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*Federal Arbitration Act* — *DirecTV, Inc. v. Imburgia*

“[Y]ou agree to arbitrate *all disputes and claims* between us.”<sup>1</sup> Words like these can now be found buried in the boilerplate language of almost any consumer contract<sup>2</sup> and many employment agreements.<sup>3</sup> Under these mandatory arbitration clauses, potential plaintiffs forfeit the right to pursue their legal claims in court. And in most cases, courts have had no choice but to enforce these agreements: the Federal Arbitration Act<sup>4</sup> (FAA) provides that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>5</sup> Moreover, for decades now the Supreme Court has embraced a liberal interpretation of the FAA, expanding its reach in one case after another.<sup>6</sup> The Court’s decision last Term in *DirecTV, Inc. v. Imburgia*<sup>7</sup> is consistent with this trend. In enforcing the ambiguously worded arbitration clause of a form consumer contract,<sup>8</sup> the Court revealed just how broad its interpretation of the FAA has become. While the Court has attempted to frame its FAA doctrine narrowly, as requiring only that arbitration agreements be treated “on equal footing with all other contracts,”<sup>9</sup> the Court’s reasoning in *Imburgia* shows that this doctrine in fact privileges arbitration agreements, enforcing them even where there are compelling reasons to strike them down.

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<sup>1</sup> *Residential Customer Agreement*, DIRECTV § 9.2 (June 30, 2016), [http://www.directv.com/content/dam/dtv/directv\\_marketing/agreements\\_and\\_policies/customer\\_agreement\\_update/FINAL\(clean\\_v2\)\\_FINAL\\_REDLINE\\_DIRECTV\\_CUSTOMER\\_AGREEMENT\\_2016\\_\(all\\_inclusive\\_revised\\_MMS\)\\_5\\_4\\_16.pdf](http://www.directv.com/content/dam/dtv/directv_marketing/agreements_and_policies/customer_agreement_update/FINAL(clean_v2)_FINAL_REDLINE_DIRECTV_CUSTOMER_AGREEMENT_2016_(all_inclusive_revised_MMS)_5_4_16.pdf) [<https://perma.cc/UV9H-8YWS>].

<sup>2</sup> The Consumer Financial Protection Bureau (CFPB) reports that mandatory arbitration clauses are included in a majority of contracts in many areas of consumer finance, including credit cards, prepaid cards, and student loans. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 2.3, at 8 tbl.1 (2015) [hereinafter CFPB STUDY]. Arbitration clauses are also routinely found in other consumer contracts, such as cell phone service contracts. See Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008).

<sup>3</sup> See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., BRIEFING PAPER: THE ARBITRATION EPIDEMIC 14–15 (2015) [hereinafter EPI BRIEFING PAPER].

<sup>4</sup> 9 U.S.C. § 2 (2012).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (holding that class action waivers contained in arbitration agreements are enforceable); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that California’s unconscionability rule is preempted by the FAA); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (holding that arbitration clauses are severable from other unenforceable provisions); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that arbitration agreements are enforceable with respect to statutory disputes).

<sup>7</sup> 136 S. Ct. 463 (2015).

<sup>8</sup> See *id.* at 471.

<sup>9</sup> *Id.* at 468 (quoting *Buckeye*, 546 U.S. at 443).

*Imburgia* hinged on the meaning of a peculiar clause in DirecTV's service agreement with its customers. Like many standard service agreements, this one featured a mandatory arbitration clause<sup>10</sup> and a waiver of class arbitration, compelling arbitration instead of litigation and prohibiting customers from "join[ing] or consolidat[ing]" arbitration claims.<sup>11</sup> This much was typical of a consumer contract.<sup>12</sup> But curiously, DirecTV's agreement also carved out an exception to mandatory arbitration, providing: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration clause] is unenforceable."<sup>13</sup>

