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

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 09-893, AT&T
5 Mobility v. Concepcion.

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE PETITIONER

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

11 The Ninth Circuit concluded in this case
12 that a State law may mandate the use of a particular
13 procedure in arbitration as long as the law also
14 requires the use of that same procedure in litigation.
15 That interpretation of section 2 of the Federal
16 Arbitration Act would permit a State to oppose in
17 arbitration any procedure employed in court and thereby
18 require arbitration to be a carbon copy of litigation,
19 precisely what the Act was designed to prevent.

20 Section 2 of the Federal Arbitration Act
21 provides that an arbitration agreement may be held
22 unenforceable under State law only if the State law rule
23 being invoked to invalidate the agreement qualifies as a
24 ground that exists in law or equity for the revocation
25 of any contract. Respondent argues that, because

1 California's Discover Bank rule does not facially
2 discriminate against arbitration, it falls within the
3 savings clause. But the plain language of the savings
4 clause makes clear that it is not limited to statutes
5 that discriminates facially against arbitration.

6 By referring to "any contract," it makes
7 clear that, as this Court has said, the rule must be
8 applicable to contracts generally.

9 JUSTICE SCALIA: What if -- what if a State
10 finds it unconscionable to have an arbitration clause in
11 an adhesion contract which requires the arbitration to
12 be held at a great distance from -- from where the other
13 party is and requires that party to pay the cost of the
14 arbitration? Can a State not find that to be
15 unconscionable?

16 MR. PINCUS: It can, Your Honor, and --

17 JUSTICE SCALIA: Well, that wouldn't apply
18 to other -- to other contracts.

19 MR. PINCUS: But the legal doctrine that the
20 State is applying there, as States have and as we
21 discuss in our brief, is a doctrine that applies a
22 general principle of unconscionability with principles
23 elucidating how it applies that apply evenhandedly
24 across the board.

25 JUSTICE SCALIA: Are we going to sit in

1 judgment? Are we going to sit in judgment? I know you
2 say -- you say it has to shock the conscience, but if a
3 State wants to apply a lesser standard of
4 unconscionability, can we strike that down?

5 MR. PINCUS: If it wants to apply a lesser
6 standard to arbitration clauses, yes, absolutely you
7 can, because that would -- that would violate what is at
8 the core of the provision, which is discrimination
9 against State law.

10 If a State -- if a State enacted -- if the
11 legislature enacted a statute and it was headed
12 arbitration -- unconscionability, rather, and section 1
13 of that statute had general principles to be applied to
14 all contractual provisions to determine
15 unconscionability: It must shock the conscience, the
16 question is addressed with respect to the party before
17 the court against whom the contract is going to be
18 applied, and the third principle is unconscionability is
19 decided ex ante. And then section B said -- I'm sorry?

20 JUSTICE SOTOMAYOR: What's the difference,
21 then, with the act that you are positing? A State comes
22 in -- or I should ask: Is there no difference between a
23 State saying these terms in a contract are
24 unconscionable, making the petitioner always pay the
25 fees and making him or her arbitrate in a different

1 State -- that is unconscionable -- or a general rule of
2 State law that says in a contract of adhesion the
3 stronger party can't impose undue cost or expenses on
4 the other side to vindicate their rights, whether it's
5 in litigation and/or arbitration.

6 In your mind, there is no difference between
7 those two things, between these two approaches to the
8 issue?

9 MR. PINCUS: I don't think so, Justice
10 Sotomayor. Maybe if I could finish with my example, it
11 may elucidate the distinction that I'm trying to draw.

12 JUSTICE SCALIA: So how do you address
13 Justice Scalia's -- if you are saying there is no
14 difference between those two things, then how can a
15 State find those terms unconscionable? Under what
16 theory, general theory of law, would they be --

17 MR. PINCUS: I think the critical question
18 is: Is the State applying the same principles to
19 arbitration, of unconscionability to arbitration
20 agreements, as to other agreements? And in my example I
21 was positing a first provision that laid out three
22 principles that would be applied.

23 If part B of that section, or part 2 of that
24 section, said with respect to arbitration agreements, on
25 the other hand, we are going to require that the

1 procedures be equivalent to what is in court, we are
2 going to look at the time the dispute arises rather than
3 ex ante, and we are going to look at the effect on
4 everyone, then I think it would be quite clear that that
5 would be discrimination.

6 JUSTICE SCALIA: That is bad, absolutely,
7 but that's not what the State is going to do. The State
8 is simply going to say: We find this to be
9 unconscionable. And you say it's not unconscionable;
10 it's very fair. And the State says: Eh, we think it is
11 unconscionable.

12 Are we going to tell the State of California
13 what it has to consider unconscionable?

14 MR. PINCUS: Respectfully, Justice Scalia, I
15 don't think that's what the State is doing here. I
16 think what the State is doing here is saying -- is not
17 saying, under the same principles we apply elsewhere,
18 this is unconscionable. They're just saying, it's quite
19 clear that it's --

20 JUSTICE GINSBURG: There's nothing --

21 MR. PINCUS: I'm sorry.

22 JUSTICE GINSBURG: There is nothing that
23 indicates that California's laws are applying a
24 different concept of unconscionability. You haven't
25 come up and said, oh, look what they did here. And in

1 another case they said it has to shock the conscience.

2 Maybe across the board, California is
3 saying: We think that unconscionability should have a
4 broader meaning. Is it unfair to the weaker party
5 to the bargain? Is there really no genuine agreement
6 here? And if that is so, that will fit our definition
7 of unconscionability.

8 You don't have anything that says -- the
9 California court hasn't said: We are applying a special
10 definition of unconscionability to arbitration
11 agreements.

12 MR. PINCUS: Well, they haven't said that,
13 Your Honor, but their opinion makes clear that they do.
14 For example, the statute in California that defines
15 unconscionability specifically says unconscionability
16 shall be assessed at the time of contracting.

17 Here, the decision holding the Discover Bank
18 rule is specifically based on a determination of
19 unconscionability, not ex ante, when there would be a
20 variety of situations to consider, but it is explicitly
21 based at the time the dispute arose.

22 JUSTICE KAGAN: I was under the impression
23 --

24 MR. PINCUS: So it's clear that they are
25 applying a different --

1 JUSTICE KAGAN: I was under the impression,
2 Mr. Pincus, that Discover Bank specifically cites a case
3 which arose not in the arbitration context, but instead
4 in the general litigation context, which is this America
5 Online case, and thereby made clear that its rule,
6 however different it may seem to you from normal
7 contract provisions, its rule applied both in the
8 arbitration sphere and in the litigation sphere.

9 MR. PINCUS: Justice Kagan, I think that
10 question goes to -- to a separate question. I think
11 Respondent has two arguments. One is, because this rule
12 applies to all dispute resolution provisions, it is a
13 general -- it applies to any contract that qualifies
14 under section 2. We think that that clearly can't be
15 the case, for several reasons.

16 First of all, section 2 says "any contract,"
17 and that, the Court has said, means principles that
18 apply to contracts generally, not principles that are
19 limited to dispute resolution contracts.

