

No. 05-1119

In the Supreme Court of the United States

CINGULAR WIRELESS LLC,

Petitioner,

v.

ASTRID MENDOZA, JAMES BETHEA, GERRY ROBERTSON,
RAMZY AYYAD, AND WENDY LOWINGER,

Respondents.

**On Petition for a Writ of Certiorari to
the Court of Appeal of the State of California,
First Appellate District, Division Five**

REPLY BRIEF FOR THE PETITIONER

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Respondents' brief in opposition rests principally on misunderstandings of the applicable law. Respondents assert that the first issue presented in the petition is not meritorious because this Court has observed that Section 2 of the FAA allows states to decline to enforce arbitration provisions on the basis of "a generally applicable contract defense." Opp. i., 5-8. But the question presented, on which the lower courts are divided, is whether a generally applicable state-law defense nonetheless is impliedly preempted if it would frustrate the purposes of the FAA. Respondents assert that the second issue is not meritorious because this Court has observed that "certain types of cases are not suitable for arbitration." Opp. 19. But they fail to respond to our argument—which is firmly rooted in this Court's precedents and widely embraced everywhere other than California—that only Congress, not a state legislature or state court, is empowered to declare claims "not suitable for arbitration." Respondents offer no reason why this case is not an ideal vehicle for resolving those important and recurring questions. Indeed, respondents acknowledge that the California Supreme Court "has already spoken, and spoken clearly," on both issues. Opp. 8. Thus, in the State of California, the largest economy in the United States, arbitration is severely restricted in a huge range of cases in derogation of the powerful federal policy favoring arbitration. Review is plainly warranted.

I. THE CLASS-WAIVER ISSUE MERITS REVIEW

A. Neither This Court's Precedents Nor Section 2 Of The FAA Precludes Operation Of The Doctrine Of Conflict Preemption.

Respondents' principal ground for opposing review of the first question is merits-based. They assert that this Court repeatedly has stated that "a party may challenge an arbitration agreement based on any generally applicable state law contract defense, including unconscionability." Opp. 5. Though that is true, the Court has never been confronted with a self-

declared “generally applicable state-law rule” that would frustrate the central purpose of the FAA in a huge number of cases. In other contexts, the Court has left no doubt that “[a] savings clause (like [an] express preemption provision) does *not* bar the ordinary working of conflict pre-emption principles.” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (emphasis in original).¹

Moreover, respondents are mistaken in assuming that Section 2’s savings clause is satisfied merely because the California Supreme Court asserted in *Discover Bank* that its holding applies equally to class waivers in contracts that do not require arbitration. Though respondents have identified one case in which a contract that did not require arbitration effectively barred class actions (Opp. 7-8), they can point to no case involving an explicit class waiver outside the arbitration context. Nor can they deny that the overwhelming majority of agreements that contain class waivers require that disputes be settled by arbitration, not litigation. Hence, the California Supreme Court’s rule is even-handed only in the most trivial sense; in its purpose and practical effect, it discriminates against arbitration. Indeed, the California Supreme Court rested heavily and explicitly on a mere “public policy” favoring class lawsuits over individual arbitration (*e.g.*, 113

¹ In any event, respondents’ assumption that, in holding class waivers unconscionable, the California courts have applied a “generally applicable state law contract defense” is false. As amicus Pacific Legal Foundation points out, the California courts have consistently distorted state unconscionability law in order to thwart arbitration agreements, and the California Supreme Court’s decision in *Discover Bank* is merely the latest example of that tendency. Indeed, then-Justice Janice Rogers Brown has explained that “this court appears to be ‘chip[ping] away at’ United States Supreme Court precedents broadly construing the scope of the FAA ‘by indirection,’ despite the high court’s admonition against doing so” and “urge[d]” this Court “to clarify once and for all whether our approach to arbitration law comports with its precedents.” *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 999 (Cal. 2003) (Brown, J., concurring and dissenting) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001)).

P.3d at 1105-08, 1112, 1115-16), which amounts to an assertion of state judicial veto power over the FAA.

B. Respondents Paint A Distorted Picture Of The State Of The Lower-Court Case Law.

Respondents concede that the California Supreme Court's holding conflicts with *Pyburn* and *Schultz*, but characterize those decisions as "outliers" and assert that "no state supreme court or federal court of appeals has adopted the FAA preemption argument asserted by Cingular." Opp. 9-10. They are wrong in both respects.

