IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 16-16915

MARCUS A. ROBERTS, KENNETH A. CHEWEY, ASHLEY M. CHEWEY, and JAMES KRENN, on behalf of themselves and all others similarly situated,

Appellants,

v.

AT&T MOBILITY LLC,

Appellee.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae certify that they have no outstanding shares or debt securities in the hands of the public, and they do not have a parent company. No public held company has a 10% or greater ownership interest in *amici curiae.*

/s/ Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this *amicus* brief.[1]

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC files *amicus* briefs on behalf of the retail industry in the cases of greatest importance to retailers.

Appellants contend that the Federal Arbitration Act is unconstitutional under the Petition Clause to the extent it requires enforcement of arbitration agreements that have not been individually negotiated. *Amici curiae*'s members depend on arbitration for its simplicity, informality, and expedition. *Amici curiae* and their members thus have a strong interest in this case.

SUMMARY OF ARGUMENT

The Court should decline Appellants' invitation to hold that the FAA, as interpreted by the Supreme Court, is unconstitutional. *Amici curiae* agree with all of AT&T's arguments, and add two more arguments in support of AT&T's position.

I. The premise of Appellants' position is that the Constitution treats arbitration agreements differently from other contracts. In Appellants' view, as to the mine run of contracts, there is no constitutional problem with applying the ordinary principle that parties are bound by the contracts they sign. But according to Appellants, applying that standard to arbitration agreements violates the Petition

Clause, which instead requires that parties enter into arbitration agreements "knowingly and voluntarily."

That argument has no basis in precedent and has been rejected by every court to have considered it. Appellants cite two Supreme Court cases in support of their "knowing and voluntary" standard, but both are easily distinguishable. One case involved a contract in which the debtor waived *all* rights to defend its case in *any* forum, and the debtor raised a due process challenge—which Appellants do not raise here. Such a contract is very different from an arbitration agreement, in which the parties merely transfer their dispute to a different forum. The other involved a gratuitous waiver of the right to an Article III judge in litigation, not a bilateral contract that preceded litigation. No case supports Appellants' request to enact a constitutional rule requiring special treatment for arbitration agreements.

To the contrary, courts have invariably rejected arguments indistinguishable from Appellants' argument. Litigants have repeatedly and unsuccessfully argued that the enforcement of arbitration agreements without a "knowing and voluntary" standard violates their Seventh Amendment right to a jury trial—which is not meaningfully different from Appellants' argument here that the enforcement of arbitration agreements without a "knowing and voluntary" standard violates their Petition Clause right to litigate in court. Four courts of appeals, as well as other

courts, have rejected that theory, and none has held to the contrary. The Court should follow that unanimous and well-reasoned authority.

II. The Court should also reject Appellants' argument because of its absurd consequences. Appellants do not claim that the enforcement of arbitration agreements under state law is state action. Instead, Appellants' challenge is directed solely to the FAA. Thus, under Appellants' position, if a state court chose as a matter of state common law to enforce an arbitration agreement with a class-action waiver, there would be no constitutional problem—even without a knowing-and-voluntary standard. But if a state court enforced that same arbitration agreement under the FAA, it would violate the Petition Clause.

That cannot be right. If that was correct, state courts could, in effect, reverse-preempt federal law. A state court would be free to enforce arbitration agreements according to their terms—but if the state court refused to enforce them, Congress would be powerless to preempt such rulings, even if a preemptive statute would fall within Congress' enumerated powers. Appellants' position would also suggest that a state that enforced arbitration agreements as a matter of *common law* would not be engaging in state action, but a state that enforced arbitration agreements as a matter of *state statutory law* would be engaging in state action—thus interfering with a state's sovereign ability to enact legislation within its police

powers overriding the decisions of its own state courts. These outcomes are not only bizarre, but contrary to the purposes of the Petition Clause.

ARGUMENT

I. As Courts Have Unanimously Held, Enforcing Arbitration Clauses According To Their Terms Does Not Violate The Constitution.

