No. 13-351

In The
Supreme Court of the United States

BINGHAM McCUTCHEN LLP, et al.,

Petitioners,

v.

HARTWELL HARRIS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION

TAMARA S. FREEZE
Counsel of Record
ROBERT A. ODELL
ALLISON LIN
LAW OFFICES OF
TAMARA S. FREEZE
8 Corporate Park
Suite 300
Irvine, CA 92606
(949) 378-9794
tf@freezelawoffice.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether a California intermediate appellate court correctly interpreted Petitioners' unique arbitration contract, which required application of Massachusetts law, and properly applied the governing Massachusetts precedent to Petitioners' arbitration agreement.

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STATEMENT OF THE CASE

This case arises out of highly idiosyncratic circumstances in which the California state courts applied an earlier Massachusetts decision because the arbitration agreement drafted by Petitioners expressly provided that it would be governed by Massachusetts law. Aside from the instant case, that Massachusetts decision apparently has never been successfully invoked by a litigant seeking to avoid arbitration, in Massachusetts or anywhere else.

A. Petitioners' Arbitration Agreement Expressly States That It is Governed By Massachusetts Law

1. This litigation has its roots in the 2007 merger of Bingham McCutchen ("Bingham"), a large international law firm headquartered in Boston, with a portion of a small firm in southern California. Respondent Harris, who had been an associate at the California firm, became an associate at the merged firm. To keep her position Harris was required to sign an Associate Agreement, prepared by Bingham, that had two clauses of relevance. First, the agreement provided that the "agreement (and, as applicable, the performance hereof) . . . shall be construed in accordance with the internal substantive laws of The Commonwealth of Massachusetts."[1] Second, the agreement contained an arbitration provision:

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[1] Associate Agreement, ¶ 9.

> You and the Firm agree that any legal disputes which may occur between you and the Firm and which arise out of, or are related in any way to your employment with the Firm or its termination, and which disputes cannot be resolved informally, shall be resolved exclusively through final and binding private arbitration before an arbitrator mutually selected by you and the Firm.[2]

B. The Massachusetts Supreme Judicial Court Issues A Decision Requiring Employers To State Its Intent To Arbitrate Employees' Discrimination Claims In Clear And Unmistakable Terms In Any Contract

2. In July 2009 the Massachusetts Supreme Judicial Court decided *Warfield v. Beth Israel Deaconess Medical Center, Inc.,* 454 Mass. 390, 910 N.E.2d 317 (2009). The plaintiff in *Warfield* had filed suit under the Massachusetts anti-discrimination statute, alleging gender-based discrimination and retaliation. The defendant contended that Warfield's lawsuit was barred by an arbitration agreement she had signed. That arbitration agreement was framed only in general terms, and made no mention of any particular type of claim that might be subject to arbitration. The Massachusetts court acknowledged that the Federal Arbitration Act ("FAA") and "[s]tate law and policy favor arbitration," 454 Mass. at 396, 910

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[2] *Id.* ¶ 8.

N.E.2d at 323, both imposing "presumption of arbitrability." 454 Mass. at 400, 910 N.E.2d at 326. Accordingly the question before the court was not whether the arbitration agreement was enforceable, but solely "whether the parties have contractually agreed, in the agreement, to submit statutory claims of discrimination to arbitration." *Id*.

Nonetheless, noting that the state anti-discrimination statute had established a number of distinct enforcement mechanisms, the Supreme Judicial Court held that a waiver of access to those particular mechanisms – whether contained in an arbitration agreement or in any other agreement – had to be clearly stated.

> [A]s a matter of the Commonwealth's general law of contract, a private agreement that purports to waive or limit – whether in an arbitration clause or on some other contract provision – the employee's otherwise available right to seek redress for employment discrimination through the *remedial paths* set out in [the state anti-discrimination statute], must reflect that intent in unambiguous terms.

Id. (emphasis added).[3]

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[3] The Supreme Judicial Court subsequently explained that *Warfield* does not require a specific reference to the state anti-discrimination law or to particular types of discrimination, but is satisfied by a general reference to claims of discrimination. *Joule, Inc. v. Simmons*, 459 Mass. 88, 100 n.15 (2011); *see Warfield*, 454 Mass. at 400 n.16, 910 N.E.2d at 326 n.16.

(Continued on following page)

The court explained that the rule is an interpretive rule intended to discern the intent[4] of the parties, akin to the rule this Court adopted in *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247 (2009). *Warfield*, 910 N.E.2d at 327. There, this Court "upheld the validity of agreements to arbitrate statutory discrimination claims in the National Labor Relations Act ("NLRA")-governed collective bargaining agreement, so long as the agreement to arbitrate such claims is 'explicitly stated' in the agreement." *Id.* (quoting *14 Penn Plaza*, 556 U.S. at 258). Under the similar Massachusetts rule, the *Warfield* court explained, parties are likewise "free to agree on arbitration of statutory discrimination claims" so long as they "state clearly and specifically that such claims are covered." 910 N.E.2d at 326. The rule thus "continues to uphold the language and generous spirit of the FAA" and "is not inconsistent with the presumption of arbitrability embedded in the FAA." *Id.* at 326. The court also emphasized that this rule was not limited to arbitration agreements. 454 Mass. at 400 n.14.

Bingham errs in suggesting that *Warfield* or the decisions below applying *Warfield* require that an arbitration provision "identify . . . antidiscrimination statutes by name." Pet. 8.

[4] Contrary to Petitioners' argument, the subjective intent of the parties is irrelevant if an arbitration agreement is invalid.

