No. 05-1119

IN THE

Supreme Court of the United States

CINGULAR WIRELESS, LLC,

Petitioner,

v.

ASTRID MENDOZA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, First Appellate District

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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Dated: May 5, 2006

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America ("the Chamber') hereby respectfully moves for leave to file the following brief in support of the petition for certiorari. Petitioner has filed with this Court a blanket written consent to the filing of *amicus* briefs. Respondents have refused consent, without explanation.

The Chamber is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the state and federal courts, legislatures, and executive branches. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community. In particular, the Chamber has been involved in a wide variety of cases involving the interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Many Chamber members, constituent organizations, and affiliates include in their business contracts standard provisions that, in appropriate circumstances, require the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties and because arbitration minimizes the disruption and loss of good will that often results from litigation. Indeed, based on this Court's consistent endorsement of arbitration over the past several decades (most recently in February 2006), Chamber members have structured millions of contractual relationships around arbitration agreements.

The Chamber is deeply concerned, however, that the decision below (applying the California Supreme Court's holding in *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005)) may cause its members to abandon arbitration in the vast area of ordinary consumer contracts. Individual arbitration of ordinary, limited-value consumer disputes has proved efficient, effective, and satisfactory to both consumers and businesses alike. But, superimposing a class-action requirement onto contractual agreements to arbitrate individually will effectively eliminate the virtues of arbitration, while multiplying the stakes exponentially. The risk to businesses of litigating a class action in the arbitral forum is simply too high, while the benefits of doing so are non-existent. Hence, if allowed to stand, the California Supreme Court's class-arbitration requirement may result in the wholesale abandonment of arbitration in a huge swath of consumer-business transactions, driving up costs, and hence prices, accordingly. The Chamber thus has a strong interest in presenting its views on the pending petition to this Court.

This brief elaborates upon the widespread and significant impact of California's prohibition of class-arbitration waivers in order to demonstrate the significance of the questions presented and the importance of this Court granting the petition. The brief also describes how, in addition to the practical effect of California's rule in burdening arbitration, the decision below and the underlying *Discover Bank* decision ignore the direct discriminatory effects of the rule by wrongly comparing the treatment of arbitration agreements to the treatment of agreements relating to litigation, rather than to the treatment of "any" contract, as required by the FAA. Finally, this brief discusses how California's rule conflicts with the FAA's textual references to "arbitration" by negating what Congress understood to be the essential characteristics of arbitration when it adopted the FAA. Such additional discussion complements the arguments set forth in the petition and can assist

this Court in evaluating whether to grant a writ of certiorari in this case.

Respectfully Submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber') is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

important matters before the state and federal courts, legislatures, and executive branches. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community. In particular, the Chamber has been involved in a wide variety of cases involving the interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Many Chamber members, constituent organizations, and affiliates include in their business contracts standard provisions that, in appropriate circumstances, require the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties and because arbitration minimizes the disruption and loss of good will that often results from litigation. Indeed, based on this Court's consistent endorsement of arbitration over the past several decades (most recently in February 2006), Chamber members have structured millions of contractual relationships around arbitration agreements.

The Chamber is deeply concerned, however, that the decision below (applying the California Supreme Court's holding in *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005)) may cause its members to abandon arbitration in the vast area of ordinary consumer contracts. Individual arbitration of ordinary, limited-value consumer disputes has proved efficient, effective, and satisfactory to both consumers and businesses alike. But, superimposing a class-action requirement onto contractual agreements to arbitrate individually will effectively eliminate the virtues of arbitration, while multiplying the stakes exponentially. The risk to businesses of litigating a class action in the arbitral forum is simply too high, while the benefits of doing so are non-existent. Hence, if allowed to stand, the California Supreme Court's class-arbitration requirement may result in the wholesale abandonment of arbitration in a huge swath of consumer-business

transactions, driving up costs, and hence prices, accordingly. The Chamber thus has a strong interest in presenting its views on the pending petition to this Court.

