE BREYER: It does? In other words,
24 California now has a law that makes it okay to dispense
25 with class action procedures.

1 MR. GOLDSTEIN: In several respects. The
2 first is there are several cases -- there are an array
3 of cases that aren't subject to the Federal Arbitration
4 Act. And the second is if you and I agree to follow
5 that law, it is not preempted.

6 Let me also point to some other indicia
7 that's going to make it very hard for --

8 JUSTICE KENNEDY: But you have to agree with
9 Justice Breyer -- or do you not -- that California
10 interpreted this Contract as saying if there is an
11 invalid State law that prohibits arbitration, then
12 that's binding on us.

13 MR. GOLDSTEIN: Okay.

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

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

16 So remember, my point is this: If you and I
17 have a contract to follow that State law, which is this
18 is a contract, then it's not valid because Concepcion
19 and preemption only apply when the State forces you to
20 do something. But in all events --

21 JUSTICE KAGAN: Well, sure. The parties can
22 do anything they want. But the question is, did the
23 parties do what they want -- did that parties do that
24 here?

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

1 problem is that that's going to be the question in every
2 case. And if we say we're going to reverse this
3 decision, then every time there's going to be a Federal
4 question about whether this is really what the parties
5 intended. That every time that the Contract is -- is
6 ambiguous under State law.

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

8 JUSTICE SCALIA: That's one horrible, and
9 the horrible on the other side is if we -- if we agree
10 with you, the States can do whatever they want to
11 invalidate arbitration agreements so long as they're
12 doing it under the guise of contract interpretation. Is
13 that not also a horrible?

14 MR. GOLDSTEIN: It is -- is a possible
15 horrible, Justice Scalia, so let me just give you the
16 choice between the two of them. There is no evidence
17 that the latter is actually happening, and you do have
18 the backstop. And that is we fully agree that if you
19 conclude that a State court is just making it up and
20 discriminating against arbitration, the FAA has a role
21 to play.

22 What I am saying to you is that they do, in
23 truth, want a different legal rule, and that is you've
24 got to construe these in favor of arbitration. That's
25 the principle that he's trying to derive from Volt, Your

1 Honor. That's a whole nother kettle of fish than the
2 backstop that you and I are talking about.

3 JUSTICE ALITO: Well, if we could see a
4 State court opinion that doesn't say anything that is
5 explicitly against arbitration, but it interprets a
6 contract in such a strange way that the only possible
7 explanation for the interpretation is hostility to
8 arbitration. Can that be invalidated?

9 MR. GOLDSTEIN: I think so, Your Honor.
10 And --

11 JUSTICE ALITO: And that's the question.
12 Does this case fall to that category?

13 MR. GOLDSTEIN: All right. If that's what
14 the question is, because that is not the Volt principle.
15 That is the idea that this is just wildly out of bounds.
16 It's the incredibly fact-bound question about whether
17 this one decision is wildly out of bounds, so let me
18 talk about the other reasons it's not remotely wildly
19 out of bounds. Because if you write an opinion about
20 anything other than legal rule you just articulated,
21 Justice Alito, we are going to be in an incredible way.

22 JUSTICE KENNEDY: Well, you say that's not
23 the Volt principle. Why isn't it the Volt principle?
24 Ambiguities. I mean, this is even more than an
25 ambiguity. Even ambiguities have to be interpreted --

1 resolved in favor of arbitration. And this is more than
2 an ambiguity.

3 MR. GOLDSTEIN: Okay, Justice Kennedy.
4 Because in my -- I may be mistaken. I think that you
5 and Justice Alito are describing two different legal
6 rules. Justice Alito is saying, as I understand it --
7 and I don't purport to speak for the Justice,
8 obviously -- is that if this is a crazy decision, it's
9 invalid under the FAA. The ambiguities construed in
10 favor of arbitration principle is an ordinary
11 interpretive principle. And the reason, Justice
12 Kennedy, just to bracket this, why the Volt principle,
13 the Moses H. Cone principle doesn't apply here, and that
14 is that it's ambiguities in the scope of an arbitration
15 agreement. Here the question is whether the parties had
16 an arbitration agreement whatsoever.