C. Petitioners Issue An Article Warning Employers To List Discrimination Claims In Arbitration Agreements In Order To Be Valid

Within a month of the decision in *Warfield*, Petitioner Bingham – one of the largest law firms in Massachusetts – posted on its website a "Legal Alert" for employers. The Legal Alert set out a detailed summary of the decision in *Warfield*, and warned that:

> [e]mployers should have their arbitration provisions reviewed for enforceability under the new Massachusetts ruling. . . . Massachusetts employers who want to arbitrate all employment disputes, *including discrimination claims*, should explicitly cite claims arising under federal and state discrimination statutes as being covered by the arbitration clause. . . . Employers should consult with their employment counsel to ensure compliance with federal and state law in fashioning arbitration provisions.[5]

The Legal Alert listed seven Bingham attorneys who could provide "more information about this alert," including the co-director of the firm's Labor and Employment Group (in Boston) and three partners in Bingham's California offices. Despite the sound advice contained in the Legal Alert, Bingham

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[5] Legal Alert: Massachusetts High Court Requires Specific Language to Arbitrate Discrimination Claims, available at http://www.bingham.com/SearchResults?st=warfield, visited November 20, 2013 (emphasis in original).

itself never revised the arbitration provision to which it had earlier required Harris to accede as part of her Associate Agreement. Bingham's surprising failure to do so gave rise to the unusual problem in this case.

D. Harris Sues Bingham For Employment Discrimination And The Trial Court Denies Bingham's Petition To Compel

3. In February 2011 Bingham terminated Harris after she requested reasonable accommodations for her disability. In November 2011, after exhausting the applicable administrative remedies provided by California law, Harris filed suit in California Superior Court against Bingham and a number of partners at the firm. (For simplicity we refer to all the defendants simply as "Bingham."). Her complaint asserted several claims under the California anti-discrimination statute (California Fair Employment and Housing Act), including a claim that she had been dismissed because of her disability and in retaliation for her efforts to obtain reasonable accommodation for that disability. Pet. App. 4a.

Relying on the arbitration clause in its employment agreement with Ms. Harris, Bingham moved to compel arbitration. *Id.* Harris, relying on the choice-of-law provision in the Associate Agreement, argued that the arbitration provision was governed by *Warfield*. There is no dispute that the arbitration clause does not satisfy the requirements of *Warfield*, if it indeed applies to Harris's California anti-discrimination

claims. Nor does Bingham dispute that its arbitration agreement is governed by Massachusetts law.

The California trial court denied Bingham's motion. Pet. App. 15a. The court found that, because the parties had agreed to apply Massachusetts law in their agreement, the contract was subject to, and failed, the interpretive rule established by the Massachusetts Supreme Judicial Court in *Warfield*. *See* Pet. App. 15a.[6]

E. A California Court Of Appeal Affirmed The Trial Court's Ruling Denying Bingham's Motion To Compel Arbitration

Dissatisfied with the court's ruling, Petitioners appealed the denial of their motion to compel arbitration to the California Court of Appeal for the Second District. Pet. App. 14a.

1. Before that court, Petitioners argued that the *Warfield* rule should not apply in this case, for three reasons. Pet. App. 6a. First, although neither "party challenge[d] the validity of the choice-of-law provision," Petitioner claimed that because Plaintiff filed the lawsuit in California, the enforceability of Defendants' arbitration provision must also be

[6] Harris also argued that the arbitration provision was procedurally and substantively unconscionable. The Superior Court made a separate ruling that the agreement was unconscionable and, thus, unenforceable. Pet. App. 16a. The Court of Appeal did not reach this issue. *Id*. 14a n.1.

governed by California law. *Id.* The California Court of Appeal disagreed, noting that Petitioner was trying to "attack[ ] its own choice-of-law provision." *Id.* 7a. The court concluded that Massachusetts law governs the enforceability of the arbitration clause in the employment agreement under California choice-of-law rules. *Id.* 8a.

2. Second, Petitioners argued "that *Warfield* should be narrowly construed to apply only to violations of Massachusetts antidiscrimination statutes but not to any violations of California antidiscrimination statutes." Pet. App. 9a. The court rejected that assertion as well, explaining that Defendants cannot escape the choice-of-law provision in their own contract at their convenience, as this "interpretation would give defendant the benefit of applying its choice-of-law provision to any employment relationship disputes while depriving plaintiff of Massachusetts law addressing statutory rights against discrimination in the workplace. Defendants cannot have it both ways while claiming the employment agreement is not illusory." *Id.* 10a. Additionally, the court emphasized, because Petitioners "were the drafters of a document which required a California employee to be bound by substantive Massachusetts law" any "ambiguity is to be construed against defendants' interest." *Id.*

3. Finally, Petitioners argued that the *Warfield* rule was preempted by the FAA. Pet. App. 11a. The Court of Appeal disagreed. *Id.* The court explained that "to the extent a state law is not inconsistent with

the Federal Arbitration Act's policies, choice-of-law clauses are interpreted to incorporate the chosen state's laws governing the enforcement of arbitration agreements." *Id.* The court explained that the Massachusetts Supreme Judicial Court had concluded that the *Warfield* interpretive rule "does not interfere with the purposes of the Federal Arbitration Act," and set forth the Massachusetts court's reasoning in detail. *Id*. 11a-13a.

4. The California Court of Appeal further observed that this Court's opinion in *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), "contains language supportive of the *Warfield* court's conclusion on the preemption issue." Pet. App. 13a. In that case, this Court explained that "states remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id.* 13a (quoting *Concepcion,* 131 S. Ct. at 1750 n.6).

