No. 18-1437

IN THE
Supreme Court of the United States

WINSTON & STRAWN LLP, PETITIONER,

v.

CONSTANCE RAMOS; THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Rules

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

Amicus curiae, DRI–The Voice of the Defense Bar, respectfully submits that the Petition for Certiorari should be granted and the judgment of the California Court of Appeal should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. In furtherance of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its members, their clients, and the judicial system. This is such a case.

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[1] In accordance with this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and both parties have consented. The Superior Court of California is nominally a party but has no actual interest in the case. Nonetheless, *amicus curiae* timely notified that court of the filing of its brief.

This case is of significant interest to DRI because its members routinely represent clients seeking to compel arbitration of claims brought under consumer-protection, wage-and-hour, or other state laws that are subject to arbitration clauses. DRI's members are familiar with the common refusal of California state courts to enforce arbitration clauses because of state public policy, unconscionability principles, or other tenets of state law. For that reason, DRI has submitted *amicus* briefs in cases where California law conflicts with the Federal Arbitration Act ("FAA"). See, *e.g., AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011); *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *MHN Gov't Servs., Inc.* v. *Zaborowski*, No. 14-1458 (dismissed because the parties settled); *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407 (2019).

This case represents the latest in a long line of cases applying California law to frustrate the mandate of the FAA that arbitration clauses be enforced according to their terms. Of particular concern to DRI and its members is the California courts' refusal to acknowledge the basic constitutional principle, embodied in the Supremacy Clause, that federal law is part of the law of every state and that state law to the contrary is invalid.

DRI and its members seek uniform application of the FAA across the nation in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. The California law applied by the California Court of Appeal in this case thwarts that goal. Accordingly, DRI has a vital interest in certiorari being granted in this case.

SUMMARY OF ARGUMENT

The FAA was enacted "in response to widespread judicial hostility to arbitration," and requires courts to "'rigorously enforce' arbitration agreements according to their terms," including the terms setting "the rules under which that arbitration will be conducted." *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2308–09 (2013) (citation omitted).

As this Court has recognized, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). Unfortunately, state courts have long exhibited the very "judicial hostility towards arbitration that prompted the FAA" decades ago, and have employed "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011). "California's courts" in particular "have been more likely" to apply their own state laws to preclude the enforcement of arbitration agreements. *Id.*

Before the Court's decision in *Concepcion*, The California Supreme Court employed various devices to evade the preemptive force of the FAA. Beginning in 1999, in an effort to ensure that plaintiffs could litigate state statutory rights that California had deemed essential as a matter of state public policy, California's high court held that the FAA did not preempt state public policies against certain arbitral

procedures or against arbitration of particular types of claims. But *Concepcion* made clear that the California Supreme Court was wrong to so narrowly construe the preemptive scope of the FAA, holding that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'" and that states cannot—whether in the guise of unconscionability, public policy, or some other state law defense—"require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 344–45.

Despite *Concepcion*'s clear holding, California courts have persisted in using unconscionability, vindication of state public policy, and similar rationales to resist the mandate of the FAA. Indeed, just four years after *Concepcion*, this Court again had to intervene when the California Court of Appeal held "that, despite this Court's holding in *Concepcion*, the law of California would find [an arbitration clause's] class action waiver unenforceable." *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 467 (2015) (quotation and citation omitted). This Court held that the California Court of Appeal's decision failed to put "arbitration contracts 'on equal footing with all other contracts.'" *Id.* (quoting *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006)).

The California Court of Appeal's opinion here, and the California Supreme Court's failure to review—much less reverse—that decision, are simply the latest examples of the California courts' failure to give the FAA the supremacy that the Constitution requires. The court assessed Winston & Strawn's partnership arbitration provisions in light of

California law that conflicts with the FAA and this Court's *Concepcion* and *DIRECTV* decisions. But "the Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *DIRECTV*, 136 S. Ct. at 468 (quotation and citation omitted). In *DIRECTV*, this Court could not have been more clear: "The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act." *Ibid.* For that reason, "the judges of every State must follow it. U.S. Const., Art. IV, cl. 2." *Ibid.*

This brief will trace the history of California courts' failures to follow the FAA and will show how that unfortunate trend continues to this day. As this historical overview confirms, this Court's ongoing vigilance is necessary to ensure that California courts do not thwart the FAA's purpose as they have so often done in the past.

