No. 13-351

IN THE

Supreme Court of the United States

BINGHAM MCCUTCHEN LLP,

Petitioner,

v.

HARTWELL HARRIS,

Respondent.

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

After the Petition for a Writ of Certiorari was filed, Ms. Harris dismissed her claims against Seth Gerber and Jonathan Loeb. Bingham McCutchen LLP is now the only petitioner, so all parties to the proceeding are listed in the caption.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Under the rule adopted in *Warfield* v. *Beth Israel Deaconess Medical Center, Inc.*, 910 N.E.2d 317 (Mass. 2009), and applied by the California court of appeal in this case, when parties agree to arbitrate "any legal disputes * * * which arise out of, or are related in any way to * * * employment * * * or its termination," Pet. App. 4a, a court will not compel arbitration of employment-discrimination claims because they are not clearly and specifically listed in the arbitration agreement. This Court and others have rejected similar rules because the Federal Arbitration Act (FAA) prohibits any rule that targets arbitration agreements and makes their enforceability contingent on public policy. See Pet. 10–24.

Ms. Harris barely disputes that the decisions upholding the clear-and-specific statement rule conflict with FAA precedents. She mainly contends that this case does not present the lawfulness of the rule—a puzzling contention, since the lower court opined on it at length. See Pet. App. 11a–14a. The only question presented, she asserts, is whether the Massachusetts choice-of-law clause in Bingham's arbitration agreement excuses the lower court's application of the rule or otherwise prevents Bingham from arguing that the rule is preempted. Ms. Harris also tries to recast the clear-and-specific statement rule as a rule for determining the extent of contracting parties' intent to arbitrate. Because her objections to certiorari lack merit, and because the clear-and-specific statement rule cannot be reconciled with settled FAA jurisprudence, the Court should grant Bingham's petition.

I. CHOICE OF LAW HAS NO BEARING ON THE QUESTION PRESENTED.

Ms. Harris spends most of her brief trying to answer her own question presented—a choice-of-law question that was neither raised nor decided below. See Opp'n at i. She supposes that "the Massachusetts choice of law clause" in Bingham's arbitration agreement "signal[s] its unequivocal intent *not* to apply California law or FAA," but to apply Massachusetts law, warts and all. *Id.* at 11. Thus, she maintains, this is not a case about whether the FAA preempts the clear-and-specific statement rule. She sees this case as presenting a factbound question of one court's application of another state's law. *Id.* at 10.

But the court of appeal did not read the choice-of-law clause as signaling Bingham's intent to opt out of the FAA or as altering the preemption analysis. In deciding whether "Massachusetts law is preempted because it is inconsistent with the Federal Arbitration Act," the court held that Bingham's choice of Massachusetts law has *no* effect on preemption. Pet. App. 11a. A choice-of-law clause may be "interpreted to incorporate the chosen state's laws" only "to the extent a state law is not inconsistent with the Federal Arbitration Act's policies." *Ibid.* So the lower court considered preemption on the merits, adopting the rationale of the *Warfield* court. *Id.* at 11a–14a. Indeed, the lower court followed in *Warfield*'s footsteps: in that case, the Supreme Judicial Court considered preemption even though the parties chose Massachusetts law, and its conclusion that the FAA did not preempt the clear-and-specific statement rule was completely unaffected by the parties' choice of law. 910 N.E.2d at 322, 326–327 & n.14. Both courts, therefore, aligned with the Ninth

Circuit in understanding that the "contention that the parties intended for state law to govern the enforceability of [the] arbitration clause, even if the state law in question contravened federal law, is nonsensical." *Murphy* v. *DirecTV, Inc.*, 724 F.3d 1218, 1226 (CA9 2013).

Ms. Harris seizes on this Court's statement that "interpretation of private contracts is ordinarily a question of state law." Opp'n 19, 23 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 474 (1989)). That presumption has no bearing here because Bingham does not now complain that the lower court "erred in interpreting the choice-of-law clause." *Volt*, 489 U.S. at 474. Below, Bingham advanced several arguments that *Massachusetts* arbitrability rules should not apply to Ms. Harris's *California* employment-discrimination claims, but the court of appeal interpreted Bingham's choice-of-law clause as embracing the mismatch—as long as Massachusetts law is consistent with the FAA. See Pet. App. 6a–11a. Bingham does not challenge that choice-of-law holding now but complains only that the lower court erred in holding Massachusetts law (*i.e.* the clear-and-specific statement rule) not preempted.