5. The California Supreme Court denied Petitioners' petition for review. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

Seeking to escape the self-imposed choice of law provision in their own arbitration contract, after

realizing that Massachusetts does not have arbitration enforcement rules favorable to them, Petitioners are trying to create an illusion of legal "conflict" where there is none. Behind the smokescreen, however, Petitioners are essentially appealing the lower court's denial to apply the choice of law provision in Petitioners' own arbitration agreement with a former associate in the light most favorable to Petitioners. In other words, Petitioners are simply complaining that a California Court of Appeal misapplied the Massachusetts law to the unique facts of this case (or misperceived the facts). This is not a proper reason to seek certiorari.

Moreover, Petitioners raise new arguments in their petition. However, a failure to preserve these federal issues is a jurisdictional bar to consideration by this Court; at the least, and its failure to do so has waived these arguments.

Further, the unique circumstances of this case make it an inappropriate vehicle for addressing any issue regarding the FAA. Petitioners seek review of an intermediate California appellate court decision applying a Massachusetts rule of contract interpretation to an employment contract with a California employee based on an odd choice-of-law provision Petitioner Bingham inserted into a contract it drafted. Petitioners allege no split of authority between any federal decisions, any decision of the California Supreme Court, or any other jurisdiction. Indeed, they fail to identify any other decision addressing the question presented by the petition, much less a

decision addressing the unique combination of factors that govern the disposition of this case.

Finally, while Petitioners insist that the Massachusetts interpretative rule applied in this case conflicts with the FAA, they barely acknowledge that the only reason that rule was applied here is because *they* chose to incorporate it into their arbitration agreement, and largely ignore that under this Court's decision in *Volt*, that voluntary incorporation renders irrelevant the question upon which they seek certiorari. The FAA preemption analysis is further inapplicable to Petitioners' case, since Petitioners specifically opted into the Massachusetts choice of law clause in their own arbitration contract, signaling its unequivocal intent *not* to apply California law or FAA to its own arbitration agreement, Petitioner's plea for fact-bound review of this one-off decision should be denied.

I. The Unique Circumstances Of This Case Make It An Inappropriate Vehicle For Addressing Any Issue Regarding The Federal Arbitration Act

1. Petitioner insists that "[t]he decision below is not a one-off from a state appellate court undeserving of this Court's time." Pet. 24. To the contrary, that is exactly the nature of the Court of Appeal's decision.

This case derives from a truly unique legal situation unlikely ever to arise again. The case concerns an employment dispute that arose in California and

was litigated in the California state courts but where the Petitioner-employer deliberately selected Massachusetts choice of law provision in its arbitration contract. When Petitioner objected to the enforcement of the very choice-of-law provision they included in their own arbitration agreement, the California courts were placed in the unusual situation of being asked to rule on the validity of the Petitioner-employer's arbitration provision under the governing precedent of the Supreme Judicial Court of Massachusetts. Petitioners cannot point out a single case or judicial decision (aside from this pending matter) with the same scenario, as there are none.

2. Because Petitioners voluntarily opted into Massachusetts law to govern their arbitration contract (which forced California courts to apply and interpret the proper Massachusetts precedent in enforcing Petitioners' arbitration clause), the petition's attack on California judiciary as implacably hostile to arbitration is misplaced. Pet. 10, 25. The "clear statement rule", which Bingham vehemently criticizes was adopted, not by any California court in the instant case, but by the Supreme Judicial Court of Massachusetts in *Warfield*. California itself has no such rule.[7] Bingham speculates that this case shows

[7] In one passage the petition asserts that "the court of appeal[ ] . . . adopted, as a matter of state law, the same clear-and-specific statement rule this Court [in *Mitsubishi*] rejected as a matter of federal law." Pet. 13. That emphatically is incorrect; there is no such *California* "state law."

that the rule in *Warfield* "can metastasize in the hands of another state's anti-arbitration court." Pet. 24. But the California Court of Appeal did not adopt the *Warfield* rule as a standard of California law. Rather, faced with the unusual situation in which a choice-of-law clause provided for application of Massachusetts law, but in which the plaintiff (without objection by the defendants) was asserting a violation of California anti-discrimination statutes, the Court of Appeal concluded that under that choice-of-law clause *Warfield* should be applied to the plaintiff's California-law claims. Bingham has not sought review by this Court of that aspect of the decision below.

3. Petitioners minimize the fact that the *Warfield* rule to which Petitioner is objecting to is actually a Massachusetts rule that was only applied by the California courts *because* of Bingham's deliberate desire to incorporate such choice-of-law clause in its own arbitration agreement. Ironically, if Petitioners' arbitration clause had been governed by California law, Petitioners' motion to compel arbitration would not have been denied because of any lack of specificity in its arbitration clause.

4. Bingham erroneously objects that the *Warfield* rule is "not unique." Pet. 24. But it is indeed unique; Bingham does not claim that any other state has adopted that rule, and there is nothing in the decision below to suggest that California itself has done so. To the contrary, Bingham itself pointed out in the litigation below that California courts – absent a

choice-of-law provision incorporating Massachusetts law – would not apply such a rule to California litigants.[8] More significantly, Petitioner identifies no single case ever to have addressed that question (except for this case). Notably, a single intermediate appellate court decision does not establish the law of California and is not binding even within the state's intermediate appellate courts. *See Sarti v. Salt Creek Ltd.*, 167 Cal. App. 4th 1187, 1193 (2008) ("[T]here is no horizontal stare decisis in the California Court of Appeal") (footnote and citations omitted).

