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No. 09-893

In The
Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,
v.

VINCENT AND LIZA CONCEPCION,
Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safe-guards guaranteed by our Constitution.

CAC assists state and local officials in upholding valid and democratically enacted measures and historic common law remedies. CAC filed an *amicus* brief in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), and *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314; over the last decade, CAC's predecessor organization, Community Rights Counsel, filed *amicus* briefs in preemption cases before this Court in support of many state and local laws.

CAC seeks to preserve the careful balance of state and federal power established by the Constitution, including its Amendments. CAC thus has a strong interest in this case and the development of preemption law generally.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

AT&T's argument that the Federal Arbitration Act (FAA) preempts application of California's generally applicable contract law to bans on class-actions contained in arbitration agreements bans is contrary to the Constitution's text and history, as well as fundamental principles of federalism.

First, AT&T asks the Court to preempt California's generally applicable contract law based not on the text of the FAA—which expressly saves state contract law that does not discriminate against arbitration—but on a pro-arbitration "purpose" inferred from the Act. However, the text of the Supremacy Clause makes "supreme" the "*Laws* of the United States . . . made in Pursuance [of the Constitution]," U.S. CONST. art. VI, cl. 2 (emphasis added), not vague inferences about what Congress meant to achieve by passing those laws. Displacing state law for broad, implied purposes—especially where a statute contains a savings clause indicating that state law should be preserved—is contrary to the clear text of the Constitution.

Second, this Court has repeatedly warned against relying on supposed "purposes" or "objectives" of a statute, not only because it is far more appropriate to apply statutes based on their plain text, but also because divining the "purposes" of legislation is a questionable enterprise in the first place. Statutes may embody "countless policies," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990), and "[i]t is at best

dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions," *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring). Indeed, the legislative history of the FAA shows that at least some members of Congress were not interested in enacting a substantive law applicable in state courts, intending instead to create a rule of procedure applicable only in federal courts. And the existence of the FAA's savings clause suggests that lawmakers were so concerned about preserving state contract law that they wrote such protection directly into the text of the statute. In general, state law should not be displaced based on fuzzy notions about the policies, objectives, or motives behind a federal legislative enactment—especially when one could easily pluck contradictory "purposes" out of the same legislative history.

Finally, the thinly veiled and entirely unsupported suspicion that AT&T and its *amici* harbor about the good faith of the California Supreme Court and its application of state contract law to class-action bans in arbitration agreements—suggesting that the state's nominally neutral contract law is at heart hostile to arbitration—runs contrary to our constitutional system of federalism. The Supremacy Clause must be applied in a way that preserves the balance of power established by our Constitution: preempting state contract law based on little more than skepticism, suspicion, and pro-arbitration "policy" fails to honor the Constitution's federalist design.

This Court has repeatedly held that comity and respect require federal courts to defer to a state court's interpretation of state law absent extreme circumstances. The fact that courts applying the general contract law of at least twenty states have held that bans on employees or consumers seeking class-wide relief may be unenforceable in any forum make it absolutely clear that no such extreme circumstances exist in this case.

The FAA expressly leaves to the states the question of whether a provision in an arbitration agreement runs afoul of generally applicable state contract law. The ruling in this case fits easily within this savings clause. While the FAA prohibits the states from discriminating against arbitration, it does not prevent states from applying generally applicable contract laws aimed at protecting consumers and holding corporations accountable for misconduct.

ARGUMENT

I. THE TEXT OF THE FEDERAL ARBITRATION ACT DOES NOT SUPPORT PREEMPTION OF CALIFORNIA'S UNCONSCIONABILITY LAW, WHICH SHOULD NOT BE DISPLACED BASED ON VAGUE PURPOSES OR OBJECTIVES

The Constitution's text and history support implied preemption only in circumstances in which there is a direct conflict between a state law or

remedy and federal law. The Supremacy Clause of the Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. The Court has applied the Supremacy Clause to preempt state laws that conflict with federal law. *E.g.*, *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54,* 468 U.S. 491, 501 (1984) (explaining that federal preemption occurs "by direct operation of the Supremacy Clause").