Ms. Harris misreads *Volt* as having "declined" to address preemption in light of the parties' choice of state law. Opp'n 32. *Volt* declined to decide only whether Sections 3 and 4 of the FAA—sections governing arbitration procedure—apply in state court. Addressing preemption on the merits, the Court held that Sections 3 and 4 did not conflict with the state law at issue even if they applied in state court. Those sections set default procedures, which parties are free to modify. See *Volt*, 489 U.S. at 476–479.

Section 2 of the FAA and state rules on arbitrability or enforceability, however, are outside *Volt*'s holding. Ms. Harris resists circumscribing *Volt*, see Opp'n 33, but that is what this Court has done. *Volt* itself distinguishes between arbitration procedures and arbitrability rules, and later opinions read *Volt* as hinging on the distinction. See *Volt*, 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) ("The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself.").

Ms. Harris's approach to general choice-of-law clauses—as renouncing the FAA and incorporating preempted arbitrability and enforceability rules—is unprecedented and extreme. *Volt* does not support it. The two federal court of appeals opinions she cites do not support it, either.[1] Dissenting in *Volt*, Justice Brennan cautioned that extending *Volt*'s holding to arbitrability rules—as Ms. Harris wishes the lower court did here—would spell the end of the

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[1] The Eighth Circuit did not consider the question because, like the court below, it read the parties' choice-of-law clause as rejecting preempted state law. See *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 997 (CA8 1998). The Fifth Circuit, considering a choice-of-law clause that mentioned the Texas General Arbitration Act by name, was not asked to decide whether Texas's arbitration rules conflict with the FAA. See *Ford* v. *NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 247–250 (CA5 1998).

FAA because "[m]ost commercial contracts written in this country contain choice-of-law clauses." *Volt*, 489 U.S. at 491 (Brennan, J., dissenting).

Had the California court of appeal rendered the ruling Ms. Harris imagines, this would be a different case. It would test the limits of *Volt*'s pronouncement that the Court "ordinarily" defers to a state court's interpretation of a contract, *id.* at 474, as well as the Court's later caveat that such deference is warranted only when a state court constructs "its own State's law"—which was not the case below. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 n.4 (1995) (citing *Volt*). But since the federal preemption question is cleanly and squarely presented by the opinion below, none of Ms. Harris's revolutionary choice-of-law arguments matters.

II. THE CLEAR-AND-SPECIFIC STATEMENT RULE IS A RULE OF ENFORCEABILITY.

To blunt the force of cases holding that the FAA requires arbitration in accordance with parties' intent, Ms. Harris tries to refashion the clear-and-specific statement rule as a rule for divining "the intended scope of an arbitration agreement." Opp'n 26. But both *Warfield* and the decision below treated the rule as a rule of enforceability, resting on policies hostile to arbitration conducted as parties' intend.

An agreement to arbitrate "any" claims "arising out of" or "concerning" employment indisputably reflects an intent to arbitrate statutory employment discrimination claims. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991); *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 282 & n.1 (2002). Neither the lower court nor the *Warfield* court disagreed. Instead, both held that an agree-

ment written so broadly is not enforceable as to employment discrimination claims, *regardless* of the parties' intent, because it does not clearly and specifically list those claims. "Enforceability" and "public policy" were the buzzwords of both opinions. See *Warfield*, 910 N.E.2d at 324, 325, 326 n.16; Pet. App. 8a, 9a, 11a; see also *Crocker* v. *Townsend Oil Co.*, 979 N.E.2d 1077, 1087 (Mass. 2012) (describing *Warfield* as a rule of contract enforceability based on the state's anti-discrimination policy).

"Intent" was not. The California court of appeal mentioned "intent" once. See Pet. App. 12a (quoting *Warfield*). *Warfield* mentioned it a few more times, but the references show that the clear-and-specific statement rule is a drafting requirement, not a means for determining intent. For instance, the court stated that, because of Massachusetts's anti-discrimination policy, parties "must reflect [their] intent in unambiguous terms" and so must "state clearly and specifically that [discrimination] claims are covered by the contract's arbitration clause." *Warfield*, 910 N.E.2d at 326. A "few references to intent" cannot mask that the court "did anything other than impose its own policy preference." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 676 (2010).