5. Petitioner also erroneously argues that "[d]rafters [of arbitration agreements affecting employees] cannot reasonably be expected to run a fifty-state survey to find, then list within the text of their arbitration agreements, all potentially applicable state employment-discrimination laws." *Id.* But unless an arbitration agreement governing employment disputes were contained in a contract calling for

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[8] Petition for Review, 4 ("[u]nder the Court of Appeal's opinion, a choice-of-law clause means that arbitrability of claims *alleged under California law* is not governed by this Court's precedents and California public policy") (emphasis in original), 11 ("Defendants sought to take *Warfield* at its word that it applies only to claims under the Massachusetts statute, and sought to apply California law to claims brought under California law"), 33 (under the court of appeal's decision "two plaintiffs, with similar claims *under California law and in California court*, might nevertheless have diametrically opposite outcomes as to arbitrability depending on the happenstance of contractual choice of law") (emphasis in original).

application of Massachusetts law – surely an uncommon situation – there would be no reason to conduct such a survey.[9] The decision below emphatically is not "a serious, nationwide threat to arbitration agreements" Pet. 24; to the contrary, the decision below is entirely irrelevant outside of Massachusetts, save in those at least rare instances in which an employer deliberately utilizes a Massachusetts choice-of-law provision in its employment contracts.

6. There is essentially no possibility that there will be another case in the California courts involving the application of *Warfield*. Few if any other employers in that state require their employees to agree that disputes will be governed by Massachusetts law, and by now Bingham itself surely has rewritten its own arbitration agreements – as it earlier urged other employers to do – to avoid any problems under *Warfield*. Bingham insists that the decision below will have "a significant practical effect" because "[m]ore people live and work in [the counties within the Second Appellate District] than in entire states whose anti-arbitration decisions this Court has recently reversed." Pet. 26. But the decision below will not affect anyone who lives or works in those counties unless he or she is a party to an employment agreement with a Massachusetts choice-of-law clause. There are surely no more than a handful of people in the Second Appellate District of California who are

[9] *Warfield* does not require an employer to list particular anti-discrimination statutes. See n.3, supra.

subject to any such clause, and if Bingham has prudently rewritten its Associate Agreement, there may be none at all.

7. The only place where the decision in *Warfield* could have any practical importance is in Massachusetts; Bingham, however, does not complain about any impact of that decision in the firm's home state. There is no evidence that the rule is preventing actual arbitration of employment discrimination claims in Massachusetts; Petitioners have identified no other case in which the *Warfield* rule has applied to bar arbitration of any claim. Employers in Massachusetts doubtless have by now taken well-publicized Bingham's advice and (where necessary) simply redrafted any relevant arbitration agreements. Employers can easily comply with that requirement and may have reasons for doing so independent of *Warfield*. In the years since the 2009 decision in *Warfield,* there does not appear to be a single reported case in state or federal court in Massachusetts in which the rule in *Warfield* was successfully invoked to defeat a motion to compel arbitration. We have been able to identify only two cases in which a plaintiff attempted to rely on *Warfield* to defeat such a motion, and in both instances the court rejected that defense and ordered arbitration.[10] If in the future *Warfield* does result in a substantial body of litigation

[10] *Salvi v. TRW Automotive U.S. LLC,* 2012 WL 274755 at *4 n.3 (D. Mass. Jan 30, 2012); *Joule v. Simmons,* 459 Mass. 88, 100 n.15 (2011).

in Massachusetts, including a significant number of decisions applying that decision to deny arbitration, that circumstance might warrant review of a Massachusetts state court decision. In that situation, should it indeed occur, this Court's understanding would be informed by a body of experience in the lower courts regarding both the importance of this issue and the practical application of the *Warfield* rule.

8. It would be far more practical for this Court to wait and decide the validity of the Massachusetts rule in a Massachusetts case directly posing the question. Whether such a case will arise is uncertain. Petitioners argue that this Court's recent decision in *Concepcion*, as well as a variety of intervening federal decisions, make clear that *Warfield* was wrongly decided. *See* Pet. 5, 10-1. Although respondent disagrees with that assertion, the Massachusetts Supreme Judicial Court has not yet had occasion to revisit *Warfield* in the aftermath of those decisions. Permitting this issue to percolate further in the lower courts would allow expanded body of lower court cases to develop and may shed additional light on or otherwise refine legal issues and their application to different factual situations. However, no matter how pivotal the legal issue is in the present petition, the unique circumstances of this case would probably not occur again.

9. This case is also a poor vehicle for reviewing the validity of the *Warfield* rule because any decision on that question would not affect the outcome in this case. As the California trial court correctly found,

the arbitration agreement here was unconscionable. Pet. App. 16a. Thus, the California trial court based its decision on an independent state law ground. Petitioners do not seek review of that holding in this Court.

10. Nor is a departure from this Court's ordinary certiorari criteria required in light of any alleged pattern of California courts disregarding the FAA. *See* Pet. 3-4. The petition does not challenge any rule of California law. Instead, Petitioners seek review of an interpretive rule established by Massachusetts law and allege no pattern of resistance by the courts of that state to this Court's FAA precedents.

II. Petitioners Seek Review Of What They Perceive Is Misapplication Of Massachusetts Law By A California Court Of Appeal

1. Because California does not have a rule similar to *Warfield*, the gist of the petition is that a California court incorrectly applied Massachusetts law to the facts of this case. For example, Petitioners criticize the California Court of Appeal for applying Bingham Massachusetts choice of law provision to its arbitration agreement: "the court treated the argument as an attack on the choice-of-law clause" Pet. 8, for interpreting the Massachusetts *Warfield* rule broader than Petitioners preferred: "[T]he court of appeal read *Warfield* more broadly" Pet. 8, criticizing the Court of Appeal for not interpreting the *Warfield* rule as a heightened notice requirement Pet. 16, and

for interpreting the Massachusetts *Warfield* rule as consistent with the FAA Pet. 17. Petitioners' claim that a California Court of Appeal improperly interpreted the Massachusetts *Warfield* rule is not worthy of review, since the asserted error consists of merely misapplication of a properly stated rule of law.