17 So we -- I think we've now agreed on the
18 legal rule perhaps, and so let me tell you, if I could,
19 why I don't think you can write an opinion that says
20 this is nuts.

21 JUSTICE ALITO: And add to that what did the
22 Ninth Circuit say about this? The Ninth Circuit said it
23 was absurd. Was that the word?

24 MR. GOLDSTEIN: Yeah, it was --

25 JUSTICE ALITO: Right.

1 MR. GOLDSTEIN: -- nonsensical.

2 JUSTICE ALITO: Nonsensical.

3 If we agreed with the Ninth Circuit that it
4 was nonsensical, we --

5 MR. GOLDSTEIN: I mean, I just don't -- I
6 don't want to play around with words, Your Honor, about
7 nonsensical or not. I think you and I are basically on
8 the same page about the FAA principle.

9 Here is what I have of why this is not
10 remotely outside the bounds, why, if you write an
11 opinion reversing here, you are going to invite an
12 enormous amount of second-guessing of State law contract
13 interpretation. The first is that Section 10 of the
14 Contract expressly contrasts State and Federal law.
15 That is, it says the law of your State, and then
16 distinguishes Federal law from that.

17 The second is, as Justice Ginsburg says, why
18 is it the parties even referred to State law at all if
19 what they are talking about is just "it would be
20 invalid."

21 The third is both before this Contract and
22 after this Contract, DIRECTV wrote this Contract very
23 differently in the way that it now says this Contract
24 means, and it says if it would be found invalid, and as
25 was mentioned in the first half hour, every other

1 Fortune 500 company wrote it that way as well. So there
2 are a whole series of good contrasts for us.

3 I also have what I think is the pushback to
4 the intuition that DIRECTV really must have always
5 intended for the Contract to pick up Federal preemption
6 law. And here's the reason why that's not right:
7 DIRECTV claims and has applied the power to unilaterally
8 change this Contract, and that is a huge deal in the --
9 in the context of the national form contract.

10 Here is what happened here: DIRECTV put
11 this into the Contract in 2006 before AT&T v. Concepcion
12 was a glimmer in anyone's eye at all. And it referred
13 to State law, and everybody agrees at that time that
14 California's Consumer Legal Remedies Act was going to
15 control and was going to prevent any arbitration in
16 California whatsoever. DIRECTV filed an amicus brief in
17 Concepcion saying we will not arbitrate with anyone in
18 California before the Court's decision in Concepcion.

19 And the way that DIRECTV intended to account
20 for changes in the law is that they would change the
21 Contract unilaterally when the law changed, and I can
22 prove it. In the wake of Concepcion, DIRECTV rewrote
23 the Contract. It did it before the California court of
24 appeals' decision in this case.

25 DIRECTV had another mechanism fully

1 available to it that would account for the idea that
2 now, under the Federal Arbitration Act, the State can't
3 forbid class action waivers. It didn't need this
4 contract to do anything other than to pick up existing
5 California law.

6 And I will add a couple of other points just
7 about whether, as a matter of Federal law, you would
8 want to say that right now we have to go to arbitration.
9 Remember, DIRECTV's position is in the teeth of the
10 efficiency of the Federal Arbitration Act. Its view is
11 that the parties intended that three years into the
12 litigation, what they would want is to blow up the
13 litigation and send everybody to thousands of individual
14 arbitrations. That is an extremely implausible
15 interpretation of what the parties would want if their
16 goal was to have an efficiently dispute resolution
17 mechanism.

18 And so what I'm -- the point that I'm trying
19 to make, Your Honors, is while I am sympathetic to the
20 concern, and it may be a concern directed to California
21 in particular, that we need to be attentive to whether
22 or not those courts are discriminating against
23 arbitration. My point to you is that you may believe
24 this is wrong, like you were concerned in Oxford Health
25 that the arbitrator had got it wrong, but you have to

1 adopt a legal rule. And there are too many points in
2 favor of the California Court of Appeals' decision to
3 say that this is wildly out of bounds and have an
4 administrable legal rule that the lower courts can
5 actually apply. You can say it's way out of bounds; you
6 can say it's nonsensical. But the lower courts are
7 going to look at what happened here, and they are not
8 going to view it as something that is just wildly
9 impossible.