20 JUSTICE KAGAN: Well, this --

21 JUSTICE GINSBURG: Well, any contract that
22 would have an arbitration clause.

23 MR. PINCUS: True, Your Honor. But if the
24 provision meant that, then as long as -- as long as a
25 State law banning arbitration said, we are banning

1 arbitration in any contract, then the State could say it
2 applied to any contract. Or a provision that said
3 juries are required to resolve every dispute, whether in
4 arbitration or not.

5 JUSTICE GINSBURG: Can we criticize one
6 feature of this? You are not claiming that, vis à vis
7 litigation, arbitration is being disfavored, which was
8 the original concern about arbitration agreements and
9 what prompted the Federal Arbitration Act. The courts
10 didn't like to have their business taken away, and so
11 they were disfavoring arbitration contracts.

12 That is no part of the picture here, as far
13 as I can see, because the rule is the same whether it's
14 litigation or arbitration.

15 MR. PINCUS: Well, we -- we do make an
16 argument, Your Honor, that the impact of this rule is
17 much more significant on arbitration than it is on
18 litigation, because it basically -- with respect to
19 litigation, it is reaffirming the default rule, but with
20 respect to arbitration, it has a quite significant
21 different effect, which is really to transform
22 arbitration in the ways that the Court described in
23 *Stolt-Nielsen*.

24 And so we do argue that it does have a
25 disproportionate burden, but our principal argument here

1 is that the "any contract" requirement means that the
2 State law rule being applied has to be a rule that
3 applies generally to contractual provisions, as the
4 Court has said.

5 JUSTICE SCALIA: Yes, but some -- some
6 elements of unconscionability can only arise in a
7 litigation or an arbitration context, such as requiring
8 the complaining party to litigate or arbitrate at a
9 distant location. How could that possibly apply in --
10 to any other contracts?

11 MR. PINCUS: Well, that -- that now turns to
12 the second argument that Respondents make, which is,
13 even if the mere fact that it applies to litigation and
14 arbitration satisfied section 2, the rule satisfied --
15 satisfies section 2 because it is merely a specific
16 application of California's general unconscionability
17 rule.

18 JUSTICE SCALIA: Yes.

19 MR. PINCUS: And -- and our response to that
20 is: It is quite clear that in three critical respects,
21 it is the principles that were applied -- not the
22 result, but the principles that were applied in order to
23 find unconscionability here -- are different than the
24 principles applied in every other context. By example
25 --

1 JUSTICE SCALIA: Three? What are the three?

2 MR. PINCUS: The three are, first of all,
3 looking to the effect on people other than the parties
4 to the dispute. In every other case --

5 JUSTICE SCALIA: I was going to ask you
6 about that. Right.

7 MR. PINCUS: -- the question is: Is it fair
8 to the person before the court to apply the contract to
9 them? Here, the district court found it was quite fair
10 to apply to that person; the problem was third parties.

11 The second issue: When is the
12 unconscionability decision made? As I said, the statute
13 says ex ante. Here, the decisions explicitly say: We
14 are going to look at it at the time the dispute arises.

15 Third question: The general standard is
16 shock the -- so unfair as to shock the conscience. Here
17 the standard is: Is there a deterrent effect equivalent
18 to a judicial class action?

19 Three critical differences, three
20 differences that are not differences in result, but are
21 differences in the legal principles that are being
22 applied to determine unconscionability.

23 JUSTICE BREYER: I thought that Discover
24 Bank is the California case that sets it out; is that
25 correct?

1 MR. PINCUS: Yes, Your Honor.

2 JUSTICE BREYER: So that's California law.

3 And what they say in Discover Bank is -- they are
4 talking about class waivers in both arbitration
5 contracts and not arbitration contracts. And they say
6 they are void when it's a consumer contract of adhesion,
7 when they predictably involve small amounts of damages,
8 when it is claimed that the party with the superior
9 bargaining power has carried out a scheme deliberately
10 to cheat large numbers of consumers out of individually
11 small sums of money, and the waiver becomes in practice
12 the exemption of the party from responsibility for its
13 own fraud.

14 Now, seems to -- those seem to be the
15 principles that apply. Those principles apply to
16 litigation. They apply to arbitration. What's the
17 problem? They don't say anything there about the things
18 you mention. They just mention four things, which I
19 just read.

20 MR. PINCUS: Well, and the only -- as I
21 said, there are two questions in this case and I think
22 it's helpful to keep them separate. One is: Is it
23 permissible, simply because the rule applies to both
24 litigation and arbitration, is that sufficient to
25 satisfy --

1 JUSTICE BREYER: No. I would guess it's
2 like Switzerland having a law saying, we only buy milk
3 from cows who are in pastures higher than 9,000 feet.
4 That discriminates against milk from the rest of the
5 continent. But to say we want cows that have passed the
6 tuberculin test doesn't. So I guess we have to look at
7 the particular case.

8 And here, my impression is -- correct me if
9 I am wrong -- the class arbitration exists. It's not
10 a -- it's not like having a jury trial. You could have
11 it in arbitration. You can have it in litigation. So
12 where is the 9,000-foot cow, or whatever it is? Where
13 is the discrimination?

14 MR. PINCUS: Well, I think this is exactly
15 the 9,000-foot meadow, Your Honor, because I think the
16 problem here is there is -- it is not possible, based on
17 the language of section 2 or any other basis that we can
18 think of, to say a statute that requires the full use of
19 discovery procedures in court and in arbitration or
20 factual determinations by a panel of six individuals
21 selected at random --

22 JUSTICE GINSBURG: Mr. Pincus, are they
23 necessarily saying that? As I read it, the plaintiff
24 brought a case to court, not to arbitration, and then
25 there was a motion to stay the State court litigation.

1 Why isn't it a proper reading of this case
2 to say: You want -- if you are in the arbitration
3 forum, it's bilateral, but you can't dupe these
4 plaintiffs out of a class action? So if you don't have
5 a class action in arbitration, you can have it in court.
6 That is, the class action is preserved, not necessarily
7 in the arbitration forum, but in the court.

8 MR. PINCUS: Well, I think the problem,
9 Justice Ginsberg, is both prongs of that requirement are
10 independently problematic. I think, for the reasons
11 that I was just saying and I think for the reasons that
12 the Court explained in Stolt-Nielsen, requiring class
13 arbitration is just the same as requiring discovery or a
14 jury trial or all of the other judicial processes in
15 arbitration. And if the alternative prong of that is to
16 say, well, if you don't do that you must exclude these
17 claims from arbitration --

18 JUSTICE SOTOMAYOR: But they're not
19 requiring --

20 MR. PINCUS: -- is independently --

21 JUSTICE SOTOMAYOR: But they're not
22 requiring arbitration --

23 CHIEF JUSTICE ROBERTS: Go ahead, Justice
24 Sotomayor.

25 JUSTICE SOTOMAYOR: They are not saying you

1 have to arbitration -- class actions in all arbitration
2 proceedings. They are identifying a class of cases in
3 which they pursue the State, who's their own sovereign,
4 and the savings clause in the FAA permits them in law or
5 equity to set forth rules to say in this subset of cases
6 there is a substantive right being affected. That is
7 different than rules that are looking at procedures and
8 setting uniform procedures in both.

9 How do we draw the line between a law that
10 says discovery has to happen in arbitration, and one
11 that says a -- in a contract of adhesion, if the
12 superior party retains the right to do discovery but
13 tells the inferior party, you can't? And a State says,
14 that's unconscionable.