2. Petitioners assert that other federal courts would not read this particular choice-of-law provision to incorporate a rule like *Warfield*'s. Pet. 14-15. But the correctness of the California court's interpretation of the choice-of-law provision is not within the scope of the question presented. *See* Pet. i. And, in any event, this Court has held that "the interpretation of private contracts is ordinarily a question of state law," not subject to second-guessing in this Court. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 60 n.4 (1995) (distinguishing *Volt* on the ground that it arose on appeal from a state court, which had already construed the choice-of-law provision). The cases Petitioners cite, by contrast, involve federal courts applying federal rules of contract interpretation. *See* Pet. 14-15. And none of those cases purported to establish a rule of construction binding on state courts.[11]

[11] Moreover, most of the cases address the issue of whether the parties intended to preclude application of the FAA entirely. *See UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992 (8th Cir. 1998) and cases cited therein. This case, on the other hand, simply involves a state law rule of contract interpretation.

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III. There Is No Conflict Among The Lower Courts On The Question Presented In This Case

The petition's attempt to establish a certworthy conflict implicated by the decision below also fails on multiple levels.

A. Petitioners Allege No Conflict Between The California Supreme Court And Any Other Circuit Court Or State Court Of Last Resort

Petitioners do not claim that the California Supreme Court has passed on the question presented by this petition. They do not claim, for example, that the Court of Appeal in this case was applying an on-point California Supreme Court precedent. Accordingly, Petitioners do not assert that there is any conflict worthy of this Court's review between the law in California and the law in any other jurisdiction.[12]

Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956 (10th Cir. 2001), is inapposite for a different reason: the question in that case was whether a state court's determination on a question of federal law – *i.e.*, that a contract's language satisfied this Court's standard set out in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), for determining whether a judge or an arbitrator decides questions of arbitrability – was made binding on a federal court by a choice-of-law provision.

[12] The jurisdiction of California's intermediate appellate courts is divided among six appellate districts. *See* California Courts, http://www.courts.ca.gov/courtsofappeal.htm.

Nor is there any reason for this Court to presuppose the answer the California Supreme Court would give to the question presented by the petition. Although Petitioners now suggest that the California Supreme Court would reflexively adopt the Court of Appeal's position, Petitioners argued below that the California Supreme Court's existing decisions already determine the outcome in their favor. *See, e.g.*, Petr. C.A. Br. 25. Petr. C.A. Reply Br. 33-34. In its petition for review by the California Supreme Court, Bingham argued that two cases then pending in that court would "address closely related issues" that might well affect the resolution of the instant case.[13] Subsequent to the decision of the California Supreme Court denying review in this case, that court has issued a decision in one of the cases relied on by Bingham. *Sonic-Calabasas v. Moreno*, 57 Cal. 4th 1109, 311 P.3d 184 (2013). The second case relied on by Bingham is still pending in that court. *Iskanian v. CLF Transp. Co.,* No. S204032 (Cal.Sup.Ct.). Once proceedings in this case resume in the California courts, Bingham will be free to advance arguments based on the decision in *Sonic-Calabasas* or the future decision in *Iskanian*.

[13] Petition for Review, p. 31. We disagree with Bingham's contention that these cases have some bearing on the issues in the instant case.

B. There Is No Conflict Over The Question Actually Presented In This Case

Even if the decision below established the law of California, the case would still present no conflict worthy of this Court's attention because Petitioner mischaracterizes the legal question actually presented on the facts of this case.

Petitioners allege a circuit conflict over whether the *Warfield* interpretive rule is preempted by the FAA. But, as discussed, this case does not present that question because the question presented here is not whether Massachusetts can impose the *Warfield* rule on unwilling parties to an arbitration agreement governed by the FAA, but whether a party that has deliberately opted into having Massachusetts law govern its affairs can be bound by the *Warfield* interpretive rule, just as it is bound by other aspects of Massachusetts law. Petitioners voluntarily selected Massachusetts law to govern their arbitration agreement, as permitted by *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989). Even the cases Petitioners cite recognize that parties may, through a choice-of-law provision, "designate state law to govern the scope of an arbitration clause in an agreement otherwise covered by the FAA." *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.,* 141 F.3d 243, 247 (5th Cir. 1998); *see also UHC Management Co. v. Computer Sciences, Corp*., 148 F.3d 992, 997 (8th Cir. 1998).

Petitioners assert that other federal courts would not read this particular choice-of-law provision to incorporate a rule like *Warfield*'s. Pet. 14-15. But the correctness of the California court's interpretation of the choice-of-law provision is not within the scope of the question presented. *See* Pet. i. And, in any event, this Court has held that "the interpretation of private contracts is ordinarily a question of state law," not subject to second-guessing in this Court. *Volt*, 489 U.S. at 474; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 60 n.4 (1995) (distinguishing *Volt* on the ground that it arose on appeal from a state court, which had already construed the choice-of-law provision). The cases Petitioners cite, by contrast, involve federal courts applying federal rules of contract interpretation. *See* Pet. 14-15. And none of those cases purported to establish a rule of construction binding on state courts.[14]

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C. There Is No Conflict Over Whether The *Warfield* Interpretive Rule Is Preempted By The FAA

Finally, Petitioners fail to establish a conflict even on the question they inaccurately portray the case as presenting. Petitioners do not contend that *Warfield*'s consistency with the FAA has been decided by any circuit court or any state court of last resort other than the Massachusetts Supreme Judicial Court. Instead Petitioners resort to a strategy often employed by parties who realize their case presents no circuit split – they claim that *Warfield* violates various legal principles, stated at a high level of generality, that have been applied in other jurisdictions in deciding other questions. That claim, even if true, does not establish a circuit conflict within the meaning of this Court's certiorari practice. And in any event Petitioners' argument fails on its own terms.