Appellants ask the Court to do something remarkable: hold that the FAA is unconstitutional as applied to all arbitration agreements that have not been individually negotiated. Appellants maintain that the enforcement of such arbitration agreements violates their Petition Clause right to pursue dispute resolution in court, rather than an arbitral tribunal.

The Court should reject that argument. *Amici curiae* agree with all of AT&T's arguments regarding state action (AT&T Br. 20-53), and will not repeat them here.

Appellants' contention fails for an additional reason. As AT&T correctly explains (AT&T Br. 53-72), even if enforcement of an arbitration agreement were state action, it would not violate the Petition Clause. The premise of Appellants' argument is that the Constitution requires the waiver of Petition Clause rights to be "knowing and voluntary," and signing a consumer arbitration agreement does not satisfy that heightened standard. That premise is incorrect. The Constitution prescribes no special "knowing and voluntary" standard for arbitration agreements. Rather, the Constitution treats an arbitration agreement as what it is: a contract like

any other. If the Constitution permits enforcement of other contracts without a heightened "knowing and voluntary" standard—which Appellants do not dispute—then the Constitution permits enforcement of arbitration agreements without a heightened "knowing and voluntary" standard. Courts have unanimously rejected the contention that the Constitution treats arbitration agreements differently from other contracts, and the Court should reach the same conclusion here.

A. The Constitution Prescribes No Special Rules Governing The Enforcement Of Arbitration Agreements.

Contracts that have not been individually negotiated are generally enforceable. Indeed, such contracts are ubiquitous: any time a person uses a credit card, rents a car, or subscribes to a cell phone service, the person signs a contract that has not been individually negotiated. If such contracts were not enforceable, the commercial system would grind to a halt. Appellants do not suggest that the enforcement of such contracts poses any constitutional concern.

Such contracts are enforceable even without a showing that they are signed "knowingly and voluntarily." Of course, no contract can be enforced unless there is bilateral consent. But the law assumes that if a person signs an agreement, he consents to its terms. He cannot later argue in litigation that even though he signed the agreement, he did not "knowingly and voluntarily" agree to all the terms therein. *Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87, 93 (2013) ("[T]he law effectively presumes that everyone who signs a contract has read it thoroughly,

whether or not that is true"); *Restatement (Second) of Contracts* § 157 cmt. b (1981) ("Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms."). This principle conforms to commercial reality. In the real world, people routinely sign agreements without reading every word. If they could avoid enforcement of such agreements by arguing after the fact that they did not read every word, the commercial system could not function. Appellants do not suggest that this basic principle of contract law violates the Constitution.

That principle applies even when a contract can be framed as waiving a constitutional right. For instance, the Fifth and Fourteenth Amendments protect against the deprivation of property without due process. Yet, people routinely sign contracts requiring them to pay money—such as rental car agreements with refueling charges, to take one example. If people could avoid enforcement of such contracts by arguing that they did not "knowingly and voluntarily" acquiesce to the deprivation of property, the commercial system would grind to a halt.

Nor do Appellants suggest that there would be any constitutional concern with a federal statute *generally* directing enforcement of contracts that have not been individually negotiated. The Constitution simply does not regulate how to define consent under contract law.

Appellants argue, however, that the Constitution prescribes special rules for arbitration agreements that do not apply to other contracts. In Appellants' view, when the contract is an arbitration agreement, the Constitution forbids a statute requiring application of the traditional principle that people are bound by the contracts they sign. As Appellants see it, an arbitration agreement results in a waiver of the Petition Clause right to pursue a claim in court, and the Constitution therefore demands that the agreement be signed "knowingly and voluntarily." This means that the party seeking to enforce the contract must show not only that the counterparty signed the agreement, but that he was subjectively aware of the arbitration provision and subjectively wanted to arbitrate disputes.

Appellants cite no authority supporting this novel proposition. Appellants' analysis is confined to the following paragraph:

> Like other First Amendment rights, the right to sue in court can be waived only 'knowingly and voluntarily,' not by force or coercion. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187 (1972) (contractual waiver of free speech). *Cf. Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015) (contractual waiver of right to access Article III court).