Four years ago, in *MHN Government Services, Inc.* v. *Zaborowski*, the Court granted certiorari to address California's arbitration-specific severability rule. But the petitioner there did not seek certiorari on the underlying issue of whether the FAA preempted California's arbitration-specific unconscionability standard. The *MHN* parties' settlement prevented this Court from addressing either issue. Here, the Petition raises both issues, which were squarely addressed by the California Court of Appeal. Accordingly, this case presents an ideal vehicle for addressing root and branch of the California courts' hostility to the FAA.

ARGUMENT

I. The California state courts have long resisted the FAA's preemptive effect.

The California Court of Appeal's circumvention of the FAA in this case is part of a long-standing hostility by California state courts towards the FAA. See *Concepcion*, 563 U.S. at 342–43.

Numerous commentators have noted this phenomenon both before and after *Concepcion*. See Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1455 (2014) ("The evidence from the [California Supreme Court's] cases indicates, rather, that there is still 'hostility' [toward arbitration] in the sense of courts' continued possessiveness of their jurisdiction over certain arbitration cases."); Victoria Vlahoyiannis, *The Reality of International Commercial Arbitration in California*, 68 Hastings L.J. 909, 918 (2017) ("California courts are standing firm in their view of state power over arbitration, which may force the Supreme Court to speak on the issue again before compliance with this new interpretation of the FAA's application is observed among California courts."); Amaan A. Shaikh, *The Post-*Concepcion *Contract Landscape: The Role Socially Conscious Business Can Play*, 57 Santa Clara L. Rev. 223, 233 (2017) ("California courts' repeated unsuccessful attempts to side with employees in the arbitration battle did not result in judges bowing to the FAA once and for all."); James Dawson, *Contract After* Concepcion*: Some Lessons from the State Courts*, 124 Yale L.J. 233, 236 (2014) (describing how

California courts have used "unconscionability rules to police arbitration clauses" that "do not interfere with the 'fundamental attributes of arbitration'"); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability As A Signaling Device*, 46 San Diego L. Rev. 609, 623 (2009) ("Unconscionability claims are more likely to succeed in the state courts of California. . . . Although the phenomenon of mandatory arbitration has national significance, and the willingness of some state courts to apply the unconscionability doctrine in arbitration cases in fact extends nationwide, California case law is particularly significant in this area."); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 39 (2006) ("[I]n California the courts continue to view arbitration agreements critically. Under the unique approach adopted in California, the courts have refused to enforce multitudes of arbitration agreements."); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 91–92 ("[T]he conclusion that California courts . . . are imposing their own biases against arbitration is inescapable."); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 209 (2004) ("California courts treat arbitration agreements differently precisely because they are arbitration agreements, in direct contradiction of the [FAA].").

A brief history of the California state courts' longstanding resistance to this Court's FAA precedents illustrates just how entrenched this problem is and the necessity of this Court's intervention.

1. ***Broughton***. In a 1999 opinion, the California Supreme Court recognized that this Court's decisions had previously discussed "whether Congress had intended federal statutory claims to be exempt from arbitration." *Broughton* v. *Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 1082–83 (1999). The California court recognized a rule disallowing arbitration where it would not vindicate federal rights and applied that rule to claims asserting state statutory rights to avoid a perceived potential for "the vitiation through arbitration of the substantive rights afforded by" state statutes. *Id.* at 1083; see also *Cruz* v. *PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 307 (2003) (reaffirming *Broughton's* holding and extending it to forbid arbitration of public injunctive-relief claims brought under California's Unfair Competition Law and False Advertising Law).

The California Supreme Court failed to appreciate that while Congress is free to enact federal laws that override or limit other federal laws, including the FAA, the states are not. The federal-rights-vindication exception posited by this Court derives from "the *congressional* intention expressed in some other [federal] statute" in which "*Congress* itself has evinced an intention" to exempt federal statutory rights from arbitration. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627–28 (1985) (emphases added). Where a party cannot effectively vindicate a federal statutory claim in the

arbitral forum, an inherent conflict may exist between arbitration and the underlying purpose of a federal statute that may be sufficient to override the FAA's mandate. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28 (1991); *Shearson/ Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226–27, 242 (1987).