The clear-and-specific statement rule has nothing to do with parties' intent; it reflects the courts' anti-arbitration assumption that an agreement to arbitrate employment-discrimination claims waives an employee's rights and remedies. See Pet. 10–11, 20–24. That is confirmed by rules the lower court and Ms. Harris analogize it to—a requirement that class waivers be highlighted and a "clear statement" requirement for collective bargaining agreements.

See Pet. App. 13a; Opp'n 36–38. Both govern the *form* of arbitration agreements; they do not determine what parties *intended*. Indeed, when suggesting that the FAA might not preempt a highlighting requirement, the Court admonished that any such requirement cannot be deployed to "frustrate [the FAA's] purpose to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1750 n.6 (2011). In other words, the penalty for not highlighting cannot be invalidating an unhighlighted arbitration agreement. And the collective-bargaining cases are irrelevant to this FAA case. See Pet. 13. They required clear statements for reasons of labor policy, not because the intended scope of the union-negotiated arbitration agreements was unclear. See *Wright* v. *Universal Mar. Serv. Corp.*, 525 U.S. 70, 80–81 (1998).

III. THIS CASE IS IMPORTANT AND HAS NO VEHICLE PROBLEMS.

Ms. Harris alleges various vehicle problems, hoping one will stick. All are illusory and should not deter further review.

First, Bingham preserved its arguments. See Opp'n 10, 29–30. Below, Bingham argued at length that the clear-and-specific statement rule is not saved by Section 2's saving clause because the rule is "not applicable to any contract," *i.e.* that it applies only to arbitration agreements and that it applies only to employment agreements. See Petr's CA Br. 30–32 & n.10; see also Petr's CA Reply Br. 36–40. Ms. Harris faults Bingham for citing a decision in its petition that it did not cite below, *Mortensen* v. *Bresnan Commc'ns, LLC*, 722 F.3d 1151 (CA9 2013),

which construed Section 2's saving clause to exclude state rules that *practically* apply only to arbitration agreements even if they *technically* apply to more. See Opp'n 29. But Bingham cannot be faulted for not citing an opinion issued three-and-a-half months after the lower court entered its judgment.

Second, the superior court's alternative holding that Bingham's arbitration agreement is unconscionable is not an "independent state law ground" blocking review. Opp'n 18. The court of appeal expressly declined to address that holding and based its decision solely on the clear-and-specific statement rule. See Pet. App. 14a n.1. On remand, the court of appeal will have the opportunity to decide whether the superior court's unconscionability holding is as threadbare as Bingham contends. See Pet. 7–8 n.2.

Third, the Court should rebuff Ms. Harris's request to let the preemption issue "percolate further in the lower courts." Opp'n 17. Further percolation would accomplish nothing. The clear-and-specific statement rule is not preempted solely because of some recent development in FAA jurisprudence. *Warfield* and the decision below conflict head-on with this Court's nearly twenty-year-old holding that clear-and-specific statement rules are incompatible with the FAA. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624–628 (1985).

Fourth, Bingham's case is neither "highly idiosyncratic," "odd," nor "truly unique." Opp'n 1, 10, 11. Ms. Harris's choice to sue Bingham in California is not germane to the question presented—except insofar as it suggests that the California courts' infamous hostility to arbitration factored into the decision below. See Pet. 24–25. The clear-and-specific statement rule will be applied again, even if in Mas-

sachusetts courts or the First Circuit, and the question whether the rule comports with the FAA will recur as well. A judge in the District of Massachusetts recently opined that, but for circuit precedent, he would hold that the FAA does not preempt "special notice" rules, citing *Warfield*'s clear-and-specific statement rule as the exemplar. *Awuah* v. *Coverall N. Am., Inc.*, 2013 WL 6325135, at *3–*4 (D. Mass. Dec. 5). That opinion underscores the ongoing confusion over the lawfulness of the clear-and-specific statement rule.

Nor is Massachusetts's rule a lone outlier. See Opp'n 13. The Supreme Judicial Court modeled it a New Jersey rule. See *Warfield*, 910 N.E.2d at 325–326 (citing *Garfinkel* v. *Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665 (N.J. 2001)). Left unchecked, Massachusetts's rule will take root, as New Jersey's has. See, *e.g.*, *Flaghouse, Inc.* v. *Prosource Dev., Inc.*, 528 Fed. App'x 186, 190 (CA3 2013) (applying *Garfinkel*). It is imperative, therefore, that the Court nip the rule in the bud.

CONCLUSION

The Court should grant the petition and either reverse or set the case for argument.

Respectfully submitted,

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