App. Br. 6.

This analysis and the citations in support of it do not withstand scrutiny. As a threshold matter, this case does not concern the enforceability of a contract signed through "force or coercion," as those terms are traditionally understood in

the law. *Actual* force or coercion—such as a threat of harm if a person did not sign a contract—would preclude enforcement of a contract under ordinary principles of contract law. Rather, this case concerns whether a contract should be enforced when a person willingly signs it, and then later claims in litigation that his signature was insufficiently "knowing" and "voluntary." Under ordinary principles of contract law, this argument fails.

The cases cited by Appellants also provide no support for the view that the Constitution requires diverging from ordinary principles of contract law in the arbitration context. The issue in *D.H. Overmyer Co. v. Frick Co.* was the enforceability of a "cognovit": "the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder." 405 U.S. 174, 176 (1972).[2] The Court held that the Due Process clause permitted the enforcement of the debt pursuant to the cognovit without any hearing. The debtor had argued that the cognovit should not be enforced because it would result in a waiver of due process rights that had not been knowing and voluntary. However, the Court rejected that argument, reasoning that "[e]ven if, for present purposes, we assume that the standard for waiver in a

[2] Appellants' description of *D.H. Overmyer* as involving a "contractual waiver of free speech," App. Br. 6, is therefore inaccurate. The Court did not discuss free speech, or any other portion of the First Amendment, anywhere in its opinion.

corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made . . . that standard was fully satisfied here." *Id.* at 186. Thus, the Court simply never addressed the proper standard for enforcing a contract that implicates due process rights, let alone Petition Clause rights.

Moreover, even had the Court adopted a heightened waiver standard in *D.H. Overmyer*, there would still be a fundamental difference between an arbitration clause and a cognovit clause. An arbitration agreement is a bilateral agreement that results in no waiver of substantive claims, but instead transfers the resolution of those claims to a different forum. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."). By contrast, a cognovit clause strips the defendant of all right to contest a claim: the court just mechanically enters judgment for the plaintiff. The due process concerns that led the Court to suggest that a knowing-and-voluntary standard might apply to cognovit clauses do not apply to arbitration—and indeed, Appellants do not even assert any due process challenge.

Appellants' second case, *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), is even further off point. Appellants' parenthetical states that this case addressed a "contractual waiver" of the right to access an Article III court, but that description is inaccurate. In *Wellness*, the Court addressed two questions: first, whether a litigant could waive his right to proceed before an Article III judge (as opposed to a bankruptcy judge), and second, whether such waivers could be implied. The Court answered both questions in the affirmative. As to the second question, the Court relied on authority holding that "the Article III right is substantially honored by permitting waiver based on actions rather than words," explaining that this principle "increase[d] judicial efficiency and check[ed] gamesmanship." *Id.* at 1948 (quotation marks omitted). It was in that context that the Court stated that "a litigant's consent—whether express or implied—must still be knowing and voluntary." *Id.* Thus, *Wellness* addressed a litigant's *gratuitous* waiver of a right during litigation; it said nothing about the Constitution's treatment of a bilateral *contract* to arbitrate agreement, signed before litigation was contemplated.

In sum, an arbitration agreement is unlike both a contractual cognovit clause (which results in a complete waiver of all rights) and a litigation waiver (which is not a contract at all). No authority supports Appellants' position that the

Constitution requires treating arbitration contracts differently from other types of contracts.

As AT&T explains (AT&T Br. 65-66), the more pertinent case is *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). In *Cohen*, the Supreme Court held that a reporter's confidentiality agreement was enforceable because it was a contract like any other—even though the effect of the agreement was to prevent the reporter from exercising his right to free speech. *Id.* at 671 (enforcing contract because "Minnesota law simply requires those making promises to keep them"). Notably, Justice Souter's dissenting opinion argued for the imposition of a knowing-and-voluntary standard. It argued that "the requirements" for waiver "have not been met here." *Id.* at 677 (Souter, J., dissenting). It cited *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), which held—in the context of a *litigation* waiver—that courts should be "unwilling to find waiver in circumstances which fall short of being clear and compelling." *Id.* at 145; *see Cohen*, 501 U.S. at 677 (Souter, J., dissenting) (citing *Curtis*, 388 U.S. at 145). But Justice Souter's dissent did not persuade the majority of the Court, which declined to treat contracts that waive First Amendment rights any differently from other types of contracts. Under *Cohen*, there is no basis for imposing a special knowing-and-voluntary waiver standard on arbitration agreements.