To begin with, as we pointed out in the petition (at 17 n.10), under Tennessee law *Pyburn* is the functional equivalent of a decision of the Tennessee Supreme Court. Respondents also are mistaken in contending (Opp. 10) that neither *Iberia* nor *Caley* "lend[s] credence" to our preemption argument. Of course, "neither case * * * uses the term preemption" (*id.*). We acknowledged that in the petition (at 17). But each makes the precise substantive point.

Respondents note that in *Iberia* the Fifth Circuit observed that Louisiana does not authorize claims under its Unfair Trade Practices Act to be brought as class actions. Opp. 10. The Fifth Circuit did mention that as *one* reason for not finding class waivers to be unconscionable under Louisiana law. But it *first* rejected the unconscionability argument because of the incompatibility of class actions and arbitration, stating: "As the Supreme Court has explained, the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)). And later, when rejecting an unconscionability attack on another aspect of Cingular's arbitration provision, the

Fifth Circuit added that for parties to demand “all of the procedural accoutrements that accompany a judicial proceeding” would undermine “the point of arbitration.” *Id.* at 176.

Respondents’ claim that *Caley* “is even less applicable” (Opp. 10) fails for the same reason. True, *Caley* was decided on state-law grounds. But in holding that the class waiver in that case was not unconscionable, the Eleventh Circuit expressly recognized that prohibiting class arbitration is “consistent with the goals of simplicity, informality, and expedition” that underlie the FAA. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (internal quotation marks omitted), cert. denied, No. 05-959 (May 15, 2006). There can be little doubt that, had Georgia law held class waivers to be unconscionable, the Eleventh Circuit would have found that law to be *inconsistent* with the goals of the FAA and hence preempted.

Finally, respondents’ contention (Opp. 9-10) that “[a]n overwhelming number of courts have rejected Cingular’s preemption argument” is false. As we pointed out in the petition (at 18-19 & n.11) and as respondents ignore, the overwhelming majority of courts confronted with the issue have held that prohibitions of class arbitration are not unconscionable in the first place. Those courts necessarily have not “rejected Cingular’s preemption argument.” The cases respondents cite (Opp. 6-7 n.1), meanwhile, merely apply state unconscionability law; none holds that the doctrine of conflict preemption is inapplicable when an unconscionability holding interferes with the attainment of the FAA’s objectives.

C. Respondents’ Contention That *Discover Bank* Will Not Discourage Arbitration Is Misguided.

Respondents dismiss our contention that *Discover Bank* will cause companies to abandon arbitration as “speculative and unpersuasive.” Opp. 11. The amici forcefully demonstrate otherwise. For example, the Amazon brief explains that, if *Discover Bank* remains the law, its three signatories

“will have little option but to reconsider their reliance on arbitration as an alternative to litigation. Faced with the choice of arbitrating aggregated claims with no opportunity for meaningful judicial review, or litigating those claims before a court experienced with and equipped to manage class litigation, *Amici curiae* will almost certainly choose litigation.” Amazon.com et al. Am. Br. 9. Similarly, the trade association brief explains:

Many [businesses] will stop enforcing arbitration agreements whenever a plaintiff files a purported class action in a California court, lest the dispute be sent to arbitration on a class-wide basis in violation of the contractual terms. And some may simply stop including arbitration clauses altogether in their contracts with California customers, as NCTA member Comcast has done in response to rulings like the one below.

American Bankers Ass’n et al. Am. Br. 11.

Respondents’ suggestion that several states have deemed class waivers to be unconscionable without causing the wholesale abandonment of arbitration (Opp. 11-12) is misguided. Insofar as the West Virginia Supreme Court’s holding in *Dunlap* is construed as constituting an across-the-board rejection of class waivers (rather than as being limited to cases in which the costs of arbitration are high and remedies are restricted), a federal court has held that rule to be preempted. See *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005). Similarly, at least seven federal district court decisions have construed the Alabama Supreme Court’s holding in *Leonard* as limited to cases in which the costs of arbitration are high or the arbitrator is barred from awarding attorneys’ fees and other remedies.² *Whitney* has likewise been limited by a Missouri trial

² See *Battels v. Sears Nat’l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005); *Taylor v. First N. Am. Nat’l Bank*, 325 F. Supp. 2d 1304,

court, which upheld the very arbitration provision at issue here over an unconscionability challenge precisely because it makes arbitration cost-free, allows for the recovery of attorneys' fees in a broader range of circumstances than in judicial proceedings, and does not preclude awards of punitive damages. *Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281, slip op. at 4-5 (Mo. Cir. Ct. Nov. 28, 2005).³ *Eagle* and *Powertel* are distinguishable on similar grounds.