Millions of customers signed this agreement,<sup>14</sup> including Amy Imburgia, a resident of California.<sup>15</sup> In 2008, Imburgia filed a class action complaint against DirecTV in California state court, alleging that the company had illegally charged early termination fees to its customers in violation of California's Consumers Legal Remedies Act (CLRA) and other state laws.<sup>16</sup> DirecTV did not bother to enforce its arbitration clause, believing such efforts would be "futile."<sup>17</sup> At that time, class-arbitration waivers were deemed unconscionable and therefore unenforceable under the California Supreme Court's decision in *Discover Bank v. Superior Court*.<sup>18</sup> Under the "law of [the] state" — in this case, the law of California — DirecTV's arbitration clause could not be enforced.<sup>19</sup> DirecTV had no choice but to face the plaintiffs in court. In 2011, the class was certified.<sup>20</sup>

Just a few days later, however, the law changed.<sup>21</sup> The United States Supreme Court overruled *Discover Bank* in *AT&T Mobility LLC v. Concepcion*,<sup>22</sup> holding that California's rule prohibiting class-

<sup>10</sup> *Id.* at 466 ("[A]ny Claim either of us asserts will be resolved only by binding arbitration.").

<sup>11</sup> *Id.*

<sup>12</sup> See EPI BRIEFING PAPER, *supra* note 3, at 17 (noting that the largest cell phone companies and cable companies include mandatory arbitration clauses and class action waivers in their service agreements); see also CFPB STUDY, *supra* note 2, § 2.5.5, at 44–47 (reporting that many arbitration clauses contained in consumer finance contracts also include a class-arbitration waiver).

<sup>13</sup> *Imburgia v. DirecTV, Inc.*, 170 Cal. Rptr. 3d 190, 193 (Ct. App. 2014). The agreement also stated that the arbitration clause would be "governed by the Federal Arbitration Act." *Id.*

<sup>14</sup> In 2007, DirecTV allegedly had 16.8 million subscribers. Class Action Complaint at 9, *Imburgia v. DirecTV, Inc.*, No. BC398295 (Cal. Super. Ct. Sept. 17, 2008), 2008 WL 4264463.

<sup>15</sup> *Id.* at 1.

<sup>16</sup> *Id.* at 1, 12–22.

<sup>17</sup> *Imburgia*, 170 Cal. Rptr. 3d at 193.

<sup>18</sup> 113 P.3d 1100 (Cal. 2005); see *Imburgia v. DirecTV, Inc.*, No. BC398295, 2012 WL 7657788, at \*1 (Cal. Super. Ct. Feb. 26, 2012).

<sup>19</sup> *Imburgia*, 2012 WL 7657788, at \*1 ("[DirecTV's] arbitration agreement was invalid under *Discover Bank*.").

<sup>20</sup> *Imburgia*, 170 Cal. Rptr. 3d at 193.

<sup>21</sup> *Id.*

<sup>22</sup> 563 U.S. 333 (2011).

arbitration waivers was preempted by the FAA.<sup>23</sup> Seizing its chance, DirecTV moved to compel arbitration.<sup>24</sup> The trial court said no.<sup>25</sup> It reasoned that, even though the *Discover Bank* rule was now preempted under *Concepcion*, other state laws — including those that Imburgia had sued under, such as the CLRA — were not. Noting that the CLRA establishes a nonwaivable statutory right to pursue consumer protection claims as a class,<sup>26</sup> the court concluded that DirecTV’s class-arbitration waiver remained unenforceable under state law.<sup>27</sup>

The California Court of Appeal affirmed. Because it was required under the FAA to enforce DirecTV’s arbitration clause “like other contracts, in accordance with [its] terms,”<sup>28</sup> the court focused on the meaning of those terms — and in particular, on the meaning of the phrase “law of your state.”<sup>29</sup> The court identified two possible readings of this contractual term: either it meant “the law of your state *to the extent it is not preempted by the FAA*”<sup>30</sup> (in which case the arbitration clause could be enforced, under *Concepcion*) or it meant “the law of your state *without considering the preemptive effect . . . of the FAA*”<sup>31</sup> (in which case it could not). Drawing on established principles of contract interpretation, the court settled on the latter.<sup>32</sup> It applied, first, the rule under California law that “when a general and a particular provision are inconsistent, the particular and specific provision is [paramount] to the general provision.”<sup>33</sup> Under this rule, the court read the exception under the “law of your state” as “a specific *exception* to the arbitration agreement’s *general* adoption of the FAA,”<sup>34</sup> meaning that, while the broader arbitration clause should be governed by federal law, the enforceability of the class-arbitration waiver should be governed by the law of the customer’s home state. The state court also relied on the “common-law rule of contract interpretation [construing] ambiguous language” against the drafter.<sup>35</sup> The court held that DirecTV, having drafted the state law exception itself and imposed it on

<sup>23</sup> *Id.* at 352.