In short, the so-called "vindication" exception to the FAA is "reserved for claims brought under federal statutes" because it "rest[s] on the principle that other federal statutes stand on equal footing with the FAA." *Ferguson* v. *Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013). But, in *Broughton*, the California Supreme Court held a vindication defense may be applied to hold that state statutory claims survive FAA preemption because arbitration is inappropriate where the arbitral forum "cannot necessarily afford" all of the procedural "advantages" available in court. 21 Cal. 4th at 1083.

2. *Armendariz*. One year after it decided *Broughton*, the California Supreme Court held that courts can, as a matter of state public policy, refuse to enforce mandatory employment agreements to arbitrate unwaivable state statutory claims for employment discrimination if the procedures the parties adopted in their contract threaten the ability of a party to fully and effectively vindicate a state statutory claim in the arbitral forum. *Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 90–91, 99–103 (2000) (citing *Broughton*, 21 Cal. 4th at 1087; *Gilmer*, 500 U.S. at 27–28). *Armendariz* reasoned that this state public policy was not preempted by the FAA because federal cases allowed

courts not to enforce arbitration agreements where the "arbitral forum" would not be "adequate" to vindicate certain statutory rights. See *id.* at 98–99.

Armendariz also held the arbitration clause at issue was unconscionable. Rather than apply general principles of unconscionability, the court invented arbitration-specific rules mandating a "modicum of bilaterality" in arbitration—*i.e.*, that an arbitration clause required as a condition of employment must apply to both claims more likely to be brought by an employer and claims more likely to be brought by an employee. *Id.* at 117–18. The California Supreme Court stated that "[g]iven the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'" *Id.* at 117. In reaching this conclusion, the California Supreme Court rejected the notion that its version of unconscionability impermissibly "takes its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987), and thus was preempted by the FAA. Instead, it held that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 24 Cal. 4th at 119.

3. ***Little***. Next, in *Little* v. *Auto Stiegler, Inc.*, 29 Cal. 4th 1064 (2003), the California Supreme Court reiterated *Armendariz's* state public policy limitation on the enforceability of arbitration agreements

governed by the FAA. *Little* emphasized that California's public policy against exculpatory contracts renders certain state-law claims unwaivable, and that this policy would be violated unless the parties' agreed-upon arbitration procedures equaled the procedures *Armendariz* called "necessary to enable an employee to vindicate these unwaivable rights in an arbitration forum." *Id.* at 1076–77.

Little acknowledged that *Armendariz's* vindication-of-state-public-policy defense "specifically concern[ed] arbitration agreements" and was "unique" to the "context of arbitration." *Id.* at 1079. *Little* nonetheless maintained that this vindication defense was not preempted by the FAA. *Ibid.* *Little* relied on the FAA saving clause permitting courts not to "enforce an arbitration agreement based on 'generally applicable contract defenses.'" *Ibid.* According to *Little*, one such defense is California's public policy against exculpatory contracts that "force a party to forgo unwaivable public rights." *Id.* at 1079–80.

Little further developed California's arbitration-specific unconscionability rules, holding that one type of substantively unconscionable arbitration clause originates with "the party imposing arbitration [who] mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed." *Id.* at 1072. The court then invalidated a contractual term authorizing either party to appeal to a second arbitrator from an arbitral award exceeding $50,000, concluding it would unduly favor defendants over plaintiffs. *Id.* at 1071–74.

4. ***Discover Bank***. Two years later, the California Supreme Court invoked the vindication-of-state-law principle applied in *Armendariz* and *Little*, this time under the rubric of unconscionability. *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 160–73 (2005).

Discover Bank addressed whether courts may invalidate class-arbitration waivers pursuant to an unconscionability defense. *Id.* at 152–53, 160–63. The California Supreme Court reasoned that, because class actions and arbitrations are "often inextricably linked to the vindication" of substantive state rights, such waivers are contrary to California public policy and therefore unconscionable when class actions are the only effective way to halt and redress wrongful conduct. *Id.* at 160–63. As with the vindication-of-state-public-policy defense against arbitration adopted in *Armendariz* and *Little*, *Discover Bank* held that the FAA did not preempt its unconscionability holding because, while it was tailored to arbitration agreements, the finding of unconscionability could be traced to a general state public policy against exculpatory contracts. See *id.* at 163–67.