STATEMENT

The Court of Appeal below held that the class-arbitration waiver in the arbitration agreement between petitioner and its customers was unconscionable and hence unenforceable. Pet. App. 12a-13a. The court based that conclusion on the California Supreme Court's decision in *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), which held that when a class action waiver

> "is found in a consumer contract of adhesion in a setting in which disputes between contracting parties predictably involve small amounts of damages and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent that the obligation at issue is governed by California law, the waiver becomes in practice the exemption of a party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Civ. Code § 1668."

Pet. App. 12a (quoting 113 P.3d at 1110).

Discover Bank also rejected a preemption challenge under the FAA to its class-arbitration rule, holding that because classwide arbitration was "a relatively recent development" and class-action litigation for damages "was for the most part unknown in federal jurisdictions at the time the FAA was enacted," the "Congress that enacted the FAA therefore cannot be said to have contemplated the issues before us." 113 P.3d at 1110. The California Supreme Court concluded that, under generally applicable contract principles of unconscionability, its prohibition of certain class-action waivers did not discriminate against arbitration because "it applies equally to class action litigation waivers in contracts without arbitration

agreements as it does to class arbitration waivers in contracts with such agreements." *Id*. at 1112.

The petition in this case challenges the decision below's reliance on *Discover Bank*'s holding that the FAA does not preempt California's class-arbitration rule. The petition notes that the rule has widespread application to consumer transactions and, as a practical matter, makes consumer arbitration expensive, unwieldy, time-consuming, and unduly risky for companies, effectively destroying its utility and hence discriminatorily burdening arbitration in violation of the FAA. *Amicus* submits this brief to add several additional points in support of the petition for certiorari.

SUMMARY OF ARGUMENT

1. California's rule forbidding class-arbitration waivers in connection with certain consumer contracts and disputes already is affecting numerous transactions across a range of areas, including cell-phone communications, internet service, and consumer banking. Cases from around the country further demonstrate that California's rule will likewise impact a host of other consumer transactions, including computer purchases, cable television service contracts, video rentals, credit card agreements, automobile sales, and telephone service agreements. The combined impact of the rule at issue thus is tremendous in terms of the variety of industries, the number of contracts, and the value of goods and services that will be affected. Arbitration provides substantial benefits to both consumers and businesses in such areas yet effectively would be eliminated therein if California's rule prevails. This case thus presents important national questions that are eminently worthy of this Court's valuable time and attention.

2. California's determination that its anti-waiver rule is not preempted by the FAA because it treats class-arbitration waivers equally to class-litigation waivers misconceives the requirement that States not discriminate against arbitration agreements and may only apply rules applicable to "any" con-

tract. Using agreements concerning litigation as the baseline for evaluating the treatment of arbitration agreements wrongly compares apples and oranges in that arbitration is inherently an *alternative* to litigation, not its equivalent. Substantive unconscionability rules that turn on an agreement's relation to the narrow category of dispute-resolution procedures are not rules applicable to "any" contract and have a targeted impact on arbitration agreements regardless of any concurrent impact on the additional sub-class of litigation agreements. Indeed, by forcing arbitration to emulate litigation, such rules ignore the inherent differences between the two and hence discriminate through a false notion of equality where none exists. California's approach would justify a State imposing *all* required litigation procedures onto arbitration and render the choices protected by the FAA meaningless. Elevating the State's interest in favored procedural devices above the federal interest in private choice regarding alternative procedures in arbitration constitutes improper hostility to arbitration no less than forbidding arbitration outright.