B. Courts Have Uniformly Held That The Constitution Prescribes No "Knowing And Voluntary" Standard For Arbitration Agreements.

This is not the first case in which a litigant has argued that the Constitution requires application of a "knowing and voluntary" standard to arbitration agreements. This argument has been presented to numerous courts of appeals, as well as district courts and state courts, and it has invariably been rejected.

Appellants tout that "no prior case has considered the merits of a Petition Clause challenge against the FAA as applied to adhesive consumer forced arbitration clauses." App. Br. 18. But as AT&T explains (AT&T Br. 62-65), several courts have considered a closely similar argument—whether the enforcement of an arbitration agreement that was not signed "knowingly and voluntarily" violates the Seventh Amendment right to a jury trial. Litigants in those cases have made the exact argument that Appellants make here—that they cannot be stripped of their constitutional right to litigate in court, as opposed to arbitration, without a "knowing and voluntary" waiver.

Those arguments have uniformly failed, on the straightforward ground that the Constitution does not place arbitration agreements on a different footing from other contracts. To the contrary, once a person signs an arbitration agreement that is enforceable pursuant to ordinary rules of contract law, the constitutional right to litigate in court simply leaves the picture.

Fourth Circuit. In *Sydnor v. Conseco Financial Servicing Corp.*, 252 F.3d 302 (4th Cir. 2001), the plaintiff claimed that the enforcement of an arbitration agreement violated the Seventh Amendment because "the defendants had a duty to ensure that the appellees fully informed themselves of the arbitration agreement and waiver of a jury trial." *Id.* at 306. The Fourth Circuit rejected this argument out of hand. It explained that "an elementary principle of contract law is that a party signing a written contract has a duty to inform himself of its contents before executing it." *Id.* (quotation marks omitted) Further, "the fact that the appellees waived their right to a jury trial" did not "require the court to evaluate the agreement to arbitrate under a more demanding standard," because it "is clear that a party may waive her right to adjudicate disputes in a judicial forum." *Id.* at 307.

Fifth Circuit. The Fifth Circuit addressed this issue in *American Heritage Life Insurance Co. v. Orr*, 294 F.3d 702 (5th Cir. 2002). The plaintiff contended that the enforcement of the arbitration agreement violated the Seventh Amendment, citing *Miranda v. Arizona*, 384 U.S. 436 (1966), for the proposition that "a waiver of a constitutional right must be voluntarily, knowingly, and intelligently made." 294 F.3d at 711. The Court rejected this argument, observing that *Miranda* "does not trigger the application of the Seventh Amendment right to a jury trial in a civil case." *Id.* It explained that "[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it

is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes." *Id.* (quotation marks omitted).

Seventh Circuit. In *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), the plaintiff asked the court to invalidate an arbitration agreement on the ground that it was an "unconscionable contract of adhesion." *Id.* at 366. She maintained that enforcing it according to its terms violated Article III, the Seventh Amendment right to a jury trial, and the Fifth Amendment right to due process and equal protection. *Id.* at 368. The Seventh Circuit rejected these arguments. As a threshold matter, it agreed with AT&T's state action argument here: "In this case, the defendant, not the government, sought to compel arbitration, so there is no basis to find that Koveleskie was deprived of her rights because of government action." *Id.* It also found that "[e]ven if one were to assume state action here, it is highly unlikely that any constitutional violation occurred." *Id.* It concluded that Koveleskie waived her right to an Article III forum, and that "there is no constitutional right to a jury trial outside of an Article III forum." *Id.* It also rejected the plaintiff's Fifth Amendment arguments, holding that it is "simply not the case" that "a non-Article III forum is inadequate." *Id.*

