No. 20-1573

In the Supreme Court of the United States

VIKING RIVER CRUISES, INC.,
Petitioner,

v.

ANGIE MORIANA,
Respondent.

On Writ of Certiorari to the California Court of Appeal

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ files this brief for two reasons. First, this brief highlights the fundamental preemption principles that must apply in every preemption case, including cases involving the Federal Arbitration Act. Second, this brief explains how those preemption principles, properly applied, do not authorize preemption of California's rule prohibiting the prospective waiver of statutory claims. Based on its members' expertise in both arbitration and litigation—and its organizational concern for the development of the law on those issues—AAJ is well positioned to offer a unique perspective on these issues.

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[1] No party's counsel authored any part of this brief, and no party or party's counsel contributed money intended to fund its preparation or submission. All parties have provided written consent to the brief's filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a litigant presses a "purposes-and-objectives" theory of implied preemption to preempt state law, the federal purpose on which it relies must be evident "in the text and structure of the statute at issue." *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020).[2] That is because, in every preemption case, "[t]he purpose of Congress is the ultimate touchstone." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). And "the best evidence" of the purpose of a statute "is the statutory text." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

Yet, in this case, Viking advances a theory of implied preemption that is divorced from any statutory text. Viking contends that the Federal Arbitration Act preempts California's rule prohibiting the prospective waiver of statutory rights—specifically here, claims under California's Private Attorney General Act (PAGA). But the company cannot identify any textual basis for preemption. Instead, invoking unstated federal interests in "streamlined" and "efficient" proceedings, Viking argues that its waiver of PAGA claims must be enforced because PAGA actions are "incompatible" with arbitration's informal, individualized, and bilateral nature—its purportedly "fundamental attributes."

Viking's atextual theory runs headlong into basic preemption principles. Implied conflict preemption under the FAA, just like any other form of preemption, must be based in the Act's text and structure—it cannot simply "invok[e] some brooding federal interest or appeal[] to a judicial policy preference." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1984, 1901 (2019) (plurality opinion).

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[2] Unless otherwise specified, all internal quotation marks, alterations, and citations are omitted from quotations throughout.

But that's precisely what Viking is asking this Court to do. Its argument for preemption identifies a "purpose" that relies not on the text of the FAA but on the company's own gloss on dicta from certain cases expressing judicial preferences for some aspects of arbitration (that itself conflicts with dicta from other cases expressing different preferences). And it asks this Court to impute that "purpose" to Congress which then, in turn, can be used to invalidate California's prospective-waiver rule. Viking's unmoored and cavalier approach to "purposes-and objectives" preemption has no place in this Court's preemption jurisprudence.

The FAA's text, and this Court's case law interpreting that text, demonstrate that the FAA preempts two kinds of laws. Under the FAA, a state law is preempted if it disfavors arbitration contracts as compared to non-arbitration contracts, or if it overrides the parties' agreement about the arbitration's rules and procedures. The prospective-waiver rule here does neither. It is a generally applicable contract law, and it does not require any procedures that contradict the procedures to which the parties agreed. Indeed, the rule says nothing about how the parties should arbitrate PAGA claims—it simply prohibits contractual waivers of the right to pursue such claims in *any* forum. Because California's rule does not conflict with any of the FAA's textually discernible purposes, this Court should hold that the rule is not preempted and affirm.

ARGUMENT

I. Under the Supremacy Clause, it is only the text and structure of a federal law—not some brooding federal interest or judicial policy preference—that may validly preempt state laws.

The Constitution provides that the "laws of the United States" are the "supreme law of the land," and, accordingly, that those laws may preempt state law. U.S. Const. art. VI, cl. 2. This mandate "supplies a rule of priority" that, when state and federal law conflict, state law must give way. *Virginia Uranium*, 139 S. Ct. at 1901.

But because this rule was born out of our "system of dual sovereignty between the States and the Federal Government," the "delicate balance" it struck means that *every* question of preemption "starts with the basic assumption that Congress did not intend to displace state law," *Gregory v. Ashcroft*, 501 U.S. 452, 457, 460 (1991); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). And it ends with "what can be found in the law itself," not "abstract and unenacted legislative desires." *Virginia Uranium,* 139 S. Ct. at 1907–08.

That's why, though "the purpose of Congress is the ultimate touchstone" in every preemption case, that purpose must be discerned from the text of the statute. *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963). Federal law cannot preempt state law "unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). And that purpose must be discerned "from either the Constitution itself or a valid statute enacted by Congress," *Garcia*, 140 S. Ct. at 801, not a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," *Chamber of Com. of U.S. v. Whiting*,

563 U.S. 582, 607 (2011) (opinion of Roberts, C.J.). That is because "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Ultimately, then, courts must look "to the text and context of the law in question" and be "guided by the traditional tools of statutory interpretation." *Virginia Uranium*, 139 S. Ct. at 1901.