5. ***Gentry***. In *Gentry* v. *Superior Court*, 42 Cal. 4th 443, 456–63 (2007), the California Supreme Court held that, where employees assert unwaivable state-statutory-wage claims subject to an arbitration agreement that precludes any attempt to pursue those claims on a classwide basis, the bar on class procedures is unenforceable as a matter of California public policy if the dispute-resolution method specified in the employment contract—*i.e.*, individual arbitration—could not as effectively vindicate the

employee's substantive rights under the state's Labor Code.

Gentry held that applying this vindication-of state-public-policy defense to invalidate class arbitration waivers was not preempted by the FAA because the FAA permitted courts to limit the enforcement of arbitration procedures based on state public policy where those procedures "significantly undermine the ability of employees to vindicate" their state statutory rights. *Id.* at 465 & n.8.

6. *Sonic I*. In 2011, the California Supreme Court concluded that an agreement to resolve disputes through arbitration impermissibly waived the "advantages" of certain procedures that California laws made available to employees who pursue state statutory wage claims in an administrative proceeding before the state Labor Commissioner's office. *Sonic-Calabasas A, Inc.* v. *Moreno* (*Sonic I*), 51 Cal. 4th 659, 668–69, 679, 681 n.4 (2011).

Applying its vindication-of-state-public-policy defense, the California Supreme Court concluded that substituting arbitration for Labor Commission procedures violated California public policy and rendered the agreement unconscionable. *Id.* at 678–84. Applying the reasoning of *Discover Bank* and *Gentry*, the court also held that this result was not preempted by the FAA. *Id.* at 687–95.

II. In *Concepcion*, the Court rebuffs the California courts' resistance to the FAA's preemption of state law.

Before Congress enacted the FAA in 1925, courts viewed arbitration with disfavor in no small measure because of "judges' paternalistic attitude that only they could ensure that individual plaintiffs would be afforded a fair opportunity to challenge corporate defendants." Broome, *supra*, at 42. Congress enacted the FAA to overcome this judicial hostility to arbitration agreements by requiring courts to place them "on an equal footing with other contracts" and "enforce them according to their terms." *Concepcion*, 563 U.S. at 338. The FAA preempts any contrary state law and is binding on the state courts as well as federal. *Southland Corp.* v. *Keating*, 465 U.S. 1, 10–17 (1984).

Congress was careful to temper the FAA's mandate to respect parties' freedom of contract by including in the FAA a saving clause that preserves generally applicable contract defenses from preemption. *Concepcion*, 563 U.S. at 343. But even a defense that a state court characterizes as generally applicable to all contracts is preempted by the FAA if the defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Ibid.* When, as a practical matter, a nominally arbitration-neutral contract defense disproportionately invalidates arbitration agreements, the defense obstructs the FAA's objective of allowing parties the freedom to structure contractual terms for dispute resolution—or not to contract at all if those terms are unacceptable. See *id.* at 342, 344.

Concepcion applied these principles to hold that the FAA preempted the unconscionability standard adopted by the California Supreme Court in *Discover Bank*. *Id.* at 339–352. This Court rejected the assertion that California's policy against exculpatory contracts—California's state law version of the vindication exception to the FAA—could override the FAA's principal objective of enforcing arbitration agreements according to their terms. *Concepcion* acknowledged that the FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'" *Id.* at 339. But *Concepcion* determined that where courts hold arbitration procedures to be "unconscionable or unenforceable as against public policy" based on their "*general principle of unconscionability or public-policy disapproval of exculpatory agreements*," such state-law defenses "in practice . . . have a disproportionate impact on arbitration agreements" even though they "presumably apply" to all contracts. *Id.* at 342 (emphasis added) (cleaned up). *Concepcion* therefore held that such state-law unconscionability or public-policy standards are preempted by the FAA. *Id.* at 342–43.

In short, *Concepcion* held that *Discover Bank*'s unconscionability standard is preempted because it "allowed courts to ignore and refuse to enforce the clear terms of the parties' agreement, and instead employ a judicial policy judgment" that a procedure to which the parties did not contractually agree "would better promote the vindication of the parties' rights in certain cases." *Truly Nolen of Am.* v. *Superior Court*, 208 Cal. App. 4th 487, 506 (2012).