The text of the Supremacy Clause makes "supreme" the "*Laws* of the United States . . . made in Pursuance [of the Constitution]." U.S. CONST. art. VI, cl. 2 (emphasis added). Accordingly, displacing state law for broad, implied purposes or general policy reasons is contrary to the clear text of the Clause. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (Thomas, J., concurring in the judgment). Article VI allows preemption of state law only by enacted federal *law*, which requires express agreement among two legislative houses and two democratically-elected branches of government. *See* U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S.

919, 951 (1983) (holding that courts may not give effect to law that did not follow the "single, finely wrought and exhaustively considered, procedure[s]" specified in the Constitution); *see also Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed.").

As this Court held in *Gregory v. Ashcroft*, in traditional areas of state regulation—such as contract law—"[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute," 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal citations and quotation marks omitted)). The Federal Arbitration Act (FAA) "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr., Univ.*, 489 U.S. 468, 477 (1989). Instead, the text of the FAA provides that arbitration agreements will be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has explained that, pursuant to this savings clause, states may not discriminate against arbitration as such, but "may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). With its use of the term "at law or in equity," the

savings clause specifically envisions and preserves a role for state courts in applying these contract law principles.

As part of California's "general contract law principles," the courts have held that class-action bans in adhesion contracts that effectively exculpate defendants from liability are unconscionable and unenforceable—regardless of whether these bans occur in arbitration agreements or other contracts. *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1112 (Cal. 2005) ("[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory . . . does not specifically apply to arbitration agreements, but to contracts generally."). *See generally* Resp. Br. at 17-24 (explaining California law). California law does not treat arbitration agreements "in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Accordingly, under the plain text of the FAA's savings clause, California's general contract law disapproving class-action bans in circumstances in which they serve to insulate a party to the contract from misconduct should not be preempted. *Id.* (in determining whether the FAA preempts state law, "the text of § 2 provides the touchstone").

AT&T, however, asks the Court to apply the implied purposes-and-objectives preemption doctrine, relying on this Court's statements that the FAA embodies a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l*

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Certainly, Congress enacted the United States Arbitration Act, the initial title of what would become known as the FAA, "for the express purpose of making 'valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.' " *Stolt-Nielsen S.A., et al. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (quoting 43 Stat. 883). But this purpose does not trump the text of the statute, which preserves generally applicable state contract law in § 2. *Cf. 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 n.9 (2009) (clarifying that the Court overruled the "old judicial hostility to arbitration" found in *Wilko v. Swan*, 346 U.S. 427 (1953), based on the text of the federal statute, and "not because of a policy favoring arbitration" (internal citations and quotation marks omitted)).

In addition, applying statutes based on alleged purposes or objectives behind the legislation is inherently a fatally flawed approach. *E.g.*, *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 677-78 (2003) (Thomas, J., concurring) (noting, in the context of the Medicaid Act, "the futility of discerning one 'purpose' " from the Act, "the impossibility of defining 'purposes' in complex statutes," and the "danger of invoking obstacle pre-emption based on the arbitrary selection of one purpose to the exclusion of others."); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 908 n.22 (2000) (Stevens, J., joined by Souter, Thomas, and Ginsburg, JJ., dissenting)

(explaining that allowing preemption on "purpose frustration" grounds raises "the risk that federal judges will draw too deeply on malleable and politically unaccountable sources such as regulatory history in finding pre-emption based on frustration of purposes"); *Thompson*, 484 U.S. at 192 (Scalia, J., concurring) (noting that "[i]t is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions"); Kenneth Starr, et al., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE, 36 (ABA 1991) (criticizing the "purpose inquiry" in preemption cases because "a complex of competing legislative policies can be undermined").

The dangers in seeking to discern a single legislative purpose behind a statute are well illustrated by the FAA itself. While it is unquestionably true that Congress passed the FAA to remedy situations in which "courts traditionally viewed arbitration clauses as unworthy attempts to 'oust' them of jurisdiction," *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009), and refused to order enforcement of agreements to arbitrate, the legislative history of the FAA can be read to support diverse purposes—many of which are at odds with the objectives AT&T seeks to further in this case.