Often, Congress expressly preempts state law by enacting a clear statement to that effect. *See Garcia*, 140 S. Ct. at 801. If the statute contains an express preemption clause, the inquiry is straightforward: The "plain wording of the clause . . . necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

But Congress may, in some cases, also preempt state law implicitly. This occurs when a state law "actually conflicts with federal law," *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), either because "compliance with both state and federal law is impossible," or because "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015); *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Unable to show any basis in the text of the FAA, Viking's entire argument rests on this second type of preemption. But this type of preemption is no more a license for the assertion of freewheeling judicial assumptions about unwritten congressional intent than the others. It, too, requires identifying a direct conflict with Congress's purpose—a purpose that must be evident from the text and structure of the statute. "Invoking some brooding federal interest or appealing to a judicial policy preference" is never enough. *Virginia Uranium*, 139 S.

Ct. at 1901. As a result, "a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law." *Id.*

II. Consistent with these principles, the scope of implied FAA preemption is cabined by its text.

No less than with any other statute, preemption under the FAA must adhere to these fundamental principles. "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stan. Jr. Univ.*, 489 U.S. 468, 477 (1989). Instead, the only possible way that the statute can preempt state law is through implied "purposes and objectives" preemption—that is, a state law is preempted if, and only if, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines*, 312 U.S. at 67). When confronting an argument that the FAA preempts some state law, identifying the purposes and objectives of Congress must start and end with the text and structure of the statute itself. *Virginia Uranium*, 139 S. Ct. at 1901.

The text of the FAA's "primary substantive provision," section 2, serves as the basis of its implied preemptive power. *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011). It provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Relying on this provision, this Court has identified two principal categories of state laws that may be impliedly preempted by the FAA.

Category 1: The first category of laws that have been found to conflict with the FAA are those that impermissibly disfavor arbitration.

This Court has recognized that section 2's savings clause—which allows court to refuse enforcement of arbitration contracts "upon such grounds as exist at law or in equity for the revocation of any contract"—"establishes an equal-treatment principle." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Accordingly, courts may invalidate arbitration contracts based on "generally applicable contract defenses," but not "on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.*

Based on this equal-treatment principle, the FAA preempts "any state rule discriminating on its face against arbitration," or any "rule that covertly accomplishes the same objective by disfavoring contracts that . . . have the defining features of arbitration agreements"—because such laws "fail[] to put arbitration agreements on an equal plane with other contracts." *Id.* at 1426–27 (noting the "FAA's edict against singling out [arbitration] contracts for disfavored treatment").

The most obvious example of such laws are those that prohibit outright the arbitration of certain claims. *See, e.g.*, *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530 (2012) (FAA preempts state law prohibiting arbitration of personal-injury or wrongful-death claims); *Perry v. Thomas*, 482 U.S. 483 (1987) (holding preempted state law prohibiting arbitration of certain state statutory claims). But this category of preempted laws also includes other

state laws that explicitly or implicitly disfavor arbitration, such as "clear-statement rules" requiring explicit language before arbitration contracts will be enforceable that do not apply to other kinds of contracts. *See, e.g.*, *Kindred Nursing*, 137 S. Ct. at 1425; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) (same, noting that section 2's savings clause "preclude[s] states from singling out arbitration provisions for suspect status").

Category 2: The second category includes state laws that override the parties' arbitration contract by rewriting "*the rules* under which that arbitration will be conducted" or the terms specifying "*with whom* the parties choose to arbitrate their disputes." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Once again focusing on section 2, this Court has read the statute's textual command that arbitration contracts "shall be valid, irrevocable, and enforceable" as articulating a "principal purpose" of ensuring "that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344. The plain text of other sections of the FAA, namely sections 3 and 4, reinforce this core purpose. *See* 9 U.S.C. § 3 (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); *id.* § 4 (providing for "an order directing that . . . arbitration proceed in the manner provided for in such [an] agreement"). Because "[t]his purpose is readily apparent from the FAA's text," this Court has held, state laws or rules that "interfere[]" with it are preempted by the FAA. *Concepcion*, 563 U.S. at 344.