California's rule also conflicts with the necessary meaning of the statutory term "arbitration" throughout the FAA. Multiple sections of the FAA confirm that arbitration is an alternative dispute-resolution procedure defined by the private choices of the parties. Federal courts are directed to compel arbitration "in the manner provided for" in the arbitration agreement. 9 U.S.C. § 4. Numerous cases interpreting the FAA have recognized that "arbitration" encompasses procedures that intentionally vary from those used in litigation and that arbitration procedures are a function of private choice, not government compulsion. The historical context surrounding the adoption of the FAA also reveals that class-arbitration was non-existent when the statute was enacted and hence Congress necessarily understood "arbitration" to involve individualized proceedings when it used that term in the law. The paradigmatic and exclusive form of arbitration existing when Congress decided to protect it cannot be rendered unac-

ceptable or unconscionable *post hoc* by the development of additional types of arbitration well after the statute was enacted.

ARGUMENT

Amicus agrees with petitioner that forbidding class-arbitration waivers largely eliminates the benefits of arbitration while increasing the risks to defendants of massive unreviewable judgments and thus, as a practical matter, constitutes a poison pill that "disproportionately burdens arbitration and hence violates Section 2 of the FAA." Pet. 16. *Amicus* also agrees that the decision below (and the underlying *Discover Bank* decision) conflicts with the decisions of numerous courts around the country and creates an unacceptable inconsistency in the application of the FAA depending on where a suit is brought. Pet. 17-22.

Rather than belabor matters already well-articulated by petitioner, *amicus* will focus on why this case is important and deserving of this Court's limited time and attention, and will discuss how a rule that attempts to equate arbitration with judicial dispute resolution is inherently discriminatory against arbitration and thus violates the FAA.

I. THE PETITION RAISES AN IMPORTANT AND RECURRING ISSUE AFFECTING NUMEROUS TRANSACTIONS IN A BROAD ARRAY OF INDUSTRIES.

As petitioner correctly observes, Pet. 20-22, California's class-arbitration rule already is affecting numerous contracts and transactions, including a plethora of disputes involving cell-phone contracts, internet service contracts, banking transactions, and franchise agreements. But those already existing or decided cases represent a mere fraction of the transactions and industries that stand to be affected should California's rule continue in force.

As cases from around the country demonstrate, many industries and transactions deal with consumers and generate disputes that likely would fall within California's class-arbitration rule. *See, e.g.*, *Dambrosio* v. *Comcast Corp.*, 2005 WL 3543794, at *10, *15 (E.D. Pa. 2005) (challenge to class-arbitration waiver in standard agreement regarding cable television service); *Edwards* v. *Blockbuster, Inc.*, 400 F. Supp.2d 1305, 1307-08 (E.D. Okla. 2005) (challenge to class-arbitration waiver in standard agreement concerning late-return fees for video rentals); *Hubbert* v. *Dell Corp.*, 835 N.E.2d 113, 125-26 (Ill. App. Ct. 2005) (challenge to class-arbitration waiver in standard agreement for purchase of computer), *app. denied*, 844 N.E.2d 965 (Ill. 2006); *Hutcherson* v. *Sears Roebuck & Co.*, 793 N.E.2d 886, 888-89 (Ill. App. Ct.) (challenge to class-arbitration waiver in standard agreement regarding consumer credit cards and credit insurance), *app. denied*, 803 N.E.2d 482 (Ill. 2003); *AutoNation USA Corp.* v. *Leroy*, 105 S.W.3d 190, 194 (Tex. App. 14th Dist. 2003) (challenge to class-arbitration waiver in agreement relating to used-car sales).[2]

In the above examples, and no doubt many others, standard contracts between consumers and businesses will predictably, if not exclusively, involve disputes over limited sums of money and hence any class-arbitration waiver will be deemed unconscionable under the rule of *Discover Bank*. The decision below and *Discover Bank* thus will have a sweeping

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[2] *See also Buckeye Check Cashing, Inc.*v. *Cardegna*, -- U.S. --, 126 S. Ct. 1204, 1207 (2006) (putative class action challenging fees in standard payday lending agreement); *Green Tree Financial Corp*. v. *Bazzle*, 539 U.S. 444, 447 (2003) (attempted class action regarding standard home-improvement loan agreement); *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 82 (2000) (attempted class action asserting Truth in Lending Act claims relating to mobile-home financing and insurance agreement); *In re Universal Service Fund Telephone Billing Practices Litigation*, 300 F. Supp.2d 1107, 1113-14 (D. Kan. 2003) (putative class actions regarding pass-through governmental fees on long-distance telephone bills).

impact and effectively eliminate consumer arbitration well beyond the already substantial area of cell-phone transactions.