10 CHIEF JUSTICE ROBERTS: I guess I don't
11 understand why it's a question of way out of bounds or
12 slightly out of bounds. It's a question of whether it
13 demonstrates hostility to arbitration. And I think the
14 way you show that is you say, well, look, here they
15 found a number of provisions illegal, and they struck
16 the whole thing. Here, every other case that's not
17 about arbitration, when they find a couple of provisions
18 illegal, they just sever those; they keep -- you know,
19 try to keep in effect the rest of the agreement.

20 That's a different rule for arbitration
21 contracts than other contracts. It's not a question of
22 way out of bounds or way in bounds. It may be a hard
23 question in some cases; it may be easy in others. But
24 it's a very simple question of what the rule is. The
25 rule is does it demonstrate hostility to arbitration

1 contracts?

2 MR. GOLDSTEIN: Okay. Mr. Chief Justice,
3 let me just distinguish this case from the one that you
4 granted in the Long Conference which is the factual
5 scenario that you just described. In that context, what
6 you have is an arbitration agreement. You know that the
7 parties have agreed to arbitrate and what you then do is
8 assume they intend the arbitration to be effective.
9 This is importantly, doctrinally a very different case.

10 CHIEF JUSTICE ROBERTS: That's -- I
11 understand the point and -- but, as I understand the
12 arbitration law, if you have an arbitration agreement,
13 says you're going to arbitrate workplace disputes but
14 not safety disputes --

15 MR. GOLDSTEIN: Yes.

16 CHIEF JUSTICE ROBERTS: -- and if there's an
17 issue, is this a safety dispute or not, that's covered
18 by the arbitration agreement? The arbitrator decides
19 that.

20 If you have a contract that says you agree
21 to arbitrate with all of our subsidiaries except the one
22 that does this, that's not for the arbitrator because
23 you have to decide if that other subsidiary has agreed
24 or not.

25 Now, this one talks about methods of

1 arbitration. It doesn't seem to me to be covered by
2 either of those two paradigms.

3 MR. GOLDSTEIN: Excellent. So you've just
4 described Prima Paint and the assignment between the
5 court and the arbitrator. Here is why it is in the
6 paradigm of not favoring -- not presuming arbitration,
7 and that is the effect of this Contract, Your Honor.
8 The effect of Section 9 is not to determine -- this was
9 Justice Sotomayor's question about whether there'd be
10 some arbitration in California but just not class
11 arbitration. The effect of this provision is to mean
12 that there will be no arbitration between DIRECTV and
13 any of its customers in California at all. There is no
14 agreement to arbitrate any dispute.

15 And let me just give you the proofs of that.
16 They filed an --

17 CHIEF JUSTICE ROBERTS: Well, but just clear
18 up, there is an agreement to arbitrate some disputes
19 between DIRECTV and its customers.

20 MR. GOLDSTEIN: Your Honor --

21 CHIEF JUSTICE ROBERTS: It's the arbitration
22 agreement.

23 MR. GOLDSTEIN: Your Honor, if I could just
24 distinguish, there is an agreement on the subject of
25 arbitration, that is to say Section 9 is in the

1 contract. What Section 4 of the Federal Arbitration Act
2 asks is is there an agreement with -- to resolve any
3 disputes by arbitration. And what Section 9 tells you
4 in the States where it is effective, where the -- what
5 we call the blow-up clause takes effect, is that in all
6 of those States, DIRECTV will not arbitrate with
7 individuals, it will not arbitrate with respect to class
8 arbitration.