Concepcion provides an example. There, a state-law rule allowed a party to "demand" *ex post* arbitration procedures that were inconsistent with the terms of the underlying arbitration contract: Where the contract specified individual arbitration only, the state-law rule

permitted a party to pursue classwide arbitration proceedings instead. *Id.* at 346. Such a law, this Court explained, "stand[s] as an obstacle to the accomplishment of the FAA's objective[]" of ensuring that contractual terms regarding arbitration procedures or the parties with whom an arbitration will take place are enforced. *Id.* at 343; *see also Epic Sys.*, 138 S. Ct at 1623 (explaining that, under the FAA, courts may not "mandate[e] . . . arbitration procedures without the parties' consent"); *Lamps Plus, Inc v. Varela*, 139 S. Ct. 1407, 1418 (2019) (holding preempted generally applicable "neutral" rule of contract law because it would authorize courts to "impose class arbitration in the absence of the parties' consent").

In sum, the FAA's text reflects two purposes: Arbitration contracts should be treated the same as non-arbitration contracts, and agreements about how and with whom to arbitrate should be enforced according to their terms. State laws that conflict with those textually discernible purposes—and only those purposes—are preempted under the FAA.

III. Nothing in the text of the FAA demonstrates that Congress intended to preempt California's rule prohibiting prospective waiver of PAGA claims.

Viking's attempt to displace California's prospective-waiver rule based on a "purposes-and-objectives" theory of implied conflict preemption founders on these well-established principles. All of the preempted laws described above conflicted with one of the purposes that derives explicitly from the FAA's text. The prospective-waiver rule at issue here does not. It does not violate the equal-treatment principle, because it applies equally to arbitration and non-arbitration contracts. And it does not override the parties' choices about how to conduct

arbitration; it simply prohibits parties from waiving statutory claims in *any* forum.

So Viking and its amici are left to invoke a vague—and atextual—federal interest in preempting laws "that interfere with fundamental aspects of arbitration." Pet. Br. 3. In Viking's view, the FAA requires enforcing its prospective waiver of PAGA claims because adjudicating such claims is "fundamentally incompatible" with "streamlined, traditional . . . arbitration." *Id.* at 16–17; *see also* Chamber Br. at 5 (asserting that claims involving increased "complexity and high stakes" are "incompatible with the FAA"). As Moriana explains, that is wrong on its own terms. *See* Resp. Br. 25–34. But, more importantly, nothing in section 2—or anywhere else in the Act—supports this theory of preemption. This Court has made clear time and again that generalized federal interests, detached from any statutory text, are not a proper basis for preempting a state law. *See, e.g.*, *Garcia*, 140 S. Ct. at 801; *Virginia Uranium*, 139 S. Ct. at 1901. It should do so again here and reject Viking's illegitimate preemption arguments.

A. The prospective-waiver rule does not disfavor arbitration or mandate arbitration that is inconsistent with the parties' contract.

As explained above, the FAA's text authorizes two (and only two) forms of implied preemption: State laws are preempted if they (1) impermissibly disfavor arbitration, or (2) override the contract's terms about the procedures under which or the parties with whom the arbitration will take place. California's prospective-waiver rule falls into neither category. It therefore cannot be preempted under the FAA.

1. Viking hardly tries to argue that the prospective-waiver rule offends section 2's equal-treatment

principle—the primary preemption theory discernible from the FAA's text. For good reason: The rule is a "ground[ ] . . . for the revocation of any contract." 9 U.S.C. § 2. Put differently, the rule is a "generally applicable contract defense[]," *Casarotto*, 517 U.S. at 687, because it "bars *any* waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432 (9th Cir. 2015) (emphasis added); *see also* Resp. Br. 38–40.

And this Court has long recognized that such a prospective-waiver rule is *consistent*, not incompatible, with the FAA. Courts must invalidate any contract—arbitration or otherwise—that attempts to foreclose "the assertion of certain statutory rights," because such a contract would jeopardize a party's "right to pursue statutory remedies." *Am. Express Co. v. Italian Colors Res.*, 570 U.S. 228, 236 (2013). This Court has in fact recognized this rule for as long as it has applied the FAA to statutory claims. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (holding that "a substantive waiver of federally protected civil rights will not be upheld"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (noting that arbitration must permit a party to pursue statutory claims so that "the statute will continue to serve both its remedial and deterrent function"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) ("condemning" a contract that would foreclose the right to pursue statutory claims as "against public policy"). Under the FAA, then, an arbitration contract (no less than any other) is invalid where it attempts to "eliminat[e] . . . the right to pursue" a statutory remedy. *Am. Express*, 570 U.S. at 236.

In this respect, the rule at issue here critically differs from the vast majority of state laws that this Court has held preempted under the FAA. Unlike discriminatory clear-statement rules (or outright bans on arbitrating certain claims), California's prospective-waiver rule does not "derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing*, 137 S. Ct. at 1426. The rule is agnostic about whether the waiver is in an arbitration contract or a non-arbitration contract—indeed, it has nothing to say about whether PAGA claims can be arbitrated or not. All it does is prohibit contractual waivers of the right to pursue PAGA claims in *any* forum.