Such a result is particularly ironic and troubling given that it eliminates arbitration in just those circumstances where it has been of considerable value to consumers and businesses alike. Indeed, the limited value of many consumer claims is precisely what makes arbitration a sensible and desirable alternative to litigation for such claims. *See, e.g.*, *Iberia Credit Bureau, Inc.* v. *Cingular Wireless, LLC*, 379 F.3d 159, 174 (CA5 2004) (simplicity, informality, and expedition are the "characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims"). In the banking area, for example, consumer-initiated arbitration has been a tremendous success, producing speedy, inexpensive, and satisfactory resolution of a wide variety of consumer disputes. *See, e.g.*, Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 2 (2004).[3] The Ernst & Young study – which covered consumer-initiated arbitration regarding bank accounts, loans, credit cards, and other banking agreements – found that arbitration had recognized advantages over litigation in connection with outcomes, process, costs, and timeliness; consumers prevailed more often than businesses in cases that went to an arbitration hearing; consumers prevailed close to 80% of the time when pre-hearing settlements were taken into account; and nearly 70% of the consumers surveyed were either satisfied or very satisfied with the arbitration process. *Id*.

Given the broad sweep of California's rule prohibiting consumer class-arbitration waivers, the substantial benefits of arbitration in resolving consumer disputes, and the strong federal policy favoring enforcement of arbitration agree-

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[3]Available at http://www.ey.com/global/download.nsf/US/-Outcomes_of_Arbitration/$file/OutcomesofArbitrationAnEmpirical-Study.pdf.

ments, this case presents questions of national importance deserving of this Court's attention.

II. CALIFORNIA'S RULE AGAINST CLASS-ARBITRATION WAIVERS NECESSARILY DISCRIMINATES AGAINST ARBITRATION BY FORCING ARBITRATION TO CONFORM TO THE PROCEDURES FOR LITIGATION.

Petitioner has already correctly described how requiring class-wide arbitration of limited-value consumer claims undermines the valuable qualities of arbitration, tremendously increases the risks to defendants, and thus, as a practical matter, destroys arbitration as a viable means of resolving such claims. Pet. 10-16. Companies subject to such class-wide arbitration would have virtually nothing to gain and everything to lose from such procedures and hence no sensible company will include arbitration clauses in consumer agreements subject to California's rule.[4]

In addition to that *practical* impact on arbitration, however, California's class-arbitration rule *directly* discriminates against arbitration by inappropriately comparing it to, and requiring it to emulate, litigation.

A. Arbitration Clauses Inherently Trade Off the Procedural Trappings and Burdens of Litigation for the Efficiency and Economy of More Limited Means of Dispute Resolution.

The suggestion in *Discover Bank*, 113 P.3d at 1112, that California's rule does not discriminate against arbitration be-

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[4] Ironically, class arbitration is so one-sided against business defendants that *it* would fit the definition of a substantively unconscionable term were it imposed upon the companies, given that no reasonable business would accept a term allowing or requiring class arbitration of such cases. The fact that California, in the name of unconscionability, is forcing businesses into the Hobson's choice of accepting such a one-sided term or forgoing arbitration altogether, illustrates the discriminatory nature of California's application of its unconscionability doctrine.

cause it applies "equally" to class-action *litigation* waivers wrongly compares apples and oranges and thus the case reaches exactly the wrong result regarding preemption. Using laws or doctrines regulating contracts affecting litigation as the baseline for evaluating the regulation of arbitration agreements ignores the basic legal predicate that arbitration agreements have as their essential purpose the opting-out from the litigation system and hence are by their nature *opposites* of, not equivalents to, contracts affecting litigation.