1. Petitioners contend that *Warfield* conflicts with decisions holding that "the FAA creates a federal law of arbitrability," Pet. 11, and that the FAA "considers *only* whether the parties agreed to arbitrate that dispute," *id*. at 12 (citations and internal quotation marks omitted). But the *Warfield* court did not purport to establish a state law rule of arbitrability that displaces the FAA. On the contrary, as used here, the *Warfield* rule is a tool for determining "whether the parties have contractually agreed, in the agreement, to submit statutory claims of discrimination to arbitration." *Warfield*, 910 N.E.2d at 323. That rule "continues to uphold the language and generous spirit

of the FAA and the Commonwealth's own public policy in favor of arbitration agreements: parties to an employment contract are free to agree on arbitration of statutory discrimination claims, and the presumption of arbitrability is in effect." *Id.* at 326.

2. Petitioner further argues that *Warfield* conflicts with decisions holding that the FAA preempts "heightened notice requirements." Pet. 5. But those cases are distinguishable in two ways.

First, most of those cases address rules that applied only to arbitration clauses. *See Awuah v. Coverall North America, Inc.*, 703 F.3d 36, 40, 45 (1st Cir. 2012); *David L. Threlkeld & Co. v. Metallgesellschaft Limited (London)*, 923 F.2d 245, 247, 250 (2d Cir. 1991); *Morales v. Sun Contractors, Inc.,* 541 F.3d 218, 220, 222 (3d Cir. 2008); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183-84 (3d Cir. 1998). Those decisions thus amount to nothing more than a straightforward application of this Court's decision in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), which banned such arbitration-specific rules. But the *Warfield* court emphasized that its rule was generally applicable, requiring clear notice of any limitation of anti-discrimination rights or remedies in any contractual provision. *See Warfield*, 910 N.E.2d at 326. The rule would apply equally to an apartment lease that

purported to waive punitive damages in any housing discrimination litigation.[15]

Second, all of these cases are further distinguishable because they rejected proposed rules that held arbitration agreements unenforceable in their entirety. *See Awuah*, 703 F.3d at 40, 45; *Threlkeld*, 923 F.2d at 249; *Morales*, 541 F.3d at 223-24; *Seus*, 146 F.3d at 183-84; *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1160-61 (9th Cir. 2013). The *Warfield* rule, on the other hand, is simply a rule for interpreting the intended scope of an arbitration agreement; once the scope is determined, the agreement is fully enforced with respect to the claims the parties have agreed to arbitrate. Nor does the rule ever entirely prevent the enforcement of an arbitration clause. At most, it may mean that certain anti-discrimination claims are not within an arbitration clause's scope. Nothing in *Warfield* would affect arbitration of a pay dispute over whether an employee should have received overtime, for example.

3. Petitioners also argue Pet. 18-20 that the *Warfield* rule conflicts with decisions construing the scope of Section 2's carve-out for state-law "grounds [that] exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Not so, for two reasons.

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[15] Mass. Gen. Laws, ch. 151B, Section 4, is not limited to employment discrimination; it also covers, for example, discrimination in housing. *Id*.

First, by its terms Section 2 is implicated only when a state-law rule renders an agreement invalid, revocable, or unenforceable. 9 U.S.C. § 2. The cases Petitioners cite are inapplicable because they involved challenges to the validity or enforceability of an arbitration agreement, mostly venue selection provisions. For example, in *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.,* 184 F.3d 42 (1st Cir. 1999), the parties entered into a franchise agreement that specified that all disputes would be arbitrated before the American Arbitration Association in Chicago, Illinois. *Id*. at 45. When a dispute arose, KKW filed a complaint in a Rhode Island court, which applied a provision of the Rhode Island Franchise Investment Act that voided any clause of a franchise agreement requiring adjudication outside Rhode Island, whether through litigation or through arbitration. *Id*. at 45, 47. The First Circuit held that the Rhode Island Act did not satisfy the "any contract" requirement of Section 2 because the rule applied to "one type of provision, venue clauses, in one type of agreement, franchise agreements." 184 F.3d at 51. *See also Bradley v. Harris Research, Inc*., 275 F.3d 884 (9th Cir. 2001) (considering law that applies only to forum selection clauses in franchise agreements); *OPE Int'l, LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (state statute voiding provision of construction agreements requiring adjudication outside Louisiana).

In contrast, *Warfield* applied a rule designed to determine only the intended scope of an arbitration

provision, not its validity or enforceability. There was no question that the arbitration agreement between Bingham and respondent was enforceable; there was only a question about its intended scope. *See Warfield*, 910 N.E.2d at 323. Therefore, Section 2 of the FAA is not directly implicated by the *Warfield* rule. Any preemption claim is governed instead by ordinary preemption principles, which ask whether the state rule "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748. And none of the decisions Petitioners cite concerning venue or other provisions decide whether *Warfield*'s very different interpretive rule is incompatible with the FAA's objectives. As a consequence, none of the cases addresses *Penn Plaza* or *Concepcion*'s approval of interpretive or highlighting rules specific to a particular kind of claim (discrimination in *Penn Plaza*, 566 U.S. at 258) or contract (adhesion in *Concepcion*, 131 S. Ct. at 1750 n.6).