15 MR. PINCUS: Your Honor, I think that's the
16 precise difference between the two issues that are --
17 that are in this case. For the reason we have been
18 discussing, we think there is a very strong argument
19 that a rule cannot qualify to be saved under section 2
20 simply because it applies even-handedly to arbitration
21 and litigation because of the fact that that would sweep
22 in all of these other rules that we are talking about.

23 And an additional reason, to respond to
24 Justice Breyer's question, is that at the time that the
25 FAA was enacted the ouster doctrine did apply to

1 arbitration litigation. It was a broad doctrine in
2 which courts said: We are going to invalidate any
3 contractual provision that deprives us of jurisdiction
4 whether it directs the claim to arbitration or it
5 directs the claim to some other court.

6 JUSTICE KAGAN: But Mr. Pincus --

7 MR. PINCUS: And so the very same argument
8 being made here could have been made then.

9 JUSTICE KAGAN: But, Mr. Pincus, I'm not
10 understanding what test you are asking us to formulate.
11 Justice Scalia started this by saying, how about a
12 provision prohibiting certain kinds of attorney's fees?
13 How about a provision prohibiting certain kinds of -- a
14 law prohibiting certain kinds of discovery provisions?
15 And you said that would be fine, for the State courts to
16 hold those things unconscionable, but it's not fine for
17 the State court to hold a class arbitration prohibition
18 unconscionable.

19 So what separates the two? How do we know
20 when something is on one side of the line and something
21 is on the other? Both procedures, but you say some are
22 fine, to say that those procedures are unconscionable,
23 but other procedures if you held them unconscionable
24 that would not be sufficient.

25 MR. PINCUS: What separates the two is, is

1 the State in the particular case in which the
2 determination is made applying principles that apply to
3 -- across -- that apply to its unconscionability
4 doctrine across the board.

5 JUSTICE KAGAN: The State says yes.

6 MR. PINCUS: Well, but I think --

7 JUSTICE KAGAN: The State says it absolutely
8 is. Now, who are we to say that the State is wrong
9 about that.

10 MR. PINCUS: Well, let me answer that in two
11 ways, Justice Kagan. First of all, let me explain why
12 the hypotheticals that you posit and that Justice Scalia
13 posited and that Justice Sotomayor posited have been
14 addressed under the traditional unconscionability
15 doctrine that we described. In all of those cases, what
16 courts have said is this provision -- we are measuring
17 whether it is unconscionable at the time of contracting;
18 we are looking at the effect on the party before the
19 court; can this person get to arbitration, is the fee
20 too high, is it too far away. What about -- we are
21 looking at the effect on this particular person and we
22 are deciding whether it shocks the conscience or
23 whatever their across-the-board State standard is.

24 And in all of those cases, that's what those
25 courts do, and that's why those provisions have been

1 invalidated, because they are invalidated under an even-
2 handed application of the unconscionability provisions
3 that courts apply when they assess --

4 JUSTICE ALITO: I thought that -- I don't
5 want to interrupt your complete answer.

6 MR. PINCUS: Sure.

7 JUSTICE ALITO: But I thought that was the
8 gist of your argument, the heart of your argument, that
9 traditional unconscionability in California and
10 elsewhere focuses on unfairness to the party who is
11 before the tribunal. So here it would be unfairness to
12 the Concepcions, rather than unfairness to other members
13 of the class who are not before the court.

14 MR. PINCUS: That's exactly right,
15 Justice Alito.

16 JUSTICE KAGAN: But, Mr. Pincus, the State
17 says, well, our unconscionability doctrine may not have
18 done that in the past, but now in the year 2010 it
19 actually applies to more things than it did in the past,
20 and we do take into account third parties and that's our
21 new unconscionability doctrine. Now, it may be a good
22 unconscionability doctrine or it may be a bad
23 unconscionability doctrine, but it's the State's
24 unconscionability doctrine.

25 MR. PINCUS: But it is not the State's

1 general unconscionability doctrine, Justice Kagan. It
2 is a doctrine that applies only in the context of class
3 waivers and that's the problem. If the State were to
4 adopt a general statute that said, for unconscionability
5 purposes henceforward we will look in assessing the
6 unconscionability of every provision at third parties,
7 at the impact on third parties and whether it's fair to
8 them, perhaps they could do that.

9 I think there might be some reasons why a
10 State wouldn't do that, because that would upset a lot
11 of things in the judicial system that we think of as
12 routine, such as confidential settlements and the fact
13 that arbitration doesn't require publication or estoppel
14 and all kinds of rules could be invalidated on that
15 ground. But at least it would be an even-handed rule
16 that the State applied across the board, and it would
17 also apply to things like the level of rent in rent
18 contracts and statutes of limitations and all sorts of
19 things.

20 JUSTICE BREYER: Why, why, why?

21 MR. PINCUS: But here, that's not -- I'm
22 sorry.

23 JUSTICE BREYER: Why? That's I think what
24 Justice Kagan is getting at. If a State wants to have a
25 doctrine which says, you have to have a seal of a

1 certain kind on certain kinds of contracts, they've
2 never done it before, but now they do it, and on that
3 kind you have to have a seal both on the arbitration
4 contract and on the other. And here what they've done
5 is they have listed the four characteristics from
6 Discover Bank, and they've said all contracts to do with
7 litigation have to satisfy those four.

8 At which point I think Justice Kagan said,
9 so what if they've never done this before? They sure
10 have done it now. And what's the basis for saying that
11 the Arbitration Act or any other part of Federal law
12 forbids California from doing that?

13 MR. PINCUS: Two answers to that,
14 Justice Breyer. First of all, they haven't done it
15 generally with respect to contracts. They have made up
16 a special rule that is targeted on a special kind of
17 contract and that carries -- to the extent one is
18 worried about discrimination -- nonfacial discrimination
19 designing the category of contracts relating to
20 litigation or dispute resolution is precisely the kind
21 of category that most presents the risk of
22 discrimination that isn't facial.

23 And again, whatever any contract means, we
24 think it has to mean that the category of dispute
25 resolution contracts can't be one that satisfies any

1 contract, because at the time the law was enacted the
2 ouster doctrine did just that and it was the doctrine
3 that was being targeted.

4 JUSTICE KENNEDY: But it seems to me that
5 all State -- most State statutes pertaining to contracts
6 pertain to a class that is not entirely universal.
7 Suppose the State had a statute referring to banks,
8 contracts with banks. That doesn't apply to all
9 contracts. It doesn't apply to railroads. But we know
10 that it applies to a class that generally includes both
11 arbitration and non-arbitration. And that's this case,
12 because there can be class action rule with respect to
13 litigation and class action rules with respect to
14 arbitration. So you have to have some rule that
15 recognizes that you don't have to have the entire
16 universe of contracts.

17 MR. PINCUS: Well, Your Honor --

18 JUSTICE KENNEDY: And I'm not quite sure
19 what your test is. You have a few of them in your
20 brief.

21 MR. PINCUS: Well, I think the "any
22 contract" language of the statute shows that Congress
23 was not enacting -- was not providing that everything
24 other than facial discrimination qualifies for the
25 savings clause, because it could have said any

1 nondiscriminatory rule. It said a rule that applies to
2 any contract. And the reason for that we think is
3 because of the ouster doctrine it was confronted with,
4 which did apply to both arbitration and litigation
5 contracts, and because of the risk generally that a
6 contract rule could be devised that maybe didn't
7 facially discriminate against arbitration, but had the
8 effect of targeting arbitration disproportionately and
9 that's what is going on.