While the FAA indeed allows the application to arbitration agreements of "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, the dispute-resolution-focused unconscionability rule applied in this case is not a ground that exists for "any" contract, but rather a rule applicable only to the narrow class of terms or agreements relating to dispute-resolution procedures themselves. Such a rule covering that narrow sub-category of contracts necessarily has a disparate and non-general impact on arbitration, particularly where the rule seeks to conform dispute resolution to a model based on procedures required in courts.

Unlike general rules concerning the "making" of *any* contract, 9 U.S.C. § 4 – for example doctrines regarding consent, consideration, offer and acceptance, and competence – the doctrine of *substantive* unconscionability is necessarily content-specific. As applied to contracts and terms governing dispute resolution procedures, substantive unconscionability involves grounds that do not apply to all contracts regardless of their *content*, but only apply to contract terms specifically addressing arbitration, litigation, and little else. Arbitration agreements or clauses thus are treated differently from the broader category of *all* contracts, regardless whether agreements or clauses concerning litigation likewise get the same disfavored treatment.

Furthermore, the comparison to litigation agreements does not place arbitration agreements on equal footing with "any" contract, but rather forces arbitration agreements to emulate

litigation agreements and forces arbitration itself to emulate litigation, thus vitiating the very purpose of arbitration agreements. Forcing an apple to become an orange is not treating the two fruits equally, it is discriminating against apples by ignoring the inherent differences between apples and oranges and creating a fictitious notion of equality where none in fact exists.

The essential nature of arbitration, and the reason it is protected under the FAA, is precisely that it is a voluntary *alternative* to litigation, with the attendant procedures left to agreement, not state compulsion. *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989) ("[T]he federal policy [under the FAA] is simply to ensure the enforceability, *according to their terms*, of private agreements to arbitrate."). As this Court has recognized, "parties are generally free to structure their arbitration agreements as they see fit. * * * [T]hey may specify by contract the rules under which that arbitration will be conducted." *Id*. at 478-79. Rather than protecting a particular set of arbitration procedures mandated from above, Congress' "principal purpose" in enacting the FAA was to protect the alternative choices parties made when eschewing litigation and "ensuring that private arbitration agreements are enforced according to their terms." *Id*. at 478. Supplanting private choice regarding arbitration procedures and allowing States to regulate those procedures to the same extent as they regulate litigation procedures destroys the *alternative* character of arbitration and hence discriminates against it.

Were the test for discrimination otherwise, a State could rebut discrimination under the FAA regarding *any* required procedure for which it claimed a public-policy justification and which it applied to litigation. For example, under California's view, an unwaivable requirement of fact-finding by a jury, whether in litigation or arbitration, would be nondiscriminatory and hence not preempted. Similarly the availability of extensive discovery, long timelines for filing claims,

and a right to appeal all could be deemed unwaivable procedural safeguards and hence required in arbitration to the same extent as in litigation. Indeed, *all* of the procedural trappings of litigation have some public-policy justification and hence could be made compulsory in both arbitration and litigation without offending California's conception of the nondiscrimination rule. But such putatively even-handed requirements rightly have been held preempted by the FAA because they discriminate against arbitration by substituting state procedural choices for the protected choices of the parties to arbitration agreements.[5]

California's requirement that arbitration procedures conform to favored litigation procedures supplants the federally protected private choices concerning alternative methods of dispute resolution. Indeed, class-action procedures are good examples of procedures that parties might rightly consider unduly burdensome and hence choose to reject in arbitration agreements. Despite the *State's* deterrence interest in conscripting hordes of class-action attorneys as a police force to remedy putative, imagined, or invented legal violations, it is