9 If I could just give you the reasons we know
10 that's true. DIRECTV filed an amicus brief in
11 Concepcion saying we do not arbitrate with anybody in
12 California. It then -- and you can see this in the
13 Stevens declaration in opposition to the motion to
14 compel arbitration -- said we have gotten 215 small
15 claims requests related to these early termination fees,
16 which is -- and in Court, which is the subject matter of
17 our complaint. And we have arbitrated with one party.
18 So what was going on -- and so there -- in California,
19 DIRECTV was arbitrating with no one whatsoever because
20 of this contractual provision. And that brings it not
21 within the Volt principle, Your Honor. We interpret --
22 when we have an arbitration agreement, we're going to
23 put things into the bucket, your argument -- your --
24 your point, Your Honor, about scope when it comes to
25 safety disputes. But rather, within Granite Rock, which

1 said quite expressly, what we are -- when we are talking
2 about the antecedent question, we're trying to figure
3 out if you and I have agreed to arbitrate any subjects
4 whatsoever. When we're in that circumstance, we can't
5 presume that we are arbitrating, because the first
6 principle of the Federal Arbitration Act is to not force
7 people to arbitrate when they haven't intended, and to
8 require people to arbitrate when they have.

9 So, Justice Kennedy, the distinction I was
10 drawing with Justice Alito is if we have an arbitration
11 agreement and we're trying to figure out if, say, class
12 cases were in and individual cases were out, it would
13 make a little more sense to say we're going to presume
14 and resolve ambiguities in favor of putting class
15 indicates in.

16 But this is not this situation. It is the
17 question whether we are going to arbitrate with anyone.
18 Now, that is not to say that Federal --

19 JUSTICE SCALIA: It may be, but that's quite
20 different from the question of whether there was an
21 arbitration agreement. Certainly, whether there was an
22 agreement in the first place is quite different from
23 what the meaning of the agreement is. And the -- the
24 courts decide the -- the first thing, and it's -- and
25 not the arbitrator. But this is not a -- there is no

1 doubt here that there was an agreement.

2 MR. GOLDSTEIN: I --

3 JUSTICE SCALIA: There is no doubt that
4 there was an agreement. The only issue was a matter of
5 interpretation of that agreement, whether a provision of
6 the agreement blew it up.

7 MR. GOLDSTEIN: Okay.

8 Justice Scalia, what I am saying is you --
9 I -- you and I agree, but the consequence of the place
10 we disagree is important. That is, you and I agree that
11 this isn't a contract. We have a contract on the
12 subject of arbitration. When this Court has said that
13 we will construe arbitration agreements and their scope
14 to include all the subject matter, that is, we will
15 construe them in favor of arbitration, it has been doing
16 so when we not only have an agreement on the subject of
17 arbitration, but we have an agreement to arbitrate some
18 disputes.

19 JUSTICE BREYER: It may have. They may
20 have. And I just don't want -- I want to give you one
21 other issue.

22 MR. GOLDSTEIN: Yeah.

23 JUSTICE BREYER: Because it's in my mind,
24 and I'd like you to respond to it, if you wish. Because
25 I think there is some pretty good arguments that this

1 particular interpretation, consciously or unconsciously,
2 is flying in the face of an opinion of this Court, which
3 I disagreed with. That was an opinion that -- that said
4 that this particular provision of California law is
5 invalid. I dissented.

6 All right. So we have, on the one hand, the
7 risks that we'll get into, too many State law cases, if
8 we take their side. On the other hand, there is the
9 risk that they'll run around our decisions. Now, when
10 you get to that second thing, even though I dissented, I
11 think it's an extremely important thing in a country
12 which has only nine judges here and thousands of judges
13 in other places who must follow our decisions -- and
14 think of the desegregation matters, et cetera -- that we
15 be pretty firm on saying you can't run around our
16 decisions, even if they're decisions that I disagree
17 with, okay?

18 Now, I raise that because I think it is a
19 factor, and so I would like you to -- to say whatever
20 you want.

21 MR. GOLDSTEIN: Justice Breyer, there is one
22 threshold point that needs to be made, and that is five
23 members of the Court in *Concepcion*, as I understand
24 their opinions, would not have applied *Concepcion* in
25 this circumstance. They would not extend it here

1 whatsoever, because the four members of the Court who --
2 you and the other members of the Court who agreed with
3 it would not extend it to the circumstance in which the
4 parties have agreed by contract.