<sup>24</sup> *Imburgia*, 2012 WL 7657788, at \*1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see CAL. CIV. CODE §§ 1751, 1781(a) (West 2015).

<sup>27</sup> *Imburgia*, 2012 WL 7657788, at \*1.

<sup>28</sup> *Imburgia v. DirecTV, Inc.*, 170 Cal. Rptr. 3d 190, 194 (Ct. App. 2014) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

<sup>29</sup> *Id.* at 195–96.

<sup>30</sup> *Id.* at 195 (emphasis added).

<sup>31</sup> *Id.* (emphasis added).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (alteration in original) (quoting *Prouty v. Gores Tech. Grp.*, 18 Cal. Rptr. 3d 178, 185–86 (Ct. App. 2004)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 196 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995)).

its customers without negotiation, should not benefit from its ambiguity.<sup>36</sup> Under the resultant reading, the court concluded that the “law of your state” — that is, the law of California unhampered by the FAA — made the class-arbitration waiver unenforceable, under either *Discover Bank* or a state statute such as the CLRA.<sup>37</sup> And with the exception so triggered, the entire arbitration clause was also unenforceable.<sup>38</sup>

The Supreme Court reversed, holding that the arbitration clause should be enforced.<sup>39</sup> Writing for the Court, Justice Breyer<sup>40</sup> admonished the courts below for breaking rank, reminding them that *Concepcion* was binding law — “an authoritative interpretation” of the FAA<sup>41</sup> — and that “the judges of every State must follow it.”<sup>42</sup> Under *Concepcion*, courts must enforce arbitration agreements just as they would any other agreement, placing them “on an equal footing with other contracts.”<sup>43</sup> And this, according to Justice Breyer, was what the California Court of Appeal had failed to do. Justice Breyer found that the state court’s interpretation of DirecTV’s arbitration clause was “unique[ly]” unfavorable to arbitration agreements,<sup>44</sup> in defiance of the FAA.

The Court started with its own interpretation of the arbitration clause. Unlike the state court below, the Court saw no ambiguity in the language.<sup>45</sup> Looking first at its “ordinary meaning,” the Court concluded that the term “law of your state” could refer only to “*valid* state law,” not “*invalid* . . . law” that was preempted by federal statute.<sup>46</sup> The Court claimed additional support for this reading in California case law, citing a California Supreme Court decision holding that references to state law in a contract will incorporate subsequent changes to the law made retroactive by the state legislature.<sup>47</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 197–98.

<sup>38</sup> *Id.* at 198.

<sup>39</sup> *Imburgia*, 136 S. Ct. at 471.

<sup>40</sup> Justice Breyer was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Kagan.

<sup>41</sup> *Imburgia*, 136 S. Ct. at 468.

<sup>42</sup> *Id.* Notably, Justice Breyer penned the principal dissent in *Concepcion*, joined by Justices Ginsburg, Sotomayor, and Kagan. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 357 (2011) (Breyer, J., dissenting). In *Imburgia*, he emphasized that “[t]he fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented,” made it no less binding. *Imburgia*, 136 S. Ct. at 468.

<sup>43</sup> *Concepcion*, 563 U.S. at 339 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

<sup>44</sup> *Imburgia*, 136 S. Ct. at 469.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (citing *Doe v. Harris*, 57 Cal. 4th 64, 69–70 (2013)).