For example, there is a significant body of legislative history that suggests that the FAA was intended to create a procedural rule applicable only in federal courts, not a substantive rule displacing state law. *E.g.*, H.R. Rep. No. 96, 68th Cong., 1st

Sess. 1-2 (1924) (summarizing the ouster rule and explaining that the proposed federal arbitration "bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement"); Arbitration of Interstate Commercial Disputes, Hearing on H.R. 646 and S. 1005 before the Joint Committee of Subcommittees on the Judiciary, 68th Cong., 1st Sess. 39-40 (1924) (statement by Julius Cohen, the American Bar Association member who drafted the bill, explaining that "[t]here is no disposition . . . by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement"). *See also Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting) (arguing that the FAA does not apply in state court); *id.* at 286-96 (Thomas, J., dissenting) (same); *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting) (asserting that "[o]ne rarely finds a legislative history as unambiguous as the FAA's," which "establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts").

Some observers have expressly contested the idea that the FAA can preempt substantive state law, arguing that "[t]he idea that the FAA would apply in state courts or preempt state law was beyond the contemplation of Congress; it simply did not arise in the legislative history of the Act." David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67-SPG LAW & CONTEMP. PROBS. 5, 18 (2004). As Justice Thomas

argued in his dissent in *Allied-Bruce*, "the text of the [FAA] makes clear that § 2 was not meant as a statement of substantive law binding on the States," and was not "understood to 'creat[e] federal substantive law requiring the parties to honor arbitration agreements,' " 513 U.S. at 291 (quoting *Southland*, 465 U.S. at 15 n.9). Noting that principles of federalism require federal courts to be "absolutely certain" that Congress intended to preempt state law before doing so, *Gregory*, 501 U.S. at 464, Justice Thomas concluded: "Far from being 'absolutely certain' that Congress swept aside these state rules [regarding predispute arbitration agreements], I am quite sure that it did not." *Allied-Bruce*, 511 U.S. at 293.[2]

AT&T's pro-arbitration "policy" preemption argument, Pet'r Br. at 22, is thus founded on "generalized notions of congressional purposes that are not contained within the text of federal law," *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring). Indeed, not only are these policy notions absent from the text of the FAA, but, as the discussion above demonstrates, there is also significant disagreement over whether broad preemption of state law can even be *inferred* from the text or derived from the statute's legislative history.

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[2] In addition, the legislative history of the FAA can be read to indicate an intent not to apply the arbitration act to labor or employment contracts, although this Court's precedent holds otherwise. *Compare Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 466-67 (1957) (Frankfurter, J., dissenting), *with Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

Following the text of the FAA, as the Constitution—and prudence—require, California's generally applicable unconscionability law is not preempted.

II. PRINCIPLES OF FEDERALISM COUNSEL AGAINST SECOND-GUESSING THE CALIFORNIA COURTS' EXPLICATION OF CALIFORNIA CONTRACT LAW

The broad implied preemption argument embraced by Petitioner and its *amici* is not only contrary to the text and history of the Supremacy Clause, it also risks upsetting the Constitution's carefully crafted federal-state balance of power. This implied preemption argument relies not only on inferences about the purposes and objectives of the FAA, but also upon improper and inaccurate suppositions about the motivation and genuineness of the courts applying state contract law.

The Constitution's text and structure evidence great respect for the role of the states. As this Court has long recognized, the enumeration of powers in Article I, reinforced by the Tenth Amendment, make clear the intent to preserve the authority of states, thereby "assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; [] increas[ing] opportunity for citizen involvement in democratic processes; [and] allow[ing] for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458.