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[5] *See, e.g.*, *Bradley* v. *Harris Research, Inc.*, 275 F.3d 884, 889-90 (CA9 2001) (FAA preempts application to arbitration clause of statute forbidding waiver of California venue notwithstanding law's further application to agreements to waive litigation because law governs only a sub-category of contracts and terms, not contracts generally); *OPE Intern. LP* v. *Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (CA5 2001) (same regarding Louisiana statute prohibiting venue waivers or restrictions); *Doctor's Associates, Inc.* v. *Hamilton*, 150 F.3d 157, 163 (CA2 1998) (same regarding New Jersey judicial precedent on venue waivers or restrictions; precedent did not establish generally applicable contract defense.), *cert. denied*, 525 U.S. 1103 (1999); *Saturn Distribution Corp.* v. *Williams*, 905 F.2d 719, 725 (CA4) (FAA preempts application to arbitration agreement of law forbidding contractual waiver of "procedures, forums or remedies" in Virginia, notwithstanding law's applicability to other contract terms not involving arbitration; district court used the wrong "comparison group" of only other contracts subject to the rule rather than contracts generally), *cert. denied*, 498 U.S. 983 (1990).

far from clear that the class members themselves reap much benefit from a class-action suit involving low-value claims.[6]

The FAA protects a federal interest in enforcing private choice regarding the best means for resolving private disputes, notwithstanding a State's desire to advance its *own* governmental interests by commandeering private dispute resolution as a tool of public policy. The State, of course, has ample tools of its own to enforce its laws and deter any low-value but widespread wrongdoing. Suits by the State Attorney General for public injunctive relief and restitution are but two examples. *Iberia Credit Bureau*, 379 F.3d at 175 (authority of Attorney General to sue on behalf of the State and seek restitution for consumers "tends to show that the arbitration clause does not leave the plaintiffs without remedies or" unconscionably "oppress" them). Given such other means of advancing any state interests, sacrificing private choices re-

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[6] Individual members of large classes with low-value claims often get no effective recovery once litigation costs, attorneys fees, and claims processing and distribution costs are taken into account. *Mirfasihi* v. *Fleet Mtg. Corp.*, 356 F.3d 781, 783, 785 (CA7 2004) (claims of class consisting of 1.6 million customers settled for under $2.5 million; speculating whether class counsel settled in order to get a generous fee despite lack of benefit to most class members); Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 168 (1997) ("Particularly problematic is the possibility that class action litigation will produce handsome compensation for class counsel but little discernible benefit for class members."). And the effort required to review complex class notices and to file any subsequent claim form can be equal to or greater than the minimal effort required to arbitrate a small claim. California's skepticism that individual arbitration can be an effective means to vindicate limited-value claims ignores the numerous methods employed by Cingular's arbitration agreement to facilitate such claims. A successful individual arbitration claimant thus likely will do better than a member of a successful class action. Indeed, California does not offer any argument or evidence that consumers themselves – as opposed to plaintiffs' *lawyers* – do better under class proceedings than under individualized arbitration of the type provided by the agreement in this case. To substitute the State's balance of procedural interests for the balance reached by private agreement is precisely the type of hostility that the FAA forbids.

garding arbitration procedures for some marginal further gain in advancing those state interests simply and directly conflicts with the FAA's core policy favoring private choice regarding arbitration.

And even were the State's interest purely paternalistic in that the State thought it was making a better choice for the contracting parties than they made themselves, that still reflects an improper hostility to arbitration that is forbidden by the FAA. Indeed, because the FAA protects private *choice* on whether and how to arbitrate disputes, rather than favoring any particular scope or method of arbitration, the denial of broad choice of arbitration procedures is just as much a hostile act as is the denial of arbitration in total.[7] Freedom to make such choices is precisely the point of opting out of the litigation system and striking different balances between accuracy, efficiency, speed, and economy. *See Iberia Credit Bureau*, 379 F.3d at 176 (forcing arbitration to incorporate "all the procedural accoutrements that accompany a judicial proceeding" undermines "the point of arbitration," which is that "one 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). California's attempt to extend its control over litigation procedures into control over arbitration procedures is a directly discrimi-