10 JUSTICE SCALIA: So how do you have special
11 rules applicable to banks?

12 MR. PINCUS: Well, most -- most --

13 JUSTICE SCALIA: Contracts by banks, can't a
14 State say, you know, certain bank contracts have to have
15 this or that?

16 MR. PINCUS: In most of the examples that we
17 have looked at of situations like that, the contract
18 principles that are being applied are general
19 principles, and perhaps they are being applied -- they
20 are being specified for four particular categories of
21 contracts, like the UCC, but they are tied to general
22 principles.

23 JUSTICE SCALIA: They claim that here. They
24 claim it's the general principle of unconscionability.

25 MR. PINCUS: But -- but I think, as I have

1 discussed, the problem here it has the label
2 "unconscionability" on it, but the test that is applied
3 has nothing to do with the test that is applied in every
4 other context. So it's an easy case to decide. Going
5 back to my statutory example, this is an
6 unconscionability -- this is a test that may have the
7 label on it, but everything that the court looks at to
8 find unconscionability or to find this impermissible are
9 things that are not looked at in the other context. And
10 in the other context, indeed as the district court said,
11 this contract is more than fair under our general
12 unconscionability standard, because it -- the people
13 before the court are better off than they would be in a
14 class action.

15 JUSTICE SOTOMAYOR: So then we have -- we
16 have to serve as reviewers of State law?

17 MR. PINCUS: I --

18 JUSTICE SOTOMAYOR: We have to look at what
19 the States are doing in -- to interpret their own laws?

20 MR. PINCUS: I think what the Court has to
21 do, as it does in the independent and adequate State
22 ground context and other contexts, is to determine
23 whether the State is -- is applying a rule that is --
24 that discriminates, because the core protection of
25 section 2 is discrimination. And so, if the -- if the

1 State has devised a rule that clearly discriminates, but
2 has simply put the label on -- of unconscionability,
3 surely the FAA permits the Court to look at that.
4 Otherwise it's -- the protection will be reduced to
5 nothing.

6 JUSTICE GINSBURG: So if we look at the
7 California law and we find other instances of
8 unconscionability that are applying a standard less
9 stringent than "shock the conscience," then we would say
10 okay?

11 MR. PINCUS: No, Your Honor. I think that
12 the critical question here -- are there other cases that
13 look to the effect on the party before the court? We
14 found none and -- and Respondents have found none. Are
15 there other case that assess the -- whether it's
16 unconscionability at the time of the dispute rather than
17 at the time of contracting? There are none. The
18 statute specifically requires it to be done at the time
19 of contracting. And are there cases that say, we are
20 going to look at whether something is -- not whether
21 something is so unfair as to shock the conscience, but
22 at whether it is the equivalent to some statutory
23 procedure? There are none. And that's the problem.

24 JUSTICE SOTOMAYOR: Then, Mr. Pincus --

25 CHIEF JUSTICE ROBERTS: Thank you.

1 MR. PINCUS: I'd like to reserve the balance
2 of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Pincus.

5 MR. PINCUS: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Gupta.

7 ORAL ARGUMENT OF DEEPAK GUPTA

8 ON BEHALF OF THE RESPONDENTS

9 MR. GUPTA: Mr. Chief Justice, and may it
10 please the Court:

11 As I think several of the questions this
12 morning have brought out, the question here is not what
13 this Court would decide if it were sitting as the
14 Supreme Court of California and applying the State's
15 common law in the first instance. Rather, the question
16 is whether the State law at issue falls within a
17 statutory savings clause that expressly preserves
18 contract defenses available at law or in equity.

19 The State law at issue here is not
20 preemptive, for three reasons. First, it is consistent
21 with the equal footing principle or nondiscrimination
22 principle that this Court has consistently recognized is
23 embodied in section 2.

24 Second, it's consistent with two key
25 purposes that the savings clause fulfills under the FAA:

1 ensuring that arbitration is a matter of consent and not
2 coercion; and that it represents merely a choice of
3 forum, but not an exemption from the law.

4 And third, the State law at issue is a
5 correct and legitimate application of the State's common
6 law to which this Court should defer.

7 CHIEF JUSTICE ROBERTS: If I could just go
8 to your -- your second reason seemed to be focused
9 particularly on arbitration as opposed to a principle
10 that applies to every other contract.

11 MR. GUPTA: Well, let me be clear about what
12 I mean by the second reason. I think that the savings
13 clause in the FAA serves two critical purposes, and that
14 is that the -- the contract law doctrines ensure
15 consent. You don't have arbitration unless you have a
16 consensual agreement between both parties, and you look
17 to State contract law to determine whether there is
18 consent.

19 And also, I think as this Court has
20 repeatedly said about arbitration under the FAA, it
21 represents a choice of forum, but it doesn't withdraw
22 the parties from the substantive liability rules of the
23 State.

24 CHIEF JUSTICE ROBERTS: No, but the
25 substantive State liability rule on the issue you are

1 addressing is that you consider the issue of consent ex
2 ante, and with respect to arbitration you are
3 considering it at the time the dispute arose. Isn't
4 that a discrimination against arbitration agreements?

5 MR. GUPTA: Well, first of all, I think it
6 is a -- it's a question of State law whether the
7 determination is ex ante or ex post. But we actually --

8 CHIEF JUSTICE ROBERTS: Well, sure. That's
9 true in all of these cases.

10 MR. GUPTA: Right.

11 CHIEF JUSTICE ROBERTS: It's a question of
12 what the State law provides; then you consider whether
13 it's consistent with the Federal Arbitration Act.

14 MR. GUPTA: Right. And the Discover Bank
15 application of State unconscionability law we believe is
16 an ex ante analysis. It looks at whether the contract
17 is fair or exculpatory at the time that the contract is
18 made; and indeed there is -- the two arguments that Mr.
19 Pincus made about California unconscionability law are
20 somewhat at war with themselves. He said that the --
21 the doctrine looks to third parties and that that's
22 illegitimate; and he said that the doctrine is ex post
23 and that's illegitimate. But in fact, from the
24 perspective of a consumer that's entering into this
25 contract, from the perspective of any AT&T consumer,

1 they don't know whether they are going to be among the
2 very few consumers who detect fraud, recognize a legal
3 claim, or hire a lawyer to do so, and come forward and
4 seek compensation. And so the Concepcions are situated
5 just like any other AT&T customer, and that is the point
6 at which fairness is assessed.

7 So from the perspective of California
8 unconscionability doctrine, the Concepcions and -- and
9 all the other AT&T customers are not differently
10 situated. It's not a question of whether the
11 Concepcions, once they have chosen to make a claim,
12 whether the contract is then fair to them; it's whether
13 it's fair to any AT&T customer.

14 CHIEF JUSTICE ROBERTS: Well, what other
15 area of contract law does the court consider
16 unconscionability not with respect to the parties before
17 the court, but with respect to third parties?