The Court then scrutinized the lower court’s reasoning for further signs that its interpretation was uniquely hostile to arbitration. It found several. First, the California court failed to make clear whether it would have understood the same words — “law of your state” — to have the same meaning in contracts other than arbitration agreements.<sup>48</sup> The Court expressed skepticism that references to state law in any other context would be construed to encompass laws that conflicted with federal laws other than the FAA.<sup>49</sup> Second, the language of the lower court’s opinion was “focused only on arbitration.”<sup>50</sup> Third, the California court adopted the unusual view that state law could somehow “retain[] independent force” despite being preempted — a view that it would have been “unlikely to accept as a general matter” in contexts other than arbitration.<sup>51</sup> And fourth, the California court invoked no general principle of contract law that would have compelled the same interpretation of the words “law of your state” in cases not involving arbitration.<sup>52</sup>

From these signs, the Court concluded that California’s interpretation of DirecTV’s arbitration clause was based not on general principles of contract but on principles specific — and specifically unfavorable — to arbitration. Because the state court had failed to place the arbitration clause “on equal footing with all other contracts,”<sup>53</sup> its decision was preempted by the FAA.<sup>54</sup>

Justice Ginsburg dissented.<sup>55</sup> She would have affirmed the California court’s interpretation of the arbitration clause, which in her view was “not only reasonable, [but also] entirely right.”<sup>56</sup> Focusing on the intent of the parties, Justice Ginsburg reasoned that DirecTV intended “law of your state” to mean state law “untouched by federal preemption.”<sup>57</sup> Any other reading would not only render the term meaningless,<sup>58</sup> but would also frustrate the parties’ reasonable expecta-

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<sup>48</sup> *Id.* at 469–70.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 470.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 470–71.

<sup>53</sup> *Id.* at 471 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

<sup>54</sup> *Id.*

<sup>55</sup> Justice Ginsburg was joined by Justice Sotomayor. Justice Thomas wrote a separate dissent, reiterating his view — expressed on several occasions in the past — that the FAA has no application in state court proceedings. *Id.* (Thomas, J., dissenting); *see, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–97 (1995) (Thomas, J., dissenting).

<sup>56</sup> *Imburgia*, 136 S. Ct. at 473 (Ginsburg, J., dissenting).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 474–75. Justice Ginsburg noted that DirecTV would have had “no occasion” to include a specific reference to state law if it meant only to incorporate state law as preempted by the FAA. *Id.* at 474.

tions.<sup>59</sup> A customer reading DirecTV's service agreement in 2008, before *Concepcion*, would have had no reason to anticipate that the "law of your state" was a "chameleon term[,] meaning California legislation when she received her . . . contract, but preemptive federal law later on."<sup>60</sup> Under "traditional rules of contract interpretation,"<sup>61</sup> then, the arbitration clause was unenforceable.

In closing, Justice Ginsburg sounded a warning bell. In her view, the Court's "ever-larger expansion of the FAA's scope"<sup>62</sup> has "disarm[ed] consumers, leaving them without effective access to justice."<sup>63</sup> With the spread of "take-it-or-leave-it agreements mandating arbitration and banning class procedures," consumers now lack the incentive to pursue small-dollar claims against large businesses.<sup>64</sup> Justice Ginsburg criticized the majority for taking the Court's FAA doctrine a "step[] beyond" previous decisions,<sup>65</sup> forcing potential plaintiffs into arbitration not only under contracts that "unambiguous[ly]" require it, as in *Concepcion*, but also under contracts that, like DirecTV's, can "reasonably . . . be construed" to preserve a right to a judicial forum.<sup>66</sup>

The Court's decision in *Imburgia* is consistent with its existing doctrine, adding little to past decisions interpreting the FAA. Nonetheless, *Imburgia* is instructive in that it reveals just how broad the Court's interpretation of the FAA has become. The Court has insisted that its reading of the FAA is a narrow one, requiring only that arbitration agreements be placed "on equal footing with all other contracts."<sup>67</sup> But *Imburgia* shows that this interpretation is far from neutral. In practice, it privileges arbitration agreements,<sup>68</sup> to the point where the Court will enforce even an ambiguously worded one. In her dissent in *American Express Co. v. Italian Colors Restaurant*,<sup>69</sup> Justice Kagan

<sup>59</sup> *Id.* at 475–76.

<sup>60</sup> *Id.* at 475.

<sup>61</sup> *Id.* at 476. Like the California court below, Justice Ginsburg invoked the principle that ambiguous contract terms should be construed "against the drafter." *Id.* at 475 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)).