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[7] Hostility to arbitration is often a function of hostility to *arbitrators*, who are viewed by some States as insufficiently dedicated to or protective of various substantive public policies, or at least less sensitive to such policies than are judges. But such improper hostility also arises from hostility to the procedures arbitration agreements substitute in order to avoid the burdens and expense of litigation. The notion that the State has a monopoly on the wisdom needed to create desirable dispute resolution procedures is a direct negation of the FAA's mandated respect for private choice and hence an impermissible hostility to arbitration agreements regardless whether the State is *also* hostile to agreements affecting litigation.

natory and hostile act toward arbitration and the very notion of private choice protected by the FAA.

B. The FAA's Reference to "Arbitration" Plainly Encompasses Individualized Dispute Resolution Proceedings as Within Its Protection.

In addition to the inherent discrimination of using litigation requirements as the baseline for testing restrictions on arbitration agreements, the FAA's history and textual references to "arbitration" show that Congress plainly understood such arbitration to be individualized dispute resolution between the parties to the agreement, yet protected it anyway.

The FAA provides substantive federal protection to an agreement to "settle [a subsequent controversy] by arbitration." 9 U.S.C. § 2; *id*. (agreement "to submit [an existing controversy] to arbitration"). Fundamental to the application of the FAA is an understanding of the meaning of the word "arbitration." The FAA contains no express definition of arbitration, but it does offer a variety of contextual and historical insights into what was meant by the term.

First, numerous provisions of the FAA establish that arbitration is a dispute resolution *procedure* created by *agreement*. Section 3 of the FAA provides for a stay of a suit in federal court until "arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. Section 4 of the FAA is even more explicit, allowing a party to an arbitration agreement to petition a federal court "for an order directing that such arbitration proceed *in the manner provided for in such agreement*." 9 U.S.C. § 4 (emphasis added).[8] Even

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[8] The suggestion in *Discover Bank* that § 4 has no bearing on the issues here because that section does not directly apply to arbitration enforcement in state court, 113 P.3d at 1112, ignores the fundamental principle of statutory construction that each provision of a statute provides context to the other provisions and all should be read in harmony with each other. *Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956) (FAA sections "are integral parts of a whole" that must be read together). Inso-

on procedural matters such as selecting an arbitrator, the FAA recognizes the primacy of private choice of procedures and provides default rules only where such choice has not been exercised. 9 U.S.C. § 5 (requiring "method" for naming or appointing an arbitrator to be followed if provided in the agreement and default method if not so provided). Such contextual evidence demonstrates that the procedures or "manner" of arbitration were considered by Congress to be matters determined by agreement of the parties, not by external imposition. And given that the only arbitration that existed when the FAA was adopted was individualized arbitration, the FAA necessarily contemplated (and endorsed the fact) that arbitration agreements would "provide[] for" arbitration in such an individualized "manner."

Second, the purposes of the FAA and the numerous cases interpreting it all recognize that arbitration is a procedure that intentionally varies from the procedures applied in court and is designed to be a function of private choice. *See, e.g.*, *Ultracashmere House, Ltd.* v. *Meyer*, 664 F.2d 1176, 1180-81 (CA11 1981) (purpose of FAA was "to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation") (overruled in part on other grounds as recognized in *Baltin* v. *Alaron Trading Corp.*, 128 F.3d 1466, 1469 n. 8 (CA11 1997), *cert. denied*, 525 U.S. 841 (1998)); *Revere Copper and Brass Inc.* v. *Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (CADC) ("The goal of Congress in passing [the FAA] was to establish an alternative to the complications of litigation."), *cert. denied*, 446 U.S. 983 (1980); *American Almond Prods. Co.* v. *Consolidated Pecan*, 144 F.2d 448, 451 (CA2 1944) (*per* L. Hand, J.) (regarding agreement to arbitrate according to AAA rules; "Arbitration may or may not be a desirable substitute for trials