18 MR. GUPTA: Well, I think, first of all, the
19 California State law is applying an exculpatory clause
20 prohibition that has been on the books since 1872 in
21 California. And if you look at the cases, many of which
22 we've cited in our brief today --

23 CHIEF JUSTICE ROBERTS: But isn't that --
24 doesn't that look to the parties before the court rather
25 than third parties?

1 MR. GUPTA: No. In fact, the -- the
2 California courts have developed a test that says, we'll
3 -- we'll enforce exculpatory clauses, or what would
4 otherwise be exculpatory clauses, if they don't have
5 significant public effects.

6 So the test under that statute is actually
7 to look to the public effects, the effects of similarly
8 situated people that are parties to the contract. And
9 for example, there was a case in the early 20th century
10 under that statute where the question was whether a
11 banking contract was unfair; and what the court said is
12 that -- that parties to the contract are not the only
13 people that matter here; what matters is the interests
14 of the banking public.

15 CHIEF JUSTICE ROBERTS: Well, it's a general
16 rule of contract law that contracts contrary to public
17 policy could be unenforceable. It seems to me that's
18 quite different than saying we're worried about third
19 parties that are in the same position as these
20 particular parties. In other words, it's not simply
21 adverse public consequences, but it's a different mode
22 of analysis than I'm familiar with under basic contract
23 law.

24 MR. GUPTA: Well, again, I want to try to
25 explain why I don't think that the Concepcions are --

1 are any different from the -- what Mr. Pincus is
2 describing as third parties. At the time that they
3 entered into the contract, the question is whether the
4 contract ex ante is unconscionable as to them. And
5 they're just like anyone else. They don't know whether
6 they will detect this fraud and be able to come forward.
7 And so the question is -- is that -- is that
8 unconscionable as to them? It's not looking only to the
9 effects on third parties.

10 But there is also an exculpatory clause
11 prohibition that has always taken into account the
12 effects on the public. And both of those are at work in
13 Discover Bank.

14 JUSTICE ALITO: Well, maybe you can explain
15 it this way. Compare what the Concepcions have
16 available to them under the contract with what going
17 through the arbitration, all the procedures leading up
18 to arbitration and arbitration, against what they would
19 get at best if this were allowed to proceed on a class
20 basis.

21 MR. GUPTA: Right. The California --

22 JUSTICE ALITO: Why is -- why are they
23 better off with a -- with a class adjudication?

24 MR. GUPTA: Because from an ex ante
25 perspective, again when they enter into the contract,

1 they have -- there -- it's not reasonable to be -- to
2 expect that they will be among the very few people who
3 will recognize that there's fraud, recognize a legal
4 claim, and come forward. And so from that perspective,
5 it -- it is not reasonable them -- for them to give up
6 the benefits that they would get from a class action.

7 A class action incentivizes lawyers and
8 others to detect for this fraud. It makes it -- it
9 makes it economically justifiable to come forward with
10 these kinds of claims.

11 JUSTICE ALITO: And -- and isn't that what
12 distinguishes this from the ordinary unconscionability
13 analysis?

14 If the district court correctly understood
15 the way the AT&T Mobility scheme works and --and the
16 district court said that under the revised arbitration
17 provision nearly all consumers who purchase the
18 informal -- who pursue, I'm sorry, the informal claims
19 process, are very likely to be compensated promptly and
20 in full, etcetera, etcetera. If the district court
21 understood that correctly, the scheme here was -- is
22 found to be unconscionable because it doesn't allow the
23 enlistment of basically private attorneys general to
24 enforce -- to enforce the law. And isn't that quite
25 different from ordinary unconscionability analysis?

1 MR. GUPTA: I don't think it is. I mean,
2 obviously it's impossible to come up with a precise
3 analogy that is going to be on all fours. But in our
4 case we cite -- in our brief we cite cases involving
5 unreasonably shortened statutes of limitations, where
6 the California courts for over 100 years have found that
7 those can be deemed unconscionable. And the principle
8 is the same. Those kinds of clauses can interfere with
9 the parties' ability to have notice that they have a
10 claim and take action on that claim. That -- that kind
11 of procedural limitation has always been deemed
12 unconscionable.

13 JUSTICE KENNEDY: Suppose that this doesn't
14 have what's called a blowout clause. Suppose that that
15 kind of clause was not in there. And the consumer opts
16 out of the arbitration. Arbitration doesn't -- doesn't
17 go well. Anyway, can the consumer then insist on the
18 arbitration that the consumer bargained for, the
19 individual arbitration that the consumer bargained for?

20 MR. GUPTA: Well, under this clause the
21 consumer will always have the ability to proceed on a
22 bilateral -- on a bilateral basis.

23 JUSTICE KENNEDY: So then the bank has to
24 have -- liability exposure for two different
25 proceedings?

1 MR. GUPTA: I mean that's true anyway,
2 right? The the mine run of consumer waivers --

3 JUSTICE KENNEDY: But you are saying then
4 California can say it's unconscionable to allow the
5 parties to agree that there will be just the single
6 arbitration proceedings? I don't see how the third
7 parties are necessarily protected. If you say that the
8 consumer still has the election, that certainly isn't
9 what they bargained for. Maybe I'm -- maybe that's just
10 a quarrel with the content of the unconscionability
11 standard.

12 MR. GUPTA: Right.

13 JUSTICE KENNEDY: Rather than FAA, but I
14 think it does bear on at least section 4 of the FAA.

15 MR. GUPTA: Well, and maybe I'm
16 misunderstanding your question, but I think, you know,
17 that's true of any of the procedural limitations that
18 the Petitioners concede would be subject to the
19 unconscionability doctrine. A person would still be
20 free to proceed under a basis that would otherwise be
21 unconscionable.

22 For example, if you had an arbitration
23 clause that limited important remedies -- it banned
24 punitive damages, injunctive relief, insisted on a
25 distant forum, required excessive fees -- those would be

1 unconscionable as a matter of state contract law, or
2 could be anyway, but the consumer would still have the
3 ability to proceed on that basis.

4 JUSTICE SOTOMAYOR: Counsel, I've asked your
5 adversary this question and I'm not sure yet what his
6 answer is, so I'm asking you it. How would you propose
7 to distinguish between facially neutral contract law
8 defenses that implicitly discriminate against
9 arbitration and those that do not? What's the test you
10 would use to tell the difference between the two?
11 Because obviously there are subterfuges that some legal
12 systems could use to address themselves just to
13 arbitration. So how do we tell the difference?

14 MR. GUPTA: Right, and we don't deny that's
15 true. But it's not that different from the way this
16 Court approaches State law in general. You start from a
17 position of deference. The Court says this is facially
18 nondiscriminatory law, it's generally applicable, but
19 there's a limit on that. If the State law is -- if the
20 State is engaging in obvious subterfuge to deny
21 federally protected rights, this Court has always said
22 --

23 JUSTICE SOTOMAYOR: How do we test that?

24 MR. GUPTA: -- that there is a limit --

25 JUSTICE SOTOMAYOR: I mean, other than -- I

1 don't want to look through legislative history and
2 determine whether some committee person said something
3 that sounds like subterfuge. How do I look at the law
4 and its effects and determine that subterfuge or that
5 discrimination?