Second, and in any event, even if Section 2 applied, the *Warfield* rule is not limited to "employment-related contracts" but applies to any "other contract provision[s]" purporting to waive *any* statutory right under the discrimination statutes. Pet. 20; *Warfield*, 901 N.E.2d at 326. Thus, the rule is not limited to arbitration clauses; it would apply, for example, to a provision agreeing to submit discrimination claims to a bench trial, therefore waiving the right to a jury, or waiving the right to receive damages. Nor is the rule limited to a particular kind of contract. It would also apply, for example, if a private school required an

incoming student to sign an agreement waiving his right to sue for discrimination.

IV. The Courts Below Did Not Decide And Petitioners Did Not Preserve Several Issues Raised In Their Petition

Bingham argues that Section 2 of the FAA preempts, not only state rules that are arbitration-specific, but also any state rule that has "a disproportionate impact on arbitration agreements." Pet. 18. That interpretation of section 2, Bingham insists, was adopted by the Ninth Circuit in *Mortensen v. Bresnan Commc'ns*, 722 F.3d 1151 (9th Cir. 2013). "The decision below," Bingham insists, "conflicts with the Ninth Circuit's logic." Pet. 18.

But neither decision below contains any holding regarding the applicability of a disparate impact standard to section 2 of the FAA. Petitioner does not claim that it advanced this argument below, and does not fault either the Superior Court or the Court of Appeal for not discussing the issue or the decision in *Mortensen*.

Petitioner also argues that under section 2 of the FAA a state rule that affects the validity of an arbitration agreement is preempted unless that rule applies to all contracts in the state, regardless of their subject matter. "[S]tate-law defenses that do not single out arbitration still fail Section 2 if they apply only to agreements on a particular subject matter." Pet. 19. On this view the decision in *Warfield* is

preempted because it applies only to employment contracts. Petitioners argue that several lower courts have imposed such a requirement on facially neutral state rules. *Id.* Petitioners do not, however, assert that either California court decided this issue, or that any actual holding in either of the decisions below conflicts with the decisions of other courts.

Under these circumstances it is entirely understandable that the Court of Appeal did not address an issue that had never been raised in the Superior Court and that had not been injected into the appeal in a substantial fashion until Petitioners' reply brief. When the state court has failed to expressly pass upon a federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). Bingham's failure to preserve these federal issues is a jurisdictional bar to consideration by this Court; in the least, its failure to do so has waived these arguments.

V. The Decision Below Is Correct

Certiorari is further unwarranted because the decision below is correct. First, any argument about whether *Warfield* is preempted is foreclosed by this Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), which permits parties to opt into enforcement of a rule without regard to whether

the rule might otherwise be preempted by the FAA. Second, and in any event, *Warfield* is consistent with the FAA and thus not preempted.

A. The *Warfield* Rule Is Enforceable Under *Volt*, Even If Otherwise Preempted By The FAA

1. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), Stanford University and a construction company agreed, through a choice-of-law provision, that California law would govern their arbitration agreement. *Id.* at 470. A dispute arose and Stanford asked a state court to enjoin arbitration pending the completion of related litigation with other firms involved in the construction project. *Id.* at 471. Stanford cited the choice-of-law provision and a provision of California law authorizing a stay of arbitration under such circumstances. *Id.* As in this case, the construction company disputed the plaintiff's interpretation of the choice-of-law provision, claiming that it did not "incorporat[e] the California rules of arbitration into their arbitration agreement." *Id.* at 474. This Court rejected that argument, explaining that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.*

Also as in this case, the construction company asserted that even if the choice-of-law provision was properly read to incorporate California's arbitration

rules, the rule at issue in the case was preempted by the FAA. *Id.* at 476. This Court declined to address that question because it concluded that the rule was enforceable "where, as here, the parties have agreed to arbitrate in accordance with California law." *Id.* at 477. The Court explained that the basic purpose of the FAA was to ensure the enforcement of "privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms," not to "prevent parties who do agree to arbitrate from excluding certain claims from the scope of the arbitration agreement." *Id.* at 478. Thus where the parties have incorporated state rules of arbitration into their contract, "enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result" is different from what would occur in the absence of that incorporation. *Id.* at 479.

In this case, Petitioners voluntarily incorporated Massachusetts law into its agreement with Ms. Harris. There would be no question that a clear statement rule would properly apply if the parties had agreed that the arbitration clause would be governed by a particular set of private arbitration rules that included such a requirement. It makes no difference that instead of incorporating private rules, Petitioner incorporated by reference the rules of a particular state. In either case, the rule applies because of the parties' agreement to be bound by it. Such an agreement is sufficient, under *Volt*, to permit the rule's

enforcement, even if the FAA would otherwise preempt it.[16]

2. Petitioners argue that *Volt* only applies to contracts that adopt "state-law arbitration *procedures*," not substantive state interpretive rules. Pet. 15 n.4. But this Court enforced the provision in *Volt* not because it was a procedural rule but because the parties agreed to it. *Volt*, 489 U.S. at 478. The Court explained that "the FAA does not require parties to arbitrate when they have not agreed to do so. . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* If the purpose of the FAA is to ensure that parties arbitrate disputes as they intended, then it follows that parties may incorporate any rules they desire. Accordingly, even the cases Petitioners rely upon recognize that "parties may designate State law to govern the scope of an arbitration clause in an agreement otherwise covered by the FAA." *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.,* 141 F.3d 243, 247 (5th Cir. 1998). Indeed, courts have recognized that parties may opt out of the FAA regime altogether, choosing instead to

[16] To be sure, two years lapsed between the time that *Warfield* was decided and the termination of respondent's employment. But Petitioners were on notice of the *Warfield* decision. In fact, as noted above, Petitioner Bingham alerted its clients to the decision and advised them to conform their arbitration agreements to it. Petitioners' failure to follow their own advice is no reason to relieve them of the obligations they voluntarily assumed in drafting their agreement.

be governed by a state arbitration statute. *See Ford*, 141 F.3d at 247; *see also UHC*, 148 F.3d at 997.