<sup>62</sup> *Id.* at 478.

<sup>63</sup> *Id.* at 471.

<sup>64</sup> *Id.* at 477. Justice Breyer raised the same concern in his dissent in *Concepcion*, pointing out: "[O]nly a lunatic or a fanatic sues for \$30." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

<sup>65</sup> *Imburgia*, 136 S. Ct. at 476 (Ginsburg, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 468 (majority opinion) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

<sup>68</sup> See Willy E. Rice, *Courts Gone "Irrationally Biased" In Favor of the Federal Arbitration Act?*, 6 WM. & MARY BUS. L. REV. 405, 419, 508 (2015) (concluding based on an analysis of approximately one thousand federal and state court cases that most federal courts are "irrationally biased" in favor of enforcing arbitration clauses in consumer and employment contracts).

<sup>69</sup> 133 S. Ct. 2304 (2013).

criticized the bluntness of the Court's doctrine, observing: "To a hammer, everything looks like a nail."<sup>70</sup> *Imburgia* illustrates her point. To a Court that interprets the FAA as sweepingly as this one does, almost any challenge to an arbitration agreement is suspect. In *Imburgia*, there were compelling reasons to invalidate the arbitration clause, either out of deference to a state court's interpretation of its own law, or to effectuate the understanding of the parties themselves. But even these reasons were not enough to overcome the Court's presumption in favor of mandatory arbitration — demonstrating how strong that presumption has become.

The decision in *Imburgia* is consistent with the Court's broad reading of the FAA,<sup>71</sup> adding little to an already robust doctrine favoring arbitration. Notwithstanding Justice Ginsburg's warning that the decision is a "dangerous first" in the Court's interpretation of arbitration agreements,<sup>72</sup> commentators have been quick to dismiss it as a straightforward application of *Concepcion* that leaves the law unchanged.<sup>73</sup> Indeed, its only practical effect was to enforce a highly idiosyncratic arbitration clause that neither DirecTV nor any other corporation will likely ever make the mistake of using again.<sup>74</sup>

However, *Imburgia* is instructive in that it reveals the full extent of the Court's expansive FAA doctrine. Here, there were compelling reasons to invalidate the arbitration clause. But the Court declined to do so, demonstrating that its reading of the FAA serves not to benignly

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<sup>70</sup> *Id.* at 2320 (Kagan, J., dissenting). Justice Kagan was referring to the Court's hostility to class actions, but her observation holds true with respect to its arbitration doctrine generally.

<sup>71</sup> Two landmark decisions in particular have limited the potential grounds for challenging arbitration agreements. In *Concepcion*, the Court curtailed the power of state courts to strike down arbitration clauses for unconscionability. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–43 (2011). And in *Italian Colors*, the Court held that class-arbitration waivers can be enforced even where they would prevent parties from effectively vindicating their rights under federal statute. 133 S. Ct. at 2312.

<sup>72</sup> *Imburgia*, 136 S. Ct. at 473 (Ginsburg, J., dissenting).

<sup>73</sup> See, e.g., Scott L. Nelson, *DirecTV v. Imburgia: Supreme Court Gives Arbitration, Not Consumers, the Benefit of the Doubt*, ACSLAW: ACSBLOG (Dec. 16, 2015), <http://www.acslaw.org/acsblog/directv-v-imburgia-supreme-court-gives-arbitration-not-consumers-the-benefit-of-the-doubt> [<https://perma.cc/5YN6-R2HC>] ("*Imburgia* itself will have little or no impact beyond the parties to the case.")

<sup>74</sup> *Id.* In subsequent service agreements, DirecTV has amended its language to insulate its class-arbitration waiver from potential challenge, providing that "[a] court may sever any portion of [the arbitration agreement] that it finds to be unenforceable, *except for the prohibition on [class arbitration]*." *Imburgia*, 136 S. Ct. at 474 (Ginsburg, J., dissenting) (alterations in original) (emphasis added). According to *The New York Times*, the abandoned provision "is not used by any other major company." Adam Liptak, *Supreme Court Upholds Arbitration in DirecTV Case*, N.Y. TIMES (Dec. 14, 2015), <http://www.nytimes.com/2015/12/15/us/politics/supreme-court-upholds-arbitration-in-directv-case.html> [<https://perma.cc/PEF2-NBR3>].

place arbitration agreements “on equal footing with all other contracts,”<sup>75</sup> but to privilege them.