6 MR. GUPTA: I think in the first instance it
7 would be an objective determination. You would see
8 whether the State court is telling the truth. Is this
9 law really being applied in the same way in the
10 arbitration context and outside of the arbitration
11 context. And here we know because, as Justice Kagan
12 said, the first California appellate case on point is a
13 case outside of the arbitration context, the America
14 Online case. The Discover Bank case relied on that case
15 when it struck down a class-action ban in the
16 arbitration context.

17 CHIEF JUSTICE ROBERTS: Where do you get --

18 JUSTICE BREYER: Your brother says that the
19 --

20 CHIEF JUSTICE ROBERTS: Where do you get
21 "obvious subterfuge" in the Federal Arbitration Act?

22 MR. GUPTA: That's not in the Federal
23 Arbitration Act, Your Honor, but in Mullaney v. Wilbur
24 case and other cases where the Court is describing the
25 limits on deference to State law, those are the kinds of

1 standards the Court has used. If it's not a credible
2 rule of State law, if the State is not really doing what
3 its saying, and the result is the deprivation of
4 Federally protected rights, this Court has always said
5 that there's a limit on deference to State law. Now --

6 CHIEF JUSTICE ROBERTS: But that's in the
7 independent and adequate State ground context, which
8 strikes me as quite different. We have a statute here
9 that says the arbitration agreements have to be treated
10 like any other contract, any contract. I don't see how
11 that's the same as obvious subterfuge.

12 MR. GUPTA: Well, I'm addressing -- Justice
13 Sotomayor's question, if I understand it, is when you
14 have a facially nondiscriminatory rule of contract law,
15 where when you look at the face of the opinion nothing
16 suggests it's nondiscriminatory. And the question is
17 how do you tell whether the State court is not telling
18 the truth? And I think in that circumstance you'd have
19 to -- I can't think of any other way you would do the
20 analysis.

21 JUSTICE BREYER: You have to -- you would do
22 it differently, because they might be telling the truth.
23 The example that your brother lawyer gave is this: That
24 we have a State and the State says, if you have a
25 contract, in the dispute resolution provision, whether

1 you have arbitration or not, that provision is void if
2 it says you won't have a judge, and it's void if it says
3 you won't have a jury, and it's void if it says that you
4 will not go to the United States courthouse for deciding
5 all Federal claims.

6 That applies whether there is an arbitration
7 clause or not an arbitration clause. Now, that would
8 seem to me no subterfuge. It is absolutely clear. They
9 are not lying. It just happens to prevent arbitration.
10 And he says that's absolutely true of this one, that
11 once you get into class actions you will discover you
12 have something that really looks like a court case. You
13 have to have discovery, you have dozens of lawyers
14 involved, you have depositions, you are running off
15 every 5 minutes to the judge or to somebody to say is
16 this deposition good, bad or indifferent. You have
17 methods for enforcing the deposition. You have all
18 kinds of things.

19 He can make a much bigger list than me. So
20 he says: This case is like the case of California
21 saying everybody can decide it any way they want as long
22 as they do it before a Federal judge. Okay? Now what's
23 your answer to that?

24 MR. GUPTA: Obviously we concede that those
25 kinds of rules are preempted.

1 JUSTICE BREYER: But what's your answer to
2 his specific effort to assimilate the issue in this
3 case, which is the class action, to the made-up issue,
4 which you concede is a discrimination?

5 MR. GUPTA: Right. I think there are two
6 limiting principles in addition to the discrimination
7 inquiry. Discrimination doesn't get you there. You can
8 then ask, is the rule tantamount to a rule of
9 non-enforceability of arbitration agreements. So for
10 example, if a State law says you cannot waive the right
11 to a public jury trial. Now, obviously that renders all
12 arbitration agreements unenforceable. It contradicts
13 the general rule of enforceability. To read the savings
14 clause to allow a rule like that would be to read --

15 JUSTICE BREYER: What about -- what about a
16 rule that says what you have to have in any contract is
17 a rule that all the rules of the Federal Civil Procedure
18 apply to discovery, not necessarily in a courtroom, but
19 you have to follow exactly those procedures?

20 MR. GUPTA: I think that would bring into
21 play the second limiting principle, because parties
22 could contract, obviously, to agree to certain
23 procedural rules like that. But I think that that would
24 bring into play a principle of obstacle preemption.

25 JUSTICE BREYER: Okay. Now, why isn't this

1 obstacle preemption?

2 MR. GUPTA: Right. I think one of the
3 purposes -- we agree with Petitioners about this. One
4 of the purposes of the Federal Arbitration Act is to
5 allow parties to contract their procedures, to tailor
6 their procedures; and in general the courts ought not to
7 be interfering with those kinds of consensual decisions.

8 But there are two other important purposes
9 at play, and no statute pursues its purposes at all
10 costs. One of those purposes is to ensure that there's
11 not coercion, that you have a consensual agreement; and
12 another, just as important, is to ensure that
13 arbitration merely represents a change of forum, but
14 isn't an exemption from the law. So that's -- I think
15 that's at work in the examples that Petitioner concedes.

16 JUSTICE GINSBURG: Mr. Gupta, is -- I'd like
17 you to focus on Stolt-Nielsen. In Stolt-Nielsen this
18 Court said that, absent express consent, no class
19 arbitration. If the seller or employer, whoever it is,
20 doesn't want that class arbitration, doesn't have to
21 have it.

22 And here that's surely the case; the ATT has
23 not consented to class arbitration. Then California law
24 says: Well, that's okay; then you will be subject to a
25 class-action suit in court. But the very purpose of the

1 arbitration agreement was that you would be in
2 arbitration and not in court. So why isn't
3 Stolt-Nielsen dispositive of this case?

4 MR. GUPTA: I think Stolt-Nielsen is
5 properly read as -- the questions there was a question
6 of contract interpretation. The question here is
7 whether the agreement is valid in the first place,
8 whether you have a contract. What Stolt-Nielsen tells
9 you is that you cannot impose class arbitration on an
10 unwilling defendant.

11 JUSTICE GINSBURG: But here you have an
12 unwilling defendant who doesn't want class arbitration.

13 MR. GUPTA: Well, the defendant here has
14 specified in its arbitration agreement that if the
15 class-action ban is invalidated, it would prefer to face
16 any class-wide proceedings in court, and that choice is
17 up to the defendant. If the defendant chose to face
18 class-wide proceedings in arbitration, they could do so
19 under -- under the California rule, or they could elect
20 to do so in court, and they could do so under whatever
21 procedures they specified in the agreement or that were
22 specified in a subsequent agreement between the parties.

23 California law doesn't impose any particular
24 procedures on the party. It just insists that in
25 circumstances where the ban would function as an

1 exculpatory clause, that there is some avenue for
2 class-wide proceedings, where claims wouldn't feasibly
3 be litigated individually. I don't --

4 JUSTICE KAGAN: Mr. Gupta, AT&T says that
5 nobody would ever choose class arbitration; it's the
6 worst of both worlds. You get all the procedures, you
7 get broad liability, but at the same time you have no
8 judicial review, so that this will effectively kill off
9 arbitration in the consumer context.

10 MR. GUPTA: I think one answer to that is
11 that some parties have chosen class arbitration, and we
12 cite some examples in the brief. There have also been
13 hundreds of class arbitrations conducted by the American
14 Arbitration Association, the leading arbitration
15 association. Class arbitration has existed for a
16 quarter century, so it's not something that is foreign
17 to arbitration.