Eleventh Circuit. In *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005), the plaintiff argued that enforcing an arbitration agreement

violated the Seventh Amendment unless it was "subject to a heightened 'knowing and voluntary' standard in evaluating the enforcement of their waiver." *Id.* at 1370. The court disagreed. It observed that "a party agreeing to arbitration does not waive any substantive statutory rights; rather, the party simply agrees to submit those rights to an arbitral forum." *Id.* at 1371. Relying on *Koveleskie*, *Sydnor*, and *American Heritage*, the court concluded that "general contract principles govern the enforceability of arbitration agreements and that no heightened 'knowing and voluntary' standard applies, even where the covered claims include federal statutory claims generally involving a jury trial right." *Id.* at 1372.

Other courts. Appellants' argument has found no additional favor in federal district courts or state supreme courts. For instance, in *Preferred Care of Delaware v. Crocker*, 173 F. Supp. 3d 505 (W.D. Ky. 2016), the plaintiff urged the court to invalidate the FAA on the ground that it "violates one's Seventh Amendment right to a jury trial." *Id.* at 513 n.2. She argued, as Appellants do here, that "a waiver of a constitutional right must be voluntarily, knowingly, and intelligently made," and "[b]ecause the FAA substitutes the knowing-and-voluntary requirement to waive constitutional rights and replaces it with the standard to enforce an ordinary contract, the FAA exceeds congressional authority and violates the separation-of-powers doctrine." *Id.* (quotation marks omitted). The court had no difficulty rejecting this argument, observing that the right to a

jury trial did not apply if "claims are properly before an arbitral forum pursuant to an arbitration agreement." *Id.* (quotation marks omitted). The court rejected the plaintiff's constitutional argument in light of the unanimous view that the Constitution did not require courts to "apply the heightened 'knowing and voluntary' standard in evaluating a waiver of the right to a jury trial under an arbitration agreement." *Id.*

In *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99 (Ill. 2006), the plaintiff, like appellants here, argued that "before a constitutional right may be waived, it must be clear the waiver was entered into voluntarily and knowingly." *Id.* at 108. Thus, she argued, "the arbitration agreement is ineffective to waive her seventh amendment and statutory trial rights, such as the right to access to the courts and the right to a jury trial." *Id.* The court observed that "[s]imilar arguments have been rejected by several federal circuit courts of appeal," and rejected the plaintiffs' argument in light of *Koveleskie, Sydnor, American Heritage,* and *Kaley.*

Likewise, in *Title Max of Birmingham, Inc. v. Edwards*, 973 So. 2d 1050 (Ala. 2007), the court rejected the same argument in light of the unanimous authority holding that "a court's enforcement of an arbitration agreement does not violate the protections established by the Seventh Amendment to the Constitution of the United States." *Id.* at 1056 n.3. The court agreed with the Eleventh Circuit that "the fact that the appellees waived their right to a jury trial require" does not

"require the court to evaluate the agreement to arbitrate under a more demanding standard. It is clear that a party may waive her right to adjudicate disputes in a judicial forum." *Id.* (quotation marks omitted).

This unbroken line of authority forecloses Appellants' argument here. If the Constitution requires no heightened "knowing and voluntary" standard when a litigant waives his Seventh Amendment right to litigate in court, as courts have uniformly held, it requires no heightened "knowing and voluntary" standard when a litigant waives his Petition Clause right to litigate in court, as Appellants argue here. The Court should follow that case law and affirm the District Court.

II. Appellants' Argument Has Absurd Consequences.

The Court should also reject Appellants' argument because it would result in absurdities. Appellants' core theory is that enforcement of arbitration agreements with class-action waivers *under state law* complies with the Constitution, but enforcement of arbitration agreements with class-action waivers *under the FAA* does not. That theory, if accepted, would turn the constitutional allocation of power between states and the federal government upside down.