5 And Justice Thomas explained in his opinion
6 in that case that the opinion there -- that the -- the
7 principle opinion depended on obstacle preemption, and
8 there is no argument here that this case implicates
9 obstacle preemption, because it's a question of contract
10 law. So at the threshold, I don't think Concepcion
11 would apply here at all.

12 But your question is bigger. And that is,
13 look, I'm concerned that if we, as the Supreme Court --
14 U.S. Supreme Court articulate a question of Federal law,
15 particularly on a statute that's as important as the
16 Federal Arbitration Act, particularly on a statute that
17 is -- is rooted in a concern about hostility of the
18 State courts, we have to show people that we're serious.
19 A couple things about that.

20 First is, we know the California courts are
21 serious in the wake of -- excuse me. We have filed a
22 supplemental brief. The California Supreme Court has
23 decided a case called Sanchez. And Sanchez dealt with
24 the contract that is written like every other Fortune
25 500 contract is. And it talks about if the -- the

1 provision barring class action waivers would be deemed
2 invalid. And the California Supreme Court said that's
3 controlled by Concepcion. That is an enforceable
4 arbitration agreement right there. And so now we are
5 dancing on the head of the pin about one contract that's
6 entirely defunct, and the question of whether the
7 reference to State law, when contrasted in another
8 provision of the Contract with Federal law, is so far
9 out of bounds.

10 I think that what you have to do is compare
11 two prospects, Justice Breyer. One is the concern. And
12 we recognize the concern that if you write an opinion
13 that says, nah, we're not going to take too hard a look,
14 that the State courts will run wild.

15 All I can tell you is that there really
16 isn't evidence of that happening at all. And the Court
17 has doctrines like discrimination against arbitration
18 that can handle it.

19 The second is a reality. We know for a fact
20 that if you announce an opinion that says, this
21 interpretation of State law -- because we know what
22 California law is here. The California Court of Appeals
23 has told us. This interpretation of State law is just
24 too bad. And invalidated by arbitration agreement,
25 that's now a question of Federal law, and we are going

1 to relitigate what State law means. That is a boundless
2 rule that is going to to be invoked in every single
3 arbitration case. And so you just have to choose
4 between those two prospects. One is you know what will
5 happen, you will be going against the very first
6 principle of Federal arbitration law which is that we
7 look to State law in determining whether an arbitration
8 agreement is formed, or you have the hypothetical
9 prospect -- and what I can say to Your Honor is we have
10 a legislature that is there in the event that the
11 hypothetical comes to pass. We have doctrines to deal
12 with this. I am just terribly worried about how it is
13 you write an opinion that says this is not just wrong,
14 it's really really wrong, and explain why in the face of
15 other things of this Contract, the contrast of other of
16 contracts that I have given you are out there, you do
17 retain the possibility, of course, of not deciding the
18 case at all in the wake of Sanchez, why it is that we
19 need to have an opinion about this given that this is a
20 Contract that doesn't exist anymore, and the California
21 court of appeals has resolved it is a question that is
22 very difficult to answer.

23 But if you are going to write an opinion in
24 the case, please do not do it in a way that just invites
25 litigation upon litigation upon litigation because you

1 as an Oxford Health are concerned that this Court got it
2 wrong, just like you were concerned that the arbitrator
3 got it wrong. It is an unfortunate cost of the Federal
4 system that Congress decided this is the job of the
5 Federal courts. Not everything is a Federal case.

6 If there are no further questions.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Landau, you have three minutes
9 remaining.