18 But also, I just refer back to what I said
19 to Justice Ginsburg, which is that this is a matter of
20 consent. Nobody is forcing defendants to face class
21 arbitration, and nobody is forcing them to face it on
22 terms that they haven't consented to. So if there are
23 concerns about -- about the ability of class arbitration
24 to effectively manage the process, they can be tailored
25 by the parties. And in fact, there are even hybrid

1 procedures where --

2 JUSTICE SCALIA: Of course. The question is
3 not whether they are being forced to accept class
4 arbitration; it's whether they are being coerced into
5 abandoning regular arbitration. That's really the
6 issue.

7 MR. GUPTA: I mean, one could say the same
8 thing about many of the procedural limitations that both
9 parties agree are subject to the unconscionability
10 doctrine. If a defendant said: Well, we don't want to
11 face arbitration unless we can ban punitive damages or
12 other important remedies, unless we can insist on
13 certain kinds of discovery limitations that the State
14 courts deem unconscionable because they don't allow the
15 parties to vindicate their rights individually, the same
16 argument would hold true. The defendant would be able
17 to say: Well, that's -- you know, if we can't have
18 arbitration on our terms, we won't have arbitration at
19 all.

20 That is not what the Federal Arbitration Act
21 says, though. The Federal Arbitration Act puts
22 arbitration agreements on an equal footing with other
23 contracts. It forbids States from discriminating
24 against arbitration, but it doesn't require them to
25 remove all impediments that -- that a party may wish

1 removed to have arbitration on their terms, even where
2 it would effectively exculpate --

3 JUSTICE SCALIA: That's true, as long as
4 those impediments are removed on an -- on an equal
5 footing with all contracts.

6 MR. GUPTA: That's right. That's right,
7 Your Honor, and I think -- you know, we concede that if
8 the California courts were discriminating against
9 arbitration agreements, if they were applying one rule
10 to class-action bans or other kinds of procedural
11 limitations in arbitration and another outside of
12 arbitration, that would not fall within the savings
13 clause.

14 JUSTICE ALITO: Can I take you back to a
15 question that was asked a few minutes ago, because I'm
16 not sure I understood your answer.

17 What is the difference between a State rule
18 that says that the rules of civil procedure must be
19 followed in any adjudication and a rule that says that
20 class adjudication must always be available?

21 MR. GUPTA: I think in the first instance, I
22 don't think that -- I'm assuming that you're describing
23 a rule that purports to apply general contract law,
24 let's say unconscionability; right?

25 JUSTICE ALITO: Yes, uh-huh.

1 MR. GUPTA: I don't think -- I think it
2 would be hard for a State to credibly claim that the
3 absence of the Federal Rules of Civil Procedure
4 systematically exculpate one party from -- from
5 liability. That just --

6 JUSTICE ALITO: No, I just -- I'm not
7 putting this under an unconscionability label. These
8 are just general rules, and the question is whether
9 they -- whether they can be applied, whether they
10 constitute discrimination against -- against
11 arbitration.

12 MR. GUPTA: Well, whether or not they
13 constitute discrimination against arbitration, I think
14 your first hypothetical would be preempted, because a
15 State could not credibly be serving the purposes that
16 the savings clause serves in insisting on the Federal
17 Rules of Civil Procedure.

18 JUSTICE ALITO: Why?

19 MR. GUPTA: Because -- because I don't think
20 that a credible argument can be made that that
21 systematically serves and functions as an exculpatory
22 clause.

23 There are going to be questions of degree
24 here, but take, for example, discovery. I think that
25 both parties would agree that if an employer said: I

1 get discovery and you, the employee, don't get discovery
2 for your fact-bound discrimination --

3 JUSTICE ALITO: No, but I really would
4 appreciate it if you would answer my hypothetical on one
5 that was posed before.

6 What is the difference -- let me change it
7 slightly -- between a rule that says you must follow the
8 rules of evidence in every adjudication and a rule that
9 says that class adjudication must always be available?

10 I think your answer comes down to the
11 proposition that the former is inconsistent with the
12 idea of arbitration, and therefore, that's why it's not
13 allowed, and the latter is not inconsistent with the
14 idea of arbitration, and therefore, it is allowed. Is
15 that correct or not?

16 MR. GUPTA: No, I think -- I think -- I
17 think a better way to analyze that is under the rubric
18 of obstacle preemption, because there are important
19 purposes that are served by the savings clause in
20 invalidating certain procedural procedures that have an
21 exculpatory effect, a substantively unfair effect, but
22 at the same time the act, to be able to function, has to
23 allow parties to contract for --

24 JUSTICE ALITO: Well, okay. It amounts to
25 the same thing. Insisting on compliance with the

1 Federal -- with the California rules of evidence is an
2 obstacle to arbitration, but allowing -- insisting on
3 the availability of class adjudication is not an
4 obstacle to arbitration. But in the end --

5 MR. GUPTA: Right.

6 JUSTICE ALITO: -- we have to make a value
7 judgment about whether these things, one thing or the
8 other, fits with arbitration. That's what it comes down
9 to.

10 MR. GUPTA: No, I think -- I think that's
11 not right. I mean, I think in the first instance you
12 defer to what the State court says it is doing, and what
13 the State says it is doing -- and there is no reason to
14 doubt this -- is that it is preventing a procedural
15 limitation that systematically favors one party, tilts
16 the playing field to a degree that parties cannot
17 feasibly vindicate their claims through arbitration.

18 JUSTICE ALITO: And when it -- when it
19 imposes the rule that the -- the rules of evidence apply
20 across the board, it says it feels that these are
21 necessary in order for parties to be treated fairly in
22 every method of adjudication.

23 MR. GUPTA: Right. And, I mean, obviously,
24 the application of the Federal Rules of Evidence don't
25 have a systematic effect that favors one party or the

1 other, and -- and so I think a rule like that would not
2 be credible. And I'm trying to answer your
3 hypothetical, but I do think that the discovery --

4 JUSTICE BREYER: Where do we look to find
5 the answer? I mean, I understand your answer and I know
6 the other side's going to say: Well, this is a
7 tremendous obstacle. If I have one person to deal with,
8 I say: You want your \$75, I will offer you \$75, and if
9 you don't take it and I turn out to be wrong, I'm going
10 to give you \$7,500. That's their system. Right?

11 So they say the alternative is class action.
12 There are a million customers. I'm faced with a claim
13 for \$75 million. I can't afford that. I'll settle it,
14 even if I'm right. So if you have your rule, I'm going
15 to be facing these things all the time. I'm not -- I'm
16 not going to enter into arbitration agreements. I will
17 take my chances in court. Okay? Now, that -- that's
18 their argument.

19 So it is empirical, in part: What do I look
20 to? It's not logic. It's a question of where should
21 I -- what should I read to show, in your opinion, you're
22 right?

23 MR. GUPTA: I think you have to look first
24 at what the State law is trying to do, and the -- the
25 hypotheticals about the insistence on jury trials,

1 insistence on Federal Rules of Evidence or civil
2 procedure, those are clear -- it just would not be
3 credible for a State, I think, to say that those things
4 are required.

5 JUSTICE KAGAN: Is your test a purpose test
6 or an effects test? Is it a test that says the State is
7 doing this in order to kill arbitration, or is it a test
8 that says the State is doing something that will kill
9 arbitration?