This Court has since re-emphasized this point in *Italian Colors*. There, the Court held that the FAA requires courts to "rigorously enforce arbitration agreements according to their terms," including the terms setting "the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2308–09 (quotation and citation omitted).

III. Since *Concepcion*, California courts have continued to resist the preemptive effect of the FAA despite an additional rebuff from this Court.

In the years since this Court decided *Concepcion*, the California state courts have continued to resist the FAA's preemptive mandate.

1. ***Sonic II***. This Court vacated and remanded *Sonic I* for reconsideration in light of *Concepcion*. *Sonic-Calabasas A, Inc.* v. *Moreno* (*Sonic I*), 132 S. Ct. 496 (2011). On remand, the California Supreme Court addressed whether the plaintiff could "vindicate his right to recover unpaid wages" under California law and, in particular, "whether any barrier to vindicating such rights would make the arbitration agreement unconscionable or otherwise unenforceable . . . and, if so, whether such a rule would be preempted by the FAA." *Sonic-Calabasas A, Inc.* v. *Moreno* (*Sonic II*), 57 Cal. 4th 1109, 1142 (2013).

The California Supreme Court noted that, when an employee elects to pursue his state statutory right to recover unpaid wages before the Labor Commissioner rather than in court, state law affords the employee certain hearing and posthearing procedures that are designed to "reduc[e] the costs and risks of pursuing a wage claim in several ways." *Id.* at 1129.

The California high court held that courts could consider whether agreed-upon arbitration procedures fail to include these statutory procedures, and whether the absence of these procedures fails to "provide an employee with an accessible and affordable arbitrable forum for resolving wage disputes." *Id.* at 1146. The court emphasized that the unconscionability inquiry focuses on whether the arbitral scheme, in failing to provide these statutory procedures, "imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable." *Id.* at 1148, 1168.

The court insisted that this unconscionability standard survived FAA preemption even after *Concepcion* and *Italian Colors*. Citing *Armendariz*'s discussion of the vindication of state statutory rights, the majority maintained that the FAA allows state courts to refuse to enforce agreements to arbitrate state statutory claims where arbitration would not afford procedural benefits that plaintiffs would have received outside arbitration. *Id.* at 1150–52 (citing *Armendariz*, 24 Cal. 4th at 98–99; *Mitsubishi Motors*, 473 U.S. at 626–28). The majority reasoned that those procedures would help "vindicate" a state statutory right. S*onic II*, 57 Cal. 4th at 1155.

Justice Chin's dissenting opinion emphasized that under *Concepcion* and its progeny, the FAA precludes state courts from refusing to enforce arbitration agreements based on a concern that arbitration procedures prevent vindication of state statutory rights. See *id.* at 1184–92 (Chin, J., dissenting). Justice Chin also explained that the majority's decision impermissibly applied a state-law contract

defense to an arbitration agreement based on the uniqueness of that agreement. *Id.* at 1190–91. The *Sonic II* majority insisted that the FAA authorizes the vindication of state statutory rights because courts have the power to create state-law rules "*uniquely* in the context of arbitration." *Id.* at 1143 (majority opinion) (emphasis added). However, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Concepcion*, 563 U.S. at 341. Such an arbitration-specific rule is preempted by the FAA because it has "a disproportionate impact on arbitration agreements." *Id.* at 342.

By improperly applying a vindication rationale with a unique and disproportionate focus on arbitration, and grounding it on an unconscionability standard that is peculiar to arbitration, *Sonic II's* development of a "unique rule" for arbitration agreements flouted *Concepcion*. See *Sonic II*, 57 Cal. 4th at 1190 (Chin, J., dissenting).

2. *Iskanian*. The next year, the California Supreme Court revisited its holding in *Gentry* that class waivers in employment arbitration agreements are unenforceable as against public policy where such waivers prevent the effective vindication of employees' unwaivable rights under state wage-and-hour laws. *Iskanian* v. *CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), The court overruled *Gentry*, holding that "[u]nder the logic of *Concepcion*, the FAA preempts *Gentry's* rule against employment class waivers." *Id.* at 364.

Nevertheless, the California Supreme Court reaffirmed that "an arbitration process [must be] accessible, affordable, and consistent with fundamental attributes of arbitration" and that "the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration." *Id.* at 366.