A. Under Appellants' Theory, Arbitration Agreements With Class-Action Waivers Are Enforceable Under State Law, But Cannot Be Enforced Under The FAA.

This case is ultimately about the constitutionality of the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Appellants

want to file a class action against AT&T. AT&T, however, enters into arbitration agreements with class-action waivers with its customers. In *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the California Supreme Court held that arbitration agreements with class-action waivers were unconscionable under state law. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), however, the Supreme Court held that the *Discover Bank* rule was preempted by the FAA. Under *Concepcion*, therefore, Appellants' arbitration agreements with AT&T must be enforced according to their terms. To avoid the effect of *Concepcion*, Appellants ask this Court to hold that the FAA, as interpreted in *Concepcion*, violates the Constitution.

Appellants do not contend that the enforcement of arbitration agreements according to their terms *in general* constitutes state action. That position would be absurd—it would imply that private contracts would transform into state action merely by being enforced in court. Instead, Appellants' challenge is specific to the FAA: they assert that "[t]he Supreme Court has never considered the First Amendment implications of *Concepcion* and its other FAA decisions," and challenge "the FAA and its Supreme Court's interpretations" as unconstitutional. App. Br. 4, 16. Appellants advance two arguments. First, they claim that the FAA, as interpreted in *Concepcion*, is state action because it "withdrew from one group (consumers) previously available legal protections, including … public

policy grounds against enforcement (like the *Discover Bank* rule preempted in *Concepcion*) and well-established contract defenses." App. Br. 30 (brackets and quotation marks omitted). Second, they claim that the FAA, as interpreted in *Concepcion*, is state action because it results in undue encouragement of arbitration. App. Br. 42 ("The Supreme Court has interpreted the statute to embody 'a liberal federal policy favoring arbitration' that requires rigid enforcement of adhesive consumer contracts, preempting contrary state laws and policies" (quoting *Concepcion*, 563 U.S. at 339)).

Thus, taking Appellants at their word, there would be no constitutional problem with a state enforcing arbitration agreements under state law, even without a heightened "knowing and voluntary" standard. A state court that simply enforced the literal words of a contract would not be "withdr[awing] from one group (consumers) previously available legal protections." App. Br. 30 (quotation marks omitted). Nor would it be favoring any particular policy or preempting any contrary state-law rule. It would simply be applying the ordinary principle that contracts are enforced according to their terms. Thus, there would be no state action—and hence no Petition Clause violation—even without a finding that the consumer "knowingly and voluntarily" entered into the agreement.

This is not a hypothetical prospect. Before *Concepcion*, numerous state courts actually did hold that individualized arbitration agreements were

enforceable as a matter of state law. Those courts applied the ordinary principle that contracts should be enforced according to their terms, and declined to find that arbitration agreements with class-action waivers were inherently unconscionable. *See, e.g.*, *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-67 & n.23 (Haw. 1996); *Walther v. Sovereign Bank*, 872 A.2d 735, 750-51 (Md. 2005); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 364-65 (Tenn. Ct. App. 2001); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003). Under Appellants' view of this case, none of those cases would pose a Petition Clause problem. In Appellants' view, only in California does the enforcement of such agreements violate the Petition Clause, because the source of law for enforcing those agreements is the FAA, as interpreted in *Concepcion*.

B. Holding That Arbitration Agreements Are Enforceable Under State Law, But Not The FAA, Would Yield Illogical Results.

As described above, Appellants' theory would hold that a state court can enforce arbitration agreements according to their terms under state law, even without a "knowing and voluntary" standard. But the enforcement of such agreements under the FAA violates the Petition Clause. That position results in a series of bizarre conclusions, which confirms that Appellants' position cannot be right.

First, Appellants' position turns the constitutional allocation of power between the states and the federal government upside down. The federal government, of course, "is acknowledged by all, to be one of enumerated powers." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). But when Congress acts pursuant to its constitutional grant of power, "Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to 'make all Laws which shall be necessary and proper for carrying [them] into Execution.'" *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383 (2015) (quoting U.S. Const. art. I, § 8). And when Congress enacts laws falling within its enumerated powers, federal law reigns supreme, preempting state law to the contrary. U.S. Const. art. VI, cl. 2.