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far as the other sections shed light on what Congress meant by "arbitration," or how it understood the reach of an "agreement" to arbitrate, those provisions are material to the interpretation of the language in § 2 as well.

in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid."); *Petition of Dover S.S. Co.*, 143 F. Supp. 738, 740 (S.D.N.Y. 1956) ("One of the major purposes of arbitration is to expedite the disposition of commercial disputes without the restrictive conditions characteristic of judicial proceedings."); *Farris* v. *Alaska Airlines*, 113 F. Supp. 907, 908 (W.D. Wash. 1953) ("The primary function of arbitration is to serve as a substitute for and not a prelude to litigation."); *Western Canada S.S. Co.* v. *Cia. De Nav. San Leonardo*, 105 F. Supp. 452 (S.D.N.Y. 1952) ("parties contracting for arbitration must be content with its informalities").

Indeed, one of the clear concerns reflected in the legislative history of the FAA was with the inadequacy of state laws that allowed arbitration only if the parties agreed to particular state rules and thus failed to protect arbitration agreements containing procedures that varied from such rules. Hearing on S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 8 (1923) (criticism of state courts subject to state laws allowing only "technical arbitration by which, if you agree to arbitrate under the method provided by the statute, you have an arbitration by statute * * * [which has] nothing to do with validating the contract to arbitrate").

Third, as a historical matter, "arbitration" as used in the FAA necessarily encompassed *individualized* arbitration regarding a particular dispute given that such arbitration was the *only type* that even existed in 1925. *Discover Bank* recognizes that class arbitration was unheard of at the time the FAA was adopted, 113 P.3d at 1110, and hence that the FAA necessarily contemplated only individual arbitration and not class arbitration. *Discover Bank* wrongly concludes from the prior absence of class arbitration or class actions for damages that the validity of class-arbitration waivers is an open ques-

tion not considered by Congress in 1925 and hence not resolved by the language of the FAA itself, but rather left to the application of more generalized principles regarding FAA preemption. *Id*. That conclusion, however, interprets the history precisely backwards. If the issue is properly framed as whether the FAA expresses a position on whether individualized arbitration could be unacceptable or unconscionable simply by virtue of its individualized (as opposed to class-wide) nature, then the FAA certainly reflects a clear and strong answer to *that* question: Individualized arbitration was plainly an acceptable and protected form of arbitration. Indeed, it was the *only* form of arbitration the FAA could have been referring to at the time.[9]

To say that a procedure fully contemplated by Congress as encompassed within the term "arbitration" is nonetheless unconscionable based on *subsequent* state-law public policy favoring the later-developed class-action procedure is to conflict with the express wording and intent of the FAA. While class arbitration may have been unknown to the FAA's framers, individualized arbitration *was* well-known. The more accurate conclusion from that history is that Congress viewed individualized arbitration as the *paradigm* of what it was protecting. Finding such paradigm arbitration unconscionable as compared to alternative procedural devices not then in existence is a direct repudiation of Congress's judgment that individualized "arbitration" was worthy of protection.

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[9] That is not to say that the FAA would *not* protect a private choice to adopt class-arbitration procedures – the statute is all about such choice, after all. *Bazzle*, 539 U.S. at 454 (remanding for arbitral determination of whether the *agreements* permit class arbitration in order to "enforc[e] the parties' arbitration agreements according to their terms"). Rather, it simply demonstrates that the FAA clearly *approved* of the only type of arbitration that existed at the time – individualized arbitration.

California's prohibition of waiving class-arbitration procedures discriminates against arbitration not merely as a practical matter, but also as a direct matter in that it uses the treatment of litigation agreements as an improper basis of comparison, rather than using the legal treatment of "any" contract. California's rule also directly conflicts with the FAA's references to "arbitration" and the historical meaning of that term as involving procedural choice and encompassing individualized proceedings. Because the decision below on preemption is wrong and will have a tremendous adverse impact on the use of consumer arbitration, this case warrants full review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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