3. Petitioner further suggests that the California Court of Appeal misconstrued the choice-of-law provision to incorporate state interpretive rules like the one adopted in *Warfield*. As noted above, this assertion falls outside of the question presented. Pet. i. And it is, in any event, meritless.

Petitioners rely on this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52 (1995), for the general proposition that the FAA's arbitration rules govern even in cases where the choice-of-law provision selects state law. But, as described above, Petitioners ignore the critical distinction this Court drew in that decision between cases in which a federal court must construe a choice-of-law provision in the first instance, and cases in which a state court has already authoritatively construed the contract. *See id.* at 60 n.4 (distinguishing *Volt* by explaining that in *Volt* the Court "defer[red] to the California court's construction of its own state law"). In *Mastrobuono*, by contrast, the court "review[ed] a *federal* court's interpretation" of the contract and thus had no occasion to consider whether a state court's different interpretation of similar language would be precluded by the FAA. *Id.* (emphasis added).

In the present case, the California Court of Appeal has already interpreted Petitioners' choice-of-law provision to apply Massachusetts rules regarding the

waiving or limiting of discrimination claims as well as setting the substantive boundaries of those claims. As in *Volt*, that construction resolves the question.

Nor do Petitioners have any sound objection to the California court's construction of the choice-of-law provision in any event. By its terms, the provision says that the contract – which obviously includes its arbitration clause – "shall be construed in accordance with the internal substantive laws" of Massachusetts. Pet. App. 5a. Deciding whether respondent's discrimination claims fall within the scope of the arbitration clause requires a court to "construe[ ]" the contract. And the *Warfield* interpretive rule is part of the "substantive laws" of Massachusetts. As the drafters of this contract, Petitioners easily could have excluded the arbitration clause from the scope of the choice-of-law provision or expressly stated that the arbitration clause was subject solely to the FAA. And this Court has recognized that arbitration agreements are subject to the general principle that contractual ambiguity is construed against the interest of the party that drafted it. *See Mastrobuono*, 514 U.S. at 63 (if drafters of an arbitration agreement create "an ambiguous document," they cannot "claim the benefit of the doubt"); *see also* Restatement (Second) of Contracts § 206.

B. The *Warfield* Rule Is Not Preempted By The FAA

The *Warfield* rule itself is consistent with this Court's FAA precedents. As discussed, rather than establishing a state rule of arbitrability, *Warfield* applied a rule of contract interpretation designed to discern what claims the parties intended to cover in their arbitration agreement. And the *Warfield* rule is no different than this Court's own clear statement rule, applied in cases like *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). In compelling the arbitration of an age discrimination claim in that case, this Court emphasized that it "has required" that "an agreement to arbitrate statutory antidiscrimination claims be 'explicitly stated.'" *Id.* at 258 (quoting *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998)).[17] The *Warfield* rule also is akin to the highlighting rule anticipated in *Concepcion*. There, this Court explained that "states remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted." *Concepcion,* 131 S. Ct. at 1750 n.6.

This Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), is not to the contrary. There, the Court rejected the

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[17] Contrary to Petitioners' suggestion, Pet. 12-13, the Court gave no indication in *14 Penn Plaza* that its holding was premised on the belief that the ADEA contained an implied partial repeal of a portion of the FAA.

suggestion that the FAA itself enacted "a presumption against arbitration of statutory claims." *Id.* at 625. But the Court said nothing addressing the applicability of state-law rules that require highlighting particular kinds of claims subject to arbitration. And, as noted, in the years since *Mitsubishi*, this Court has itself applied such highlighting rules (*14 Penn Plaza*) and endorsed application of similar state requirements (*Concepcion*).

Likewise, nothing in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), precludes the *Warfield* interpretive rule. In *Doctor's Associates* this Court invalidated a state-law rule mandating that agreements highlight and underline on the first page of a contract the existence of any arbitration clauses contained within. *Id.* at 683. But that holding turned not on the fact that the rule required highlighting *per se* – as *Concepcion* made clear, the FAA permits at least some types of highlighting, 131 S. Ct. at 1750 n.6 – but on the fact that the highlighting rule only applied to arbitration agreements. *Doctor's Associates*, 517 U.S. at 687. Conversely, the *Warfield* rule does not preclude the enforcement of arbitration agreements, but rather is used to determine their scope. And, unlike the statute in *Doctor's Associates*, the *Warfield* rule is generally applicable, informing the interpretation of any contract provision, in an arbitration clause or elsewhere, purporting to "limit or waive" statutory anti-discrimination rights or remedies. *Warfield*, 910 N.E.2d at 325-26.

Finally, as discussed above, because it is an interpretive rule that does not affect the validity, revocability, or enforceability of arbitration clauses, the *Warfield* rule is not subject to Section 2's requirement of general applicability. As a consequence, it is preempted by the FAA only if it "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748; *see also Volt,* at 477. But, as this Court's decisions recognize, rules that merely require highlighting do not impede those objectives. *See Concepcion*, 131 S. Ct. 1750 n.6; *14 Penn Plaza*, 556 U.S. at 258.

CONCLUSION

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

Respectfully submitted,

TAMARA S. FREEZE
Counsel of Record
ROBERT A. ODELL
ALLISON LIN
LAW OFFICES OF
TAMARA S. FREEZE
8 Corporate Park
Suite 300
Irvine, CA 92606
(949) 378-9794
tf@freezelawoffice.com

December 4, 2013