Under the FAA, arbitration contracts must be "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Because the prospective-waiver rule treats arbitration contracts equally to non-arbitration contracts, it is not preempted.

2. The second form of implied conflict preemption that the FAA authorizes is also inapplicable here. Nothing about the prospective-waiver rule overrides the contract's terms as to "the rules under which th[e] arbitration will be conducted" or "with whom the parties choose to arbitrate their disputes." *Epic*, 138 S. Ct. at 1621.

That is why, contrary to Viking's assertions, this Court's cases preempting state-law rules imposing classwide arbitration procedures do not control the question presented here. The problem there was that the state rule allowed parties to demand *ex post* procedures that conflicted with the parties' arbitration contract. In *Concepcion*, for instance, this Court recognized that classwide arbitration "necessitate[ed] additional and different procedures"—a level of "procedural formality"

not contemplated by the parties. 563 U.S. at 348-49; *see also Epic*, 138 S. Ct. at 1622–23.

But unlike class arbitration, PAGA does not "prevent[] parties from selecting the procedures they want applied in arbitration." *Sakkab*, 803 F.3d at 434. If Viking's contract had not waived PAGA claims but instead required arbitration of those claims, the parties would be free to arbitrate the claims under ordinary arbitration rules and procedures. *See, e.g.*, *id.* at 439; Resp. Br. 32–33. Viking and its amici complain that PAGA claims are more complex than, for example, other kinds of wage-and-hour claims. But they do not argue that this complexity mandates that arbitrators override the *procedures* chosen by the parties or the *rules* that otherwise govern the arbitration. And, as this Court has already held, nothing in the FAA prevents arbitration of potentially complex or broad statutory claims. *See Mitsubishi*, 473 U.S. at 633 (holding that "potential complexity should not suffice to ward off arbitration"); *see also, e.g.*, *Epic*, 138 S. Ct. at 1623 (explaining that "parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis"); *Concepcion*, 563 U.S. at 351.

3. Of course, as Moriana explains, Viking's challenge to the prospective-waiver rule suffers from a more fundamental problem: Section 2 does not apply at all. *See* Resp. Br. 15–20. So this Court need not even analyze whether Viking satisfies either of the two textually discernible forms of implied conflict preemption discussed above—it can reject Viking's arguments at the outset.

The FAA's text provides that courts must enforce contractual provisions "to settle by arbitration a controversy." 9 U.S.C. § 2. It has nothing to say about agreements *not* to settle a controversy by arbitration.

Why would it? The entire point of the statute is "to ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

But Viking's contractual waiver is in no way an "agreement to arbitrate." The waiver says nothing about arbitrating any claims—it simply extinguishes them *ex ante*. In fact, Viking repeatedly admits (at 18, 19, 23) that the waiver requires its employees to "*forgo* PAGA claims" altogether.

A state-law rule prohibiting such a waiver falls outside of section 2's preemption framework entirely. A theory of implied preemption that would require enforcement of contractual provisions extinguishing claims—as opposed to arbitrating them—is thus entirely divorced from section 2's text. It is also inconsistent with this Court's precedent: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628.

B. Viking's theory that the prospective-waiver rule interferes with arbitration's fundamental attributes has no basis in the FAA's text, and thus is an illegitimate justification for preemption.

Instead of explaining why the prospective-waiver rule should be preempted under the text-based theories identified above, Viking looks elsewhere. It contends (at 31) that preemption is warranted because PAGA actions are incompatible with certain purportedly "fundamental attributes of arbitration"—and, in particular, its bilateral, informal, and speedy nature. *See also* Chamber Br. at 10–11 (asserting that PAGA claims are incompatible with the FAA because they "require[] an unwieldy process" that is

"slower, more costly, and more likely to generate procedural morass").

This is wrong on its own terms, for the reasons set out in Moriana's brief (at 25–34). For starters, PAGA actions are bilateral, not multilateral; they are disputes between the employer on one hand, and the aggrieved employee, acting as the State's agent, on the other. So there is no concern about aggregating parties and their individual claims, as there might be with class and collective actions. Further, the adjudication of PAGA claims does not involve the complex and potentially burdensome procedures that are required to adjudicate class or collective actions, where procedural formality is necessary to protect the absent class members' due-process rights.