First, the Court could have invalidated the arbitration clause out of deference to the California court’s interpretation under state contract law. Even where state law faces federal preemption, as here, the Court has acknowledged that deference to state courts may be appropriate where their task is to interpret not federal law, or even state law, but rather agreements between private parties. This deference to interpretations of contract is especially warranted in the context of the FAA, which gives parties considerable freedom to choose the terms of an arbitration agreement.<sup>76</sup> In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,<sup>77</sup> the Court made clear that “the interpretation of private contracts” — including arbitration agreements — “is ordinarily a question of state law, which [the] Court does not sit to review.”<sup>78</sup> As Justice Ginsburg noted in her *Imburgia* dissent, the Court has historically shown great deference to state court interpretations of arbitration agreements; since *Volt* was decided in 1989, the Court has not once reversed a state court’s decision on the ground that it misapplied state contract law to the interpretation of an arbitration clause.<sup>79</sup>

Here, the California court interpreted DirecTV’s class-arbitration waiver under its own state contract law. Moreover, it relied on established canons of construction that — unlike the *Discover Bank* rule, which specifically prohibited class-arbitration waivers — are generally applicable to all contracts: the rule privileging specific provisions over general provisions,<sup>80</sup> and the rule construing ambiguity against the drafter.<sup>81</sup> On review, the Court had ample justification to defer to this interpretation. But instead, the Court interpreted the contract de novo,<sup>82</sup> finding it enforceable notwithstanding a state court’s reading of its own state law to the contrary.<sup>83</sup>

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<sup>75</sup> *Imburgia*, 136 S. Ct. at 468 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

<sup>76</sup> Crucially, as the Court itself noted, the FAA allows parties “to choose what law governs [the] provisions” of an arbitration agreement: “In principle, [the parties] might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the *Discover Bank* rule . . .” *Id.*

<sup>77</sup> 489 U.S. 468 (1989).

<sup>78</sup> *Id.* at 474.

<sup>79</sup> *Imburgia*, 136 S. Ct. at 473 (Ginsburg, J., dissenting).

<sup>80</sup> *Imburgia v. DirecTV, Inc.*, 170 Cal. Rptr. 3d 190, 195 (Ct. App. 2014).

<sup>81</sup> *Id.* at 196.

<sup>82</sup> See *Imburgia*, 136 S. Ct. at 469–70.

<sup>83</sup> While acknowledging that the interpretation of a contract is “ordinarily a matter of state law to which [the Court] defer[s],” *id.* at 468 (emphasis added), the Court withdrew that deference here based on its suspicion that the California court was interpreting the arbitration clause differently than it would have interpreted any other contractual provision — that is, in a manner that



Second, the Court could have effectuated the understanding of the parties by enforcing the agreement — or rather, by *not* enforcing the agreement — “in accordance with [its] terms.”<sup>84</sup> In *Concepcion*, the Court reiterated that “[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements *according to their terms*.”<sup>85</sup> There, the Court enforced a class-arbitration waiver in crucial part because it was consistent with the parties’ understanding.<sup>86</sup> As Justice Scalia was careful to note, “Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.”<sup>87</sup>

In *Imburgia*, the parties’ expectations were that the arbitration agreement would not be enforced.<sup>88</sup> This was the reason that DirecTV did not even attempt to compel arbitration at first.<sup>89</sup> And indeed, the Court conceded that “when DirecTV drafted the contract, the parties likely believed that the words ‘law of your state’ included California law that then made class-arbitration waivers unenforceable.”<sup>90</sup> Since, as the Court acknowledged, “the [FAA] allows parties to an arbitration contract considerable latitude to choose what law governs . . . its provisions,”<sup>91</sup> the Court too had the latitude to honor that choice. Indeed, it could have taken a cue from the California court below and applied the common law rule that ambiguous contract terms should be construed against the drafter — a rule that, as the Court has pointed out before, is designed to effectuate the intentions of the parties, “protect[ing] the party who did not choose the language from an unintended or unfair result.”<sup>92</sup> The Court has made clear in contexts not involving mandatory arbitration that, even where “federal law controls the interpretation of [a] contract,”<sup>93</sup> courts must still be “guided by the