Although he concurred in the result, Justice Chin again disagreed with the majority's reaffirmance of the *Sonic II* standard because "an arbitration agreement may not be invalidated based on a court's subjective view that the agreement's waiver of the [Labor Commissioner] procedures and protections would render arbitration less 'effective . . . for wage claimants' than a 'dispute resolution mechanism' that includes those procedures and protections." *Id.* at 393 (Chin, J., concurring).

3. *Sanchez*. Then, in *Sanchez* v. *Valencia Holding Co.*, 61 Cal. 4th 899 (2015), the California Supreme Court reversed a lower-court decision deeming an arbitration agreement in an automobile sales contract unenforceable on unconscionability grounds. But the California Supreme Court reaffirmed that arbitration provisions may be found unconscionable if they "'contravene the public interest or public policy,'" *id.* at 911 (citation omitted), and approved "using [the] unconscionability doctrine on a case-by-case basis to protect . . . consumers against fees that unreasonably limit access to arbitration," *id.* at 920.

The California Supreme Court rejected the premise that the FAA preempts such unconscionability rules after *Concepcion*. *See id.* at 906–07, 912–13, 920–21. The court emphasized that the FAA does not

preempt unconscionability defenses, *id.* at 906, even though *Concepcion* had concluded the FAA preempted *Discover Bank's* unconscionability rules, *Concepcion*, 563 U.S. at 337–51. Adhering to *Sonic II's* interpretation of *Concepcion*, the court held that the FAA does not preclude states from applying their unconscionability rules to ensure that the "arbitral scheme set forth in a contract is in practice 'an accessible, affordable process for resolving . . . disputes.'" *Sanchez*, 61 Cal. 4th at 921 (citation omitted).

In his dissenting opinion, Justice Chin noted that after *Italian Colors*, it is clear "the FAA preempts the majority's rule insofar as it makes a 'substantial deterrent effect' sufficient to establish substantive unconscionability." *Id.* at 942 (Chin, J., concurring in part & dissenting in part). The dissent further explained that under this Court's "binding precedent, if a cost provision does not impose fees that 'make access to the forum impracticable' . . . then the FAA precludes a court from invalidating it as unconscionable because of a subjective determination that it will, in a particular case, 'have a substantial deterrent effect' on a party's exercise of the right to request a second arbitration." *Ibid.* (citations omitted).

4. ***DIRECTV***. In *Imburgia* v. *DIRECTV, Inc.*, 225 Cal. App. 4th 338 (2014), *rev. denied* (Cal.), *rev'd* 136 S. Ct. 463 (2015), the California Court of Appeal affirmed the denial of the provider's motion to compel arbitration. The arbitration clause between DIRECTV and its customers waived the right of the parties to bring class-action claims. The arbitration clause stated: "If, however, the law of your state would find this agreement to dispense with class arbitration

procedures unenforceable, then this entire Section 9 is unenforceable." *Id.* at 341. DIRECTV, quite naturally, argued that after *Concepcion*, a class-waiver provision was permitted and the California caselaw to the contrary was preempted by the FAA.

The Court of Appeal rejected this argument. Instead, it adopted a crabbed reading of the arbitration provision, holding the arbitration clause's reference to "the law of your state" should be read to mean "the law of your state without considering the preemptive effect, if any, of the FAA." *Id.* at 343–44. In other words, the Court of Appeal's decision interpreted the arbitration provision as if *Concepcion* had never been decided and as if the FAA did not preempt a state's arbitration-specific rules. The California Supreme Court denied review.

This Court would have none of it. It reversed, holding that "California courts would not interpret contracts other than arbitration contracts the same way." *DIRECTV*, 136 S. Ct. at 469. In short, the Court of Appeal's decision did not "place arbitration contracts on equal footing with all other contracts." *Id.* at 471 (quotation omitted).

5. ***Baxter***. Nonetheless, California courts continue to adjudicate questions regarding arbitration clauses as if *Concepcion* and *DIRECTV* were never decided. In *Baxter* v. *Genworth North American Corp.*, 16 Cal. App. 5th 713 (Ct. App. 2017), the Court of Appeal relied upon *Armendariz*, *Little*, and *Sonic II*, to decline to enforce an arbitration clause. It held that the provision's terms were unconscionable both procedurally and substantively and refused to sever the unconscionable portions. *Id.* at 738. Pointedly, it

concluded that "*Concepcion* has *no bearing* on the analysis of procedural unconscionability." *Id.* at 724 (emphasis added).