But Viking's preemption theory is flawed at a deeper level—it is unmoored from the FAA's text. Indeed, Viking and its amici make little effort to ground their preemption theory in the FAA's text or its stated purposes. Viking argues, for instance, that the prospective-waiver rule is preempted because it would make the resolution of PAGA claims "'slower, more costly, and more likely to generate procedural morass than final judgment.'" Pet. Br. 26 (quoting *Concepcion*, 563 U.S. at 348). And it contends that PAGA claims are "inappropriate for arbitration" because of the "potential for unwieldy proceedings" that "would plainly eliminate the 'lower costs' and 'greater efficiency and speed'" that the FAA demands. Pet. Br. 28 (quoting *Concepcion*, 563 U.S. at 348). Its amici say much the same thing. *See* Chamber Br. at 10–13 (asserting that, under *Concepcion*, because a PAGA claim "requires an unwieldy process that bears no resemblance to traditional individualized arbitrations" it is therefore "incompatible with the FAA").

But this Court has already rejected the notion that "potential complexity" is fundamentally incompatible with arbitration. *See Mitsubishi*, 473 U.S. at 632–33. Indeed, *Mitsubishi* explicitly rejected the argument that "complicat[ed]" claims requiring "sophisticated legal and economic analysis" are "ill-adapted to strengths of the arbitral process." *Id.* As this Court explained, "adaptability and access to expertise are hallmarks of arbitration." *Id.* Viking's position—that arbitration is fundamentally incapable of handling complex claims—reflects the very hostility to arbitration that the FAA was designed to avoid.

Viking does not try to engage with this precedent—in fact, it barely mentions *Mitsubishi* in its brief. Instead, it relies heavily on this Court's decision in *Concepcion*. But, as explained above, *Concepcion* involved a state-law rule that allowed parties, after the fact, to impose class-arbitration procedures that conflicted with the procedures set out in the arbitration contract. *See Concepcion*, 563 U.S. at 349. The rule at issue here does nothing of the sort—it merely prohibits parties from requiring a prospective waiver of statutory rights. Despite Viking's characterization of the case, *Concepcion* did not hold that, under the FAA, arbitration can only involve simple claims. Nor could it have: Nothing in the FAA's text supports such a reading, and this Court has already rejected it. *See Mitsubishi*, 473 U.S. at 633.

To be sure, *Concepcion* did highlight certain qualities the majority believed were typical of individual arbitration. *See id.* at 348–51. But none of these qualities—"informality," "lower costs," or "greater efficiency and speed"—can be found in the FAA's text. Nor did *Concepcion* meaningfully attempt to locate these concepts in the statutory text or structure.

Nevertheless, to the extent that Viking reads *Concepcion* to suggest that these qualities, standing alone, can be dispositive of FAA preemption analysis, it is wrong. *Concepcion* did say, without reference to the FAA's text, that an "overarching purpose" of the Act is "to facilitate streamlined proceedings." *Id.* at 344; *see id.* at 346 (identifying "achiev[ing] streamlined proceedings and expeditious results" as one of the FAA's goals). But on what basis did *Concepcion* derive this purpose, if not from the text? First, the opinion cited legislative history discussing the "the costliness and delays of litigation." *Id.* at 345. And next, it cited language from its *own* arbitration precedent. *See id.* at 345–46.[3]

These thin reeds are not enough to justify preemption of a state law based on its purported conflict with what a handful of judges believe to be the generalized "ideal type" qualities of arbitration. Indeed, it is exactly the approach to preemption that this Court has repeatedly criticized: A preemption inquiry that turns entirely on unstated "brooding federal interest[s]" and "appeal[s] to a judicial policy preference." *Virginia Uranium*, 139 S. Ct. at 1901. In no other area would this Court countenance an implied conflict preemption theory with no support in the relevant statutory text, and instead predicated on unclear legislative history and snippets of contradictory language in this Court's cases. It should not treat arbitration any differently.

Under the FAA, just as under any other federal statute, a party seeking preemption must point to "the text and context of the law in question," "guided by the

[3] To be clear, nothing in the FAA's legislative history supports the contention that Congress wanted to limit arbitration to uncomplicated or easily resolved claims. Neither, of course, does this Court's precedent. *See Mitsubishi*, 473 U.S. at 633.

traditional tools of statutory interpretation." *Id.* Viking fails to do so. Instead, it invites this Court to undertake a "freewheeling judicial inquiry into whether" California's prospective-waiver rule "is in tension with federal objectives." *Whiting*, 563 U.S. at 607. This Court should reject that invitation and instead reiterate that, even under the FAA, preemption must always "be grounded in the text and structure of the statute at issue." *Garcia*, 140 S. Ct. at 804.

CONCLUSION

The Court should affirm the judgment of the court of appeal.

Respectfully submitted,

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