The FAA applies only to contracts involving interstate commerce, *see Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), and hence plainly is a constitutional exercise of Congress' authority to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. Thus, the Constitution requires that the FAA reign supreme—state laws to the contrary must give way.

Yet Appellants advocate a kind of reverse-preemption system, under which states have power to regulate arbitration agreements affecting interstate commerce—but the federal government does not. In Appellants' view, state courts are free to decide how to treat arbitration agreements with class-action waivers

under state law. They can enforce them; they can enforce them, subject to a "knowing and voluntary" standard; or they can invalidate them as unconscionable. None of these options would pose any constitutional problem. But in Appellants' view, if a state, like California, elects to invalidate such agreements under state law, that state-law decision reigns supreme—the federal government is powerless to enact a contrary rule, because such a rule (without a knowing-and-voluntary standard) would violate the Petition Clause. That result is precisely contrary to the allocation of power intended by the Constitution, in which federal law preempts state law, not the other way around.

Second, even more strangely, Appellants define the scope of federal power as a one-way ratchet. Appellants would have no constitutional objection to a federal version of the *Discover Bank* rule—that is, a rule that invalidated arbitration agreements with class-action waivers nationwide, and preempted state law enforcing such agreements. But because the national federal rule requires enforcement, rather than invalidation, of arbitration agreements with class-action waivers, Appellants assert a constitutional violation. This result is strange indeed. The Constitution gives no indication that national rules *invalidating* contracts are preferred to national rules *enforcing* them. To the contrary, the sole constitutional provision on contract law states: "No State shall … pass any … Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. It would be strange to hold

that Congress is powerless to preempt a state law that "impair[s]" arbitration agreements with class action waivers, yet is free to invalidate such agreements nationwide.

Third, Appellants' position would interfere with states' historic right to structure their internal governments as they wish. As previously explained, under Appellants' position, a state court that enforces arbitration agreements according to their terms would not violate the Petition Clause. But what if a state *legislature* passed a state-law version of the FAA that required enforcement of such agreements, overruling state common-law decisions to the contrary? This is perfectly plausible; at least 35 states have state arbitration acts, in some cases patterned after the FAA.[3]

Taking Appellants' argument literally, those state arbitration acts might also violate the Petition Clause. Appellants maintain that the Federal Arbitration Act violates the Petition Clause because it alters state common-law decisions, and "encourages" arbitration; a state arbitration statute that does those things could also violate the Petition Clause under Appellants' logic. The result is that a state could be permitted to enforce arbitration agreements without a knowing-and-voluntary standard under its common law, but not under its statutory law. This result is antithetical to the principle that "it is characteristic of our federal system that States

[3] *See* https://www.law.cornell.edu/uniform/vol7#arbit (collecting citations to state statutes).

retain autonomy to establish their own governmental processes." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). Indeed, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* Yet Appellants would interfere with States' exercise of legislative authority by honoring common-law decisions while invalidating statutes that do the same thing.

Fourth, these outcomes are especially odd because they are disconnected from the purposes of the Petition Clause. From a plaintiff's perspective, it is irrelevant whether the rule that requires enforcement of an arbitration agreement flows from federal or state law—the supposed infringement on the right to file a lawsuit is identical. Yet in Appellants' view, the Petition Clause protects a right to file a class action in some states and not others. If a state elects to enforce arbitration agreements according to their terms, there is no state action, and hence no Petition Clause violation; but in states where the FAA preempts contrary law, the Petition Clause requires the class action to proceed. This outcome has no textual, historical, or purposive basis in the Petition Clause.

In sum, the bizarre results of Appellants' position provide additional grounds for rejecting their constitutional challenge to *Concepcion*. The Constitution authorizes Congress to require enforcement of arbitration agreements.

CONCLUSION

The judgment of the District Court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 5,828 words.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2017, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF.

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