Respondents' statement that there was no rush to the exits after the California Court of Appeal struck down a class waiver in *Szetela* (Opp. 12 n.4) is equally misguided because *Szetela* was not the only word on the subject in California. A different Court of Appeal reached precisely the opposite holding (indeed, held that *Szetela* was preempted by the FAA) in the case that eventually became *Discover Bank*. See *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393 (Cal. Ct. App. 2003), rev'd, 113 P.3d 1100 (Cal. 2005). Similarly, the Court of Appeal in the present case also rejected *Szetela* before the California Supreme Court issued its decision in *Discover Bank*. See Pet. App. 40a-43a.

In short, it was not until *Discover Bank* that the highest court of any state had definitively held that class waivers are unconscionable without regard to whether other features of the arbitration provision make it inexpensive and easy to pursue a claim on an individual basis. Hence, the fact that none of the cases cited by respondents prompted the wholesale abandonment of arbitration is perfectly understandable and hardly indicative of the result that will occur in the Nation's

1319-22 (M.D. Ala. 2004); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1276-77 (M.D. Ala. 2003); *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1263-64 (M.D. Ala. 2003); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1345 (M.D. Ala. 2003); *Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1296 (M.D. Ala. 2003).

³ The *Blitz* court also concluded that any other result would be preempted by the FAA. *Id.* at 5-6.

largest state if this decision is not reversed.⁴

D. None Of Respondents’ Merits-Based Arguments Warrants Denying Review.

Respondents assert that review should be denied because our preemption argument is born out of “hostility to class actions,” a procedure that both this Court and Congress have recognized can be beneficial. Opp. 14-16. They assert that our contention that class action procedures are antithetical to arbitration “has been rejected by this Court and by arbitration service providers” and that “class arbitrations have been expressly authorized in California for at least 23 years.” Opp. 13. And they assert that “[a]rbitration is only more efficient if few Cingular customers bring claims against the company” and that “many valid claims for unlawful business practices would go unremedied in the absence of a class action because most victims do not know they have been injured.” Opp. 17. These merits-related points miss the mark.

First, to favor individual arbitration over judicial class actions is not “hostility to class actions.” It merely is a preference for an alternative form of dispute resolution—one that has the affirmative blessing of Congress.

Second, respondents’ arguments fail to come to grips with the fact that damages class actions did not even exist at the time the FAA was enacted and that Congress therefore plainly understood arbitration to mean *individual* arbitration. See Chamber of Commerce Am. Br. 17-18. Indeed, although the California Supreme Court may have invented class arbi-

⁴ Contrary to respondents’ submission (Opp. 14), the fact that individual claims against securities dealers must be arbitrated, while class actions must be pursued in court, does not belie our prediction that businesses will avoid arbitration altogether if there has to be a carve out for class actions. Because the NASD framework is mandatory, it provides no basis for assuming that businesses will *voluntarily* choose to make arbitration available to customers on an individual basis (bearing all or almost all of the costs) if they also have to be exposed to class actions in court.

tration 23 years ago, that hardly means that companies have willingly subjected themselves to this Frankenstein's monster. To the contrary, one academic reported in 2000 that, despite "an extensive effort" to locate attorneys who had participated in class arbitrations, she "found just a handful," indicating to her that "very few arbitrations have been handled as class actions." Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38-41 & n.148 (2000). It was not until 2003 that the major arbitration providers first prescribed rules to conduct class arbitrations. Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 186-87 & n.3 (2006).