IV. The California Court of Appeal's decision is simply the latest attempt by California courts to ignore *Concepcion* and the FAA.

The California Court of Appeal's decision in this case is of a piece with the California decisions discussed above. Indeed, the lower court specifically rejected the argument that after *Concepcion, Armendariz* was no longer good law. (See App. 18a–19a.) It cited to *Sanchez* and *Sonic II*. (App. 19a.) It then proceeded to apply the *Armendariz* requirements (App. 26a–33a) and held that various provisions of the arbitration clause were unconscionable (App. 33a–41a). Following *Armendariz*, the Court concluded it could not sever the unconscionable provisions and therefore held "the agreement void as a matter of law." (App. 45a.) In essence, the *Armendariz* test created an arbitration-specific rule not applied to other contracts. By applying the *Armendariz* test, the Court of Appeal applied a different standard to an arbitration clause than it would to other contracts. And the California Supreme Court compounded things by declining to review the Court of Appeal's decision. This is a common theme where California's lower courts refuse to enforce arbitration clauses. See, *e.g.*, *Hoover* v. *Am. Income Life Ins. Co.*, 206 Cal. App. 4th 1193 (2012), rev. denied; *Roman* v. *Superior Court*, 172 Cal. App. 4th 1462 (2009), rev. denied.

Empirical data confirms that an unconscionability standard that takes its meaning precisely from the fact that an agreement to arbitrate is at issue will

necessarily have a disproportionate effect on arbitration agreements. Based on a study of California unconscionability jurisprudence that this Court cited in *Concepcion*, 563 U.S. at 342–43, one commentator has explained that "California courts are clearly biased against arbitration as an alternative means of dispute settlement" and "[t]heir disdain manifests" in the standard they apply to assess whether arbitration agreements are enforceable. Broome, *supra*, at 41. The unconscionability standard used by the Court of Appeal in this case imposes "arbitration-specific" requirements and maintains that, under California's jurisprudence predating *Concepcion*, "'unconscionable' means something quite different when the validity of an arbitration agreement is at issue." *Id.* at 53–55, 67–68.

A follow-up study of 119 California state-court decisions issued between 2005 and 2008 made findings that "confirm[ed] those of Professor Broome." Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements*, 62 Hastings L.J. 1065, 1082–84 (2011). The data show that under California law "very few contracts are voided as unconscionable—unless they can be classified as 'agreements to arbitrate which appear to be biased against the weaker party.'" *Id.* at 1070. This study concluded that in California, "unconscionability challenges to arbitration agreements succeed at a higher rate than unconscionability challenges to other agreements," *id.* at 1074, and that "[c]ourts applying California law are most likely discriminating against arbitration agreements in a manner that is preempted by the interpretation of the FAA advanced by the

Supreme Court," *id.* at 1084; see also McGuinness & Karr, *supra*, at 62 ("California has created a new brand of unconscionability. It is far more demanding—and it is unique to arbitration.").

Disproportionate application of the unconscionability doctrine to arbitration agreements can be explained only as a manifestation of hostility to arbitration. "[I]t is well known that unconscionability is generally a loser of an argument" and in the non-arbitration context "has been mostly in intellectual retreat for various reasons." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1442 (2008). The increasing use of unconscionability has therefore "been aptly described by scholars as an attempt, using one of the few tools remaining, to put the brakes on the pro-arbitration trend and restore some sort of balance." *Id.* at 1442–43. And it is a tool that calls for particular scrutiny. Because "it will often be nearly impossible to tell if a court is applying state unconscionability doctrine evenhandedly in the way the FAA requires," unconscionability provides a means for courts "to misapply, or perhaps even manipulate, state contract doctrines so as to nullify arbitration agreements while simultaneously frustrating the ability of reviewing courts to reverse." *Id.* at 1422, 1449.

While this Court has repeatedly instructed that such an imbalance—treating arbitration clauses in a unique manner from other contracts—is prohibited, the California courts are not getting the message. This Court should grant the petition, reject *Armendariz*'s unconscionability and severability analyses as

preempted by the FAA, and reverse the Court of Appeal.

CONCLUSION

For the reasons given above, the Petition should be granted and the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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