10 MR. GUPTA: I think you can look to both. I
11 think you would have to look to both. I mean, it would
12 pose an obstacle to the statute, whether the State was
13 doing something antithetical to the purposes of the
14 statute or whether it had the effect of destroying
15 arbitration. In either case, those things would be
16 preempted.

17 But all of these hypotheticals describe
18 rules that don't exist under any State's laws and are
19 unlikely to exist, because they -- they can't -- they
20 wouldn't really be able to be reconciled with
21 traditional notions of contract law, and then you really
22 would have obvious subterfuge. You really would have a
23 rule that is not true State law.

24 But -- but I think if you look, for example,
25 at discovery, a State could not insist on plenary

1 discovery, full discovery, to the same degree available
2 in courts, but a State can certainly insist on
3 invalidating one-sided discovery limitations. A State
4 could certainly say to someone who seeks to vindicate a
5 fact-bound employment discrimination claim has to have
6 some opportunity to develop the facts. Otherwise,
7 that -- that is exculpatory.

8 JUSTICE KENNEDY: If you stick with the
9 theory that the test is whether or not the law in
10 question is inconsistent with the idea of arbitration --
11 whose idea of arbitration? What about, suppose it's the
12 bank's idea of arbitration, that we -- we want this
13 settlement, say; we do not want that; that's the bank's
14 idea of arbitration that the parties agreed on.

15 MR. GUPTA: Right. I think you are right
16 Justice Kennedy, and I think the difficulty of
17 ascertaining what is sort of at the essential core of
18 arbitration means that the -- that the test of what's
19 tantamount to a rule of non-enforceability is going to
20 be -- it's going to be a very small category.

21 It's going to describe the ouster doctrine,
22 the jury trial waiver of prohibition; and I think that's
23 why you have got to resort to some principle of obstacle
24 preemption to figure out whether the State is -- is
25 legitimately fulfilling the purposes, the important

1 purposes that the savings clause serves, or whether it's
2 just insisting on full-scale procedures for the sake of
3 it, in ways that have nothing to do with the -- the
4 State policing its own marketplace, protecting its
5 substantive rules of liability and ensuring that parties
6 can adequately vindicate their claims. And if a State
7 is doing that, I think that kind of rule --

8 JUSTICE SCALIA: Yes, but I -- I find it
9 difficult to regard as -- voiding exculpatory contracts.
10 I mean, yes, contracts which say I'm not liable if --
11 even though I've committed a wrong, that's exculpatory.
12 But the State here says, you have to not only be liable
13 for any faults that the other party to this contract
14 discovers, but the other party of this contract has to
15 be able to benefit from whatever faults anybody else in
16 the world might find and bring -- and bring a class
17 action lawsuit. I -- that -- that goes well beyond
18 forbidding any exculpatory provisions.

19 MR. GUPTA: Well, with respect,
20 Justice Scalia, that is not the rule of law that this
21 State has announced. The State has made a judgment that
22 if you preclude class-wide relief, that will mean --
23 that will gut the State's substantive consumer
24 protection laws, because people will -- in the context
25 of small frauds not be able to bring those cases.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. GUPTA: Thank you, Mr. Chief Justice.

3 CHIEF JUSTICE ROBERTS: Mr. Pincus, you have
4 4 minutes remaining.

5 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

6 ON BEHALF OF THE PETITIONER

7 MR. PINCUS: Thank you, Mr. Chief Justice.

8 Although we believe we win under the
9 principle of obstacle preemption that was just being
10 discussed for the reasons that were enunciated in
11 Stolt-Nielsen, we think there is a much easier way for
12 this Court to decide this case. Congress when it wrote
13 section 2 used the phrase "any contract." And it
14 clearly did that for a reason, and the reason was it
15 wasn't -- it recognized, as Justice Sotomayor said, that
16 there could be attempts through nondiscriminatory
17 provisions to injure arbitration; and the protection
18 Congress adopted was a prophylactic rule. It said if
19 the State law rule that the State is trying to apply to
20 an arbitration clause applies broadly to a large set of
21 clauses, that's the best protection against
22 discrimination and that's why the "any contract"
23 language is there.

24 And so, in answer to your question, Justice
25 Sotomayor, about where to look for, for what "any

1 contract" means, we think it means very broad; and the
2 Court has said that, and the doctrines that the court
3 has identified as qualifying -- duress, fraud and
4 unconscionability -- are doctrines that apply broadly
5 across the entire range of contract.

6 But one thing that is very clear, we think,
7 is that it can't mean -- "any contract" can't mean any
8 dispute resolution contract, because that is the
9 gerrymandered category that most presents the risk of
10 discrimination. And if the Court holds that that
11 category is impermissible to justify a rule, it deals
12 with all of the hypotheticals that are being discussed
13 because they are all jury waivers, discovery, evidence;
14 those are all rules that, as the Court has propagated as
15 hypotheticals, are rules that apply to all dispute
16 resolution clauses, and they are focused on dispute
17 resolution clauses.

18 So we think that disposes of the argument
19 that Discover Bank can be applied, simply because it
20 applies to litigation contracts and arbitration
21 contracts.

22 The next question is Respondents' second
23 argument, which is okay, if that is not a reason it
24 falls within the savings clause, it falls within the
25 savings clause because it's simply an application of

1 California's general unconscionability doctrine. And
2 that is where we turn to the first part of the issues I
3 was discussing in the issues that -- that I was
4 discussing in the first part of the argument with the
5 Court, which is it isn't, because in the three
6 particulars that I listed, it is clearly a totally
7 different legal rule that simply has the
8 unconscionability label on it.

9 And just to drill down on my colleague's
10 discussion that this was really an ex ante analysis. It
11 couldn't be an ex ante analysis, because that would have
12 to take into account that the vast majority of claims
13 that anyone will ever have under a contract are
14 nonclassable claims. And as to nonclassable claims,
15 it's clear that the arbitration process is infinitely
16 better than the court process, because for most small
17 consumer claims there is no real court process. And so
18 if one were to make an ex ante assessment of the
19 fairness for the parties of the court, it wouldn't just
20 be about classable claims; it would have to include
21 nonclassable claims; and as to those claims it is clear
22 that there is a tremendous benefit to those people from
23 the arbitration clause.

24 With respect to exculpation, my friend
25 referred to the California rule that the contract has to

1 have a public effect. That is not about effects on
2 third parties. In the Tunkl case, which is a California
3 Supreme Court case that we cite, the court makes clear
4 that it's looking for contracts that -- in which public
5 services are being performed and that are otherwise
6 imbued with a public interest. It's not looking at all
7 at the effects on third parties.

8 Finally, my colleague spoke about lots of
9 class arbitrations. To our knowledge all of those class
10 arbitrations were arbitrations that were conducted
11 before this Court's decision in Stolt-Nielsen where a
12 party had a silent agreement and therefore it was held
13 by some lower courts to mean that class arbitration was
14 permissible. We are not aware as we say in our brief of
15 any contract that explicitly permits class arbitrations
16 for the reasons that the Court discussed. It's not --
17 just not something that makes any sense.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 11:03 a.m., the case in the
22 above-entitled case was submitted.)

23

24

25

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