The Supremacy Clause serves an important function in establishing the proper relationship between the federal government and the individual states in our Constitution's federalist system. In order to have a workable union, the Constitution's framers recognized the need to delineate when federal power displaced state authority to regulate the same subject. As James Madison noted, because the Articles of Confederation lacked a federal supremacy rule, "[w]henever a law of a State happened to be repugnant to an act of Congress," it "will be at least questionable" which law should take priority, "particularly when the latter is of posterior date to the former." James Madison, *Vices of the Political System of the United States* (Apr. 1787) 9 PAPERS OF JAMES MADISON 345, 352 (Robert A. Rutland & William M.E. Rachal eds., 1975). The Supremacy Clause cured this defect. *See* Viet D. Dinh, ***Reassessing the Law of Pre-emption***, 88 GEO. L.J. 2085, 2087-88 (2000) (describing the Supremacy Clause as a "constitutional choice of law rule . . . that gives federal law precedence over conflicting state law").[3]

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[3] The Supremacy Clause also gave structure to our constitutional federalism by ensuring that valid treaties and federal statutes would be treated by the states as part and parcel of their own law, and not as the law of a foreign sovereign. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1510 (1987); *see also* Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 559 (2003). This aspect of the Supremacy Clause corrected deficiencies in the Articles of Confederation, which granted law and treaty-making power to the United States Congress, but failed to make clear that these acts were automatically effective in the States. James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9

As Chief Justice John Marshall observed, "[i]n our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 204-05 (1824). Because the Supremacy Clause effects the displacement of states' sovereignty in certain circumstances, "in order to protect the delicate balance of power mandated by the Constitution, the Supremacy Clause must operate only in accordance with its terms." *Wyeth*, 129 S. Ct. at 1206 (Thomas, J., concurring). When the Constitution authorizes the federal government to act, and any assertion of state authority on that subject would be inconsistent with or repugnant to the constitutional delegation of power to the federal government, then state law is preempted. *See Federalist* No. 32, pp. 194-96 (Alexander Hamilton), *in* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961) (citing the Uniform Rule of Naturalization Clause as an example where the Constitution's grant of power to regulate must be exclusive). But the Constitution requires more than inconvenience or expediency to displace state power preserved under the Constitution. *Id.* at 196.

PAPERS OF JAMES MADISON 345, 352 (noting that in general "the acts of Cong[res]s [under the Articles of Confederation] . . . depen[d] for their execution on the will of the state legislatures").

This Court in *Gibbons v. Ogden* held that state laws should be preempted when they "interfere" with federal law. *Gibbons*, 22 U.S. (9 Wheat.) at 205. In the instant case, the general California contract law applied below does not "interfere" with the FAA: it applies to arbitration and non-arbitration contracts alike, in keeping with § 2 of the FAA. While AT&T has suggested that the California Supreme Court has twisted the state's law to reach the "novel" decision that class-action bans in arbitration agreements may be found unconscionable, *see* Pet'r Br. at 20, 32, 47, this decision is in fact not novel—the law of twenty other states is in agreement with that of California, *see* Resp. Br. Addendum.

This Court is appropriately reluctant to second-guess a state supreme court's articulation of its own state law. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). This deference to state courts is particularly called for in preemption cases and when the federal law itself carves out a role for state court decisions "at law and in equity." "[S]tate courts are the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and the California Supreme Court reasonably held that state law regarding the general unconscionability of class-action bans in contracts of adhesion applied to arbitration clauses as well. *See* Resp. Br. at 38-47 (demonstrating the reasonableness of the California Supreme Court's *Discover Bank* decision, which the Ninth Circuit applied below).

The carefully crafted balance of power in the Constitution's federal system should not be disturbed based solely on skepticism that state courts are not faithfully applying their own law. While "extreme circumstances" such as "obvious subterfuge," *Mullaney*, 421 U.S. at 691 n.ll, might warrant looking past a state ruling on state law, generally, the Supremacy Clause "must operate only in accordance with its terms," *Wyeth*, 129 S. Ct. at 1206 (Thomas, J., concurring), which requires that a state law "conflict[] with the text of the relevant federal statute." *Id.* at 1208. Because the California Supreme Court's articulation of its generally applicable contract law falls within the savings clause of the FAA's § 2, the Ninth Circuit's application of California law below should not be preempted.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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