10 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU

11 ON BEHALF OF THE PETITIONER

12 MR. LANDAU: Thank you, Your Honor. I'd
13 like to make three points. The fact that opposing
14 counsel, my friend, started with Oxford Health is very
15 telling because Oxford Health was a very different case
16 about the scope of This Court's review of an
17 arbitrator's decision. Everyone there agreed that the
18 parties delegated the question of the interpretation of
19 the clause to the arbitrator. And that's a very
20 different question. We don't have that here. We are --
21 in this case, this Court is reviewing what a court did.
22 You're not reviewing it under the arguable standard.
23 It's a very different standard.

24 Second, my friend said that, well, no
25 question that special rules for arbitration would be

1 preempted is discriminatory. Again, those tend to be
2 easy cases. You're not probably seeing as many of those
3 cases anymore. But now this case in a sense shows that
4 there's a new frontier, when a court will just basically
5 reach the same goal by saying black means white. Guess
6 what? I haven't done any different rule. I'm just
7 applying State court principles of interpretation. But
8 at some point, you can't just have a rule --

9 JUSTICE SOTOMAYOR: Excuse me. Why --
10 everybody is assuming that this is just a crazy
11 interpretation, but if you start with the proposition
12 that it's the intent of the parties, and everybody's
13 framing this as invalid State law, or valid State law,
14 but your own company decided before Concepcion that it
15 was okay, they would litigate everything, they would
16 take the words as they stood.

17 MR. LANDAU: Because prior to Concepcion
18 State law was valid. The question is --

19 JUSTICE SOTOMAYOR: No, it wasn't. If it
20 was preempted, it was preempted back then.

21 MR. LANDAU: Well, Your Honor, but it's hard
22 --

23 JUSTICE SOTOMAYOR: And it's preempted
24 forever.

25 MR. LANDAU: Would it be futile to make that

1 argument? In fact, we would have been subject to
2 punitive damages. I mean, we were just taking it at --

3 JUSTICE SOTOMAYOR: Probably could have done
4 what happened here and bring it up to the Supreme Court.

5 MR. LANDAU: Well, again, hats off to AT&T
6 for dog that, but there are futility doctrines that
7 recognize that not everybody doesn't has to do that.

8 JUSTICE SOTOMAYOR: How far does this go?
9 When do we make this judgment?

10 MR. LANDAU: Again, Your Honor, you could
11 decide this case on the ground, as the Chamber of
12 Commerce urged in in its amicus brief, that this is so
13 far beyond the interpretation, that it can only be
14 explained as discrimination. Again, discrimination is,
15 you know, it is an existing category for not knocking
16 these out. It's not the exclusive category. I think
17 discrimination becomes a hard principle to apply when
18 you have individual contracts. Somebody can always say
19 well, my, discrimination anticipates you have two things
20 that are similarly situated, so how can you say you're
21 discriminating again.

22 JUSTICE SOTOMAYOR: So why is it that it's
23 so farfetched --

24 MR. LANDAU: It's so farfetched --

25 JUSTICE SOTOMAYOR: -- to place the

1 legitimacy in this action at the time the complaint is
2 filed as opposed to three years later or the day before
3 a trial or the day after a trial before judgment is
4 entered?

5 MR. LANDAU: Because the parties use --

6 JUSTICE SOTOMAYOR: You could come in and
7 make a motion at any of those times. Why does the
8 interpretation of the Contract --

9 MR. LANDAU: They use --

10 JUSTICE SOTOMAYOR: Have to be at the time
11 that you make your --

12 MR. LANDAU: Because they use the verb tense
13 "would find," Your Honor. They didn't say State law
14 right now. They didn't freeze it in place. And they
15 have no way of saying when it would be frozen in place.
16 Just a line -- in the sense, this is the ultimate
17 got-you kind of case. And the question before this
18 Court is is this court going to give a stamp of approval
19 to a got-you?

20 The last point that I want to make is that
21 the other -- my friend says that there is a question
22 here about whether there was an arbitration agreement in
23 the first place. There is absolutely no question that
24 there is an arbitration agreement. The California Court
25 of Appeal acknowledged that there was an arbitration

1 agreement and construed it to be self-defeating,
2 construed there to be a blow-up provision that destroyed
3 what the parties were trying to accomplish.

4 Thank you, Your Honors.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

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

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