No. 14-1458

IN THE

Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC.
AND MANAGED HEALTH NETWORK, INC.,

Petitioners,

v.

THOMAS ZABOROWSKI, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") provides that an arbitration agreement shall be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. California law applies a different rule of contract severability to agreements to arbitrate. The arbitration-only rule disfavors arbitration and applies even when the agreement contains an express severability clause. Its application in this case conflicts with binding precedent of this Court and with opinions of four other courts of appeals.

The question presented is whether California's arbitration-only severability rule is preempted by the Federal Arbitration Act.

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INTEREST OF *AMICUS CURIAE*[1]

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes in every industry, which collectively employ nearly three million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It also provides online, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the issues presented in employment cases such as this one. The Employers Group has been involved as *amicus* in many significant employment cases before the U.S. Supreme Court, the California Supreme Court, and the U.S. Court of Appeals for the Ninth Circuit.

This case is of exceptional importance to employers in California and to the Employers Group's thou-

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amicus* 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*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

sands of members. For years, state and federal courts in California have issued decisions that conflict with the Federal Arbitration Act ("FAA") 9 U.S.C. § 1 *et seq*. and with this Court's jurisprudence. This case—in which the Ninth Circuit refused to apply to arbitration agreements the same liberal policy toward severance that California courts routinely apply to ordinary contracts—is only the latest manifestation of California courts' historic hostility to arbitration agreements. That hostility violates this Court's precedents and Congress's intent in enacting the FAA. The Employers Group therefore submits this brief to explain the importance of the issues presented and to urge this Court to reverse the Ninth Circuit's deeply flawed decision.

SUMMARY OF ARGUMENT

For the last several decades, California courts—including both the California Supreme Court and the Ninth Circuit—have waged a systematic campaign against arbitration. Through a series of decisions, these courts have undercut the FAA by applying purported state public policies that exist only to undo arbitration agreements. Underlying this campaign is a fundamental hostility towards arbitration that violates the FAA. Although this Court has repeatedly stepped in to defend the FAA, California courts continue to find new ways around this Court's precedents.

The decision below is symptomatic of this larger problem. Beginning with the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc*., 6 P.3d 669, 678 (Cal. 2000), California courts have applied a rule of severability that discriminates against arbitration contracts. Instead of adhering to California's longstanding prefer-

ence for severing contractual provisions that are unlawful or invalid as long as the remainder of the contract is lawful, *Armendariz* and cases following its lead hold that arbitration agreements containing two or more unlawful provisions are *per se* oppressive, and on that basis cannot be enforced. Dozens of arbitration agreements have been struck down for this reason. This disparate treatment plainly violates this Court's admonition in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), that arbitration agreements must be treated equally both in theory and practice, *id*. at 342, and makes it more difficult for parties to contract for arbitration.

California's persistent distaste for arbitration and its repeated efforts to undermine it at every turn show no sign of abating. Rather, two recent decisions—*Iskanian v. CLS Transport Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), and *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015)—confirm that California courts will continue to defy this Court's FAA preemption caselaw and the scope of the FAA's savings clause in the name of serving purported policy objectives that plainly conflict with the FAA. This Court should halt this disturbing trend by reversing the Ninth Circuit's decision.

ARGUMENT

I. CALIFORNIA COURTS HAVE REPEATEDLY SOUGHT TO UNDERMINE THE FEDERAL POLICY FAVORING ARBITRATION AGREEMENTS

In this case, the Ninth Circuit relied on California law to invalidate an arbitration agreement that, had it been an ordinary contract, would have been deemed severable and enforceable, at least in part.

This case is not an anomaly; rather, it is the latest example in an ongoing effort by California state courts, and federal courts following them, to end-run the FAA and the federal policy favoring arbitration agreements.

This Court has repeatedly stepped in to protect the FAA from the hostility of California courts. Beginning in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court reversed a California Supreme Court decision refusing to compel arbitration of certain claims which, under state law, had to be brought in state court. This Court held that such a law "directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Id*. at 10.

Likewise, in *Perry v. Thomas*, 482 U.S. 483 (1987), this Court reversed a California Court of Appeal decision that refused to compel arbitration of an employee's claims under section 229 of the California Labor Code. This Court concluded that the "clear federal policy" favoring arbitration was in "unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes" and as such, "the state statute must give way." *Id.* at 490, 491.

Fourteen years later, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001), this Court reversed a decision by the Ninth Circuit that sought to narrow the reach of the FAA by holding that section 1, which sets forth the types of disputes that are arbitrable, exempted *all* employment contracts from arbitration, rather than merely those pertaining to certain transportation workers.

This Court intervened twice more seven years later. *See Preston v. Ferrer*, 552 U.S. 346 (2008);

Hall Street Assocs. LLC v. Mattel, Inc., 552 U.S. 576 (2008). In *Preston*, the Court reversed a California Court of Appeal decision denying a motion to compel arbitration and held that the FAA preempted state laws lodging primary jurisdiction for the dispute in another forum. 552 U.S. at 359. To hold otherwise, the Court observed, would "frustrate[]" arbitration's goal of achieving "'streamlined proceedings and expeditious results.'" *Id.* at 357–58 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)). In *Hall*, the Court reversed the Ninth Circuit for relying on the doctrine of "manifest disregard" as a ground for vacating arbitration awards, even though that phrase appears nowhere in the text of the FAA. 552 U.S. at 588–90.

Three years later, California courts again found themselves facing this Court's scrutiny in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *Concepcion* reversed a Ninth Circuit decision affirming the denial of a motion to compel arbitration on the ground that the arbitration agreement included a class-action waiver that was unconscionable under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

This Court held that the *Discover Bank* rule was preempted by the FAA, reasoning that "[r]equiring the availability of classwide arbitration," as California did, while facially non-discriminatory, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. In particular, this Court explained that permitting classwide arbitration would eliminate any incentive for lawyers to arbitrate on behalf of individuals and for companies to resolve such claims on an individual basis. Permit-

ting classwide arbitration would also require "additional and different procedures involving higher stakes" than those the parties initially bargained for. *Id*. at 347–48. With classwide arbitration in play, the parties would be required to exchange "informality" for a "slower, more costly" and necessarily more cumbersome process in order to safeguard the rights of absent class members and the rights of defendants who might find themselves exposed to enormous liability. *Id*. at 348, 350–52.

Following *Concepcion*, this Court vacated and remanded another California case, *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011), for reconsideration. There, the California Supreme Court had held that an arbitration agreement requiring an employee to waive his right to an administrative hearing was unconscionable and that California's law requiring such a hearing to vindicate "important state interests" was not preempted by the FAA. *See Sonic-Calabasas A, Inc. v. Moreno* (*"Sonic I"*), 247 P.3d 130, 147, 151 (Cal. 2010).

Taken together, these decisions reveal an unmistakable pattern of discrimination against arbitration by California courts that denies private parties the ability to achieve quick, simple, and cost-effective resolutions of their disputes through arbitration. As the Court stated in *Concepcion*, parties "*could* agree to arbitrate" pursuant to a variety of procedures, but "[s]tates cannot *require* a procedure that is inconsistent with the FAA." 563 U.S. at 351 (second emphasis added). California courts, however, stubbornly refuse to accept this Court's repeated admonition that the FAA "requires courts to honor parties' expectations" and that state laws which "stand[] as an obstacle to the accomplishment and execution of the

full purposes and objectives of Congress" as set forth in the FAA, are preempted. *Id*. at 351, 352.

II. THE *ARMENDARIZ* RULE IS DEEPLY FLAWED AND VIOLATES THIS COURT'S PRECEDENTS AND CONGRESS'S INTENT IN ENACTING THE FAA

The Federal Arbitration Act demands that arbitration agreements be placed on "equal footing" with ordinary contracts if not "favor[ed]" over other agreements. *Concepcion*, 563 U.S. at 339 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); *Perry*, 482 U.S. at 489. Such treatment is consistent with the "liberal federal policy favoring arbitration agreements notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983). And it is consistent with this Court's precedents that "require[] courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

California courts purport to agree with these holdings, noting that the state maintains a "public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." *Pearson Dental Supplies, Inc. v. Super. Ct.*, 229 P.3d 83, 94 (Cal. 2010). They also acknowledge the "strong federal policy of enforcing arbitration agreements" and the supposed parity between arbitration agreements and other contracts. *Armendariz v. Foundation Health Psychcare Services, Inc*., 6 P.3d 669, 678 (Cal. 2000). But while cases like *Armendariz*—the basis for the Ninth Circuit's decision in this case—pay lip-service to these principles, they are anything but faithful to them in practice.

The anti-arbitration animosity embedded within *Armendariz*—and reflected in the Ninth Circuit's decision here—reveals itself on multiple levels.

1. Although this Court has declared that "a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [section] 2" of the FAA, *Perry*, 482 U.S. at 492 n.2, California courts nevertheless have adopted the view that certain principles, including unconscionability, "may manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 6 P.3d at 693. The "peculiar" form in which such unconscionability appears is in a "lack[] [of] mutuality." *Id*. For years, a "lack of mutuality" was "the most common means employed by the [California] Courts of Appeal to void arbitration agreements." Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54 (2006); *see also id*. at 45–48 (conducting empirical study and concluding that California courts struck down arbitration agreements on the grounds of unconscionability in 53 out of 114 cases, but struck down ordinary contracts on these grounds in only 5 out of 46 cases). Indeed, this Court recently observed that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts," usually on this basis. *Concepcion*, 563 U.S. at 342.

A lack of mutuality is not the only basis for invalidating arbitration agreements. California courts have also declared arbitration agreements procedurally unconscionable even where the plaintiff had an opportunity to decline the defendant's contract and enter into a contract stripped of the offending term.

See, *e.g.*, *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002). They have also done so where the contract was not otherwise presented on a "take it or leave it" basis. *Pardee Constr. Co. v. Super. Ct.*, 123 Cal. Rptr. 2d 288, 283 (Ct. App. 2002) (noting that "[i]n any event, even if the parties' agreements were deemed not to be adhesive, plaintiffs have established the judicial reference provisions of those agreements were unconscionable at the time such agreements were made").

Likewise, other restrictions typical of arbitration agreements, such as those relating to the types of remedies and claims available, the availability of appeals, limits on the statute of limitations, and the place and manner of arbitration have all been held to be unconscionable. *See*, *e.g.*, *Harper v. Ultimo*, 7 Cal. Rptr. 3d 418, 421 (Ct. App. 2003) (limitations on remedies); *Fittante v. Palm Springs Motors Inc.*, 129 Cal. Rptr. 2d 659, 722 (Ct. App. 2003) (appeals); *Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 670–71 (Ct. App. 2004) (statute of limitations); *Bolter v. Super. Ct.*, 104 Cal. Rptr. 2d 888, 896 (Ct. App. 2001) (place of arbitration). Even provisions incorporating the mutual and established rules of the American Arbitration Association, which direct the parties to share the cost of arbitration unless otherwise required by statute or by agreement, have been declared unconscionable. *See O'Hare v. Mun. Res. Consultants*, 132 Cal. Rptr. 2d 116, 125–26 (Ct. App. 2003). Yet these provisions are lightyears away from the "shock-the-conscience" provisions that might render an ordinary contract unconscionable.

Despite this Court's repeated warnings, the California Supreme Court has made clear that it will continue to invoke the doctrine of unconscionability

to justify its practice of discriminating against arbitration agreements. For example, on remand from *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011), the California Supreme Court doubled-down on the unconscionability exception to enforcing arbitration agreements, once again using public policy as the purported hook for invalidating such agreements. *Sonic-Calabasas A, Inc. v. Moreno* ("*Sonic II*"), 311 P.3d 184, 199, 201–03 (Cal. 2013).

Specifically, in *Sonic II*, the California Supreme Court gave California courts a roadmap for using the unconscionability doctrine to invalidate arbitration agreements that could be "unfairly one-sided." 311 P.3d at 202. The court explained that while a state public-policy defense to arbitration would be FAA-preempted, an unconscionability defense to arbitration would not be. The solution, therefore, is for courts to infuse considerations of (anti-arbitration) public policy into their unconscionability analysis. *See Sonic II*, 311 P.3d at 202 (noting that the unconscionability doctrine may be applied to terms that "otherwise contravene the public interest or public policy").

The California Supreme Court's most recent decision in this area, *Sanchez v. Valencia Holding Co.*, 353 P.3d 741 (Cal. 2015), reaffirms that doctrines of unconscionability and public policy may continue to be used to invalidate arbitration agreements. "*Concepcion*," the court emphasized, "does not immunize arbitration processes from state law unconscionability principles." *Id.* at 750. As if oblivious to the current treatment of arbitration agreements, the court then warned that such principles would be "as rigorous and demanding for arbitration clauses as for any contract clause." *Id.* at 749.

Justice Chin, in dissent, took issue with the majority's decision to maintain California's various unconscionability formulations while also declaring that they "all mean the same thing." 353 P.3d at 749; *id*. at 766 (Chin, J., dissenting). "Having multiple formulations," he wrote, "lends substantial credence to the 'loud chorus of courts and commentators' who assert that, contrary to the [U.S. Supreme Court's] decisions, we are using unconscionability 'as a ruse for a "new judicial hostility" to arbitration.'" *Id*. at 767 (quoting Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. Arb. & Mediation 39, 60 (2012