Third, respondents misunderstand this Court's decision in *Bazzle*. Opp. 13. That case stands only for the proposition that parties *may* agree to arbitrate on a class-wide basis; it expressed no view on whether conditioning the enforceability of an arbitration provision on such an agreement will frustrate the purposes of the FAA.⁵

Finally, whether a class action is "more efficient" than individual arbitration and whether "most victims" will never bring an arbitration because they "do not know they have been injured" (Opp. 17) are beside the point. In enacting the FAA, Congress expressed a policy preference for arbitration, which, at that time, meant *individual* arbitration. If, as respondents contend, a class action would be more efficient and would ensure that "most victims" receive something (albeit less than an individual could recover in arbitration), Congress can amend the FAA to carve out class actions. In the meantime, however, it is not for the state courts to create

⁵ There can be no doubt that, in light of *Bazzle*, many companies amended their arbitration provisions to expressly prohibit class arbitration. See Samuel Estreicher & Steven C. Bennett, *Using Express No-Class Action Provisions to Halt Class-Claims*, N.Y. L.J., June 10, 2005, at 3. Today, respondents would be hard pressed to find a consumer arbitration provision that did not prohibit class arbitration.

a judicial exception that would effectively swallow the rule.

In any event, respondents' assumption that there are a material number of customers who do not know that they have been injured is baseless. There may well be many customers who elect not to pursue an individual arbitration, but that may be because they do not believe that they have suffered any real harm.⁶ By the same token, because customers who do not want to be part of a class action must affirmatively opt out, inevitably many customers become part of a class (and help serve as an engine to coerce a settlement) even though 61% of Americans "think that consumers (32%) and class members (29%) benefit least from" class actions. Penn, Schoen & Berland Associates, U.S. Chamber of Commerce, Institute for Legal Reform, *Polling on The Class Action System: National Results 1* (Mar. 2003), <http://www.instituteforlegalreform.com/resources/classaction.pdf>.

II. THE PUBLIC-INJUNCTION ISSUE MERITS REVIEW

Respondents contend that the Court should deny review of the second question presented because the lower courts did not need to reach the issue. Opp. 18-19. They do not deny, however, that, if this Court grants review of the first issue and holds that the FAA preempts *Discover Bank*, the Court of Appeal's holding that public injunction claims are non-arbitrable would no longer be "entirely *dicta*" (Opp. 18). Instead, it would require that the public injunction claims be severed from the damages claims and litigated in court. Accordingly, if the Court grants review of the first issue, the second issue is every bit as ripe for resolution.

Respondents next contend that review is unwarranted because *Broughton* and *Cruz* are fully consistent with this

⁶ For example, most customers fully appreciate that the early termination fee serves to ensure that wireless carriers are able to recover the cost of the free or heavily discounted phones that are the quid pro quo for entering into a wireless service agreement with a term commitment.

Court's precedents. Opp. 19-21. *Broughton* and *Cruz* are based on the premise that the FAA must give way when there is an "inherent conflict" between arbitration and a *state* policy. As we pointed out in the petition (at 23-25), however, this Court's precedents hold that only a *congressional* policy can trump the FAA.⁷ Insofar as there is any doubt on that score, that is a reason for granting certiorari, not denying it.

Respondents' effort to minimize the extent to which *Broughton* and *Cruz* conflict with decisions of other courts is feeble. To begin with, although the Ninth Circuit did overrule *Arriaga* (which we acknowledged), it did so only as to a different issue. See *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1177 n.15 (9th Cir. 2003). Respondents' claim that all of the other cases we cited "involved arguments by parties seeking far broader infringements on arbitration" (Opp. 21) is both false and irrelevant. It is hard to imagine a broader infringement on arbitration than a holding that CLRA and UCL public-injunction claims are non-arbitrable, because it is standard practice in California to include such claims in virtually every complaint brought by a consumer, employee, or tenant against a business. In any event, the breadth of the infringement was not material to the cited decisions: their holdings were based on the straightforward principle that states lack the power to create exceptions to the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

⁷ Respondents contend that *Southland* and *Perry* are distinguishable because the "California Supreme Court and state legislature simply stated that the state laws at issue were not arbitrable" without identifying "an actual conflict." Opp. 20. They say that in *Broughton* and *Cruz*, by contrast, "the California Supreme Court made explicit findings that arbitration inherently conflicted with the purpose and intent of claims for public injunctive relief under the UCL and CLRA." Opp. 21. The assertion that the federal policy embodied in the FAA may be negated by the "findings" of a state court or legislature is a startling one that calls out for review.

Respectfully submitted.

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