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was “unique” to the arbitration context, *id.* at 469. However, California courts have invoked the same rules applied in *Imburgia* to invalidate contracts other than arbitration agreements. *See, e.g.,* Zipusch v. LA Workout, Inc., 66 Cal. Rptr. 3d 704, 708–10 (Ct. App. 2007) (construing ambiguous assumption-of-risk provision against drafter and finding it unenforceable). Moreover, California courts *have* enforced class-arbitration waivers where general principles of contract interpretation have required them to. *See, e.g.,* Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 749 (Cal. 2015) (holding class-arbitration waiver enforceable because it was not unconscionable under “general principles that apply to any contract clause”).

<sup>84</sup> Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

<sup>85</sup> AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (emphasis added).

<sup>86</sup> *Id.* at 351–52.

<sup>87</sup> *Id.* at 351. The Court upheld the class-arbitration waiver in *Italian Colors* on similar grounds, reasoning that where the parties had agreed to such a waiver, “it would be remarkable for a court to erase that expectation.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

<sup>88</sup> *Imburgia*, 136 S. Ct. at 473 (Ginsburg, J., dissenting).

<sup>89</sup> *Id.* at 471–72.

<sup>90</sup> *Imburgia*, 136 S. Ct. at 468–69 (majority opinion).

<sup>91</sup> *Id.* at 468.

<sup>92</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

<sup>93</sup> *United States v. Seckinger*, 397 U.S. 203, 209 (1970).

general principles that have evolved concerning the interpretation of contractual provisions.”<sup>94</sup> In any other context, these “general principles” could have resulted in the invalidation of DirecTV’s ambiguous contract provision. But in the context of the FAA, even the most fundamental of these rules — the rule honoring the parties’ understanding — proves unable to overcome the presumption in favor of enforcing arbitration agreements.

While *Imburgia* did little to expand the Court’s FAA doctrine, the decision does demonstrate just how broad its interpretation of the statute has become. If there were ever a contract that called for invalidation, this one — with its ambiguously worded state-law exception — would have been it. The Court had compelling reasons to strike down the arbitration clause, either out of deference to the state court’s interpretation, or to effectuate the understanding of the parties. But it chose not to. The presumption favoring arbitration has become so strong that it can be compelled even where there are viable grounds to deny it.

The consequences for potential plaintiffs are serious.<sup>95</sup> Many consumers and employees are bound by mandatory arbitration agreements without even knowing it.<sup>96</sup> Moreover, the outcomes of mandatory arbitration — fewer wins and smaller awards for consumers and workers<sup>97</sup> — suggest a bias in favor of repeat corporate players. Under the Court’s expansive interpretation of the FAA, however, few options remain for those who wish to challenge arbitration clauses.<sup>98</sup> *Imburgia* makes that clear. Even if she had read and understood each line of her contract with DirecTV, Amy Imburgia could not have expected that she would lose her right to a judicial forum. For her, and others like her, the usual warning — “Read the fine print!” — might no longer be enough.

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<sup>94</sup> *Id.* at 210. In *Seckinger*, the Court invoked the same “general maxim that a contract should be construed most strongly against the drafter” to interpret a government contract entered into pursuant to federal statute. *Id.*

<sup>95</sup> Some have suggested that the Court’s interpretation of the FAA presents constitutional issues. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2936 (2015) (arguing that the Court’s FAA doctrine results in “an unconstitutional deprivation of litigants’ property and court access rights”).

<sup>96</sup> See EPI BRIEFING PAPER, *supra* note 3, at 16.

<sup>97</sup> *Id.* at 20 tbl.1.

<sup>98</sup> Recognizing these effects of the Court’s current FAA doctrine, some scholars have advocated for a legislative solution to protect consumers and employees from unfair arbitration. See, e.g., Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PA. ST. L. REV. 1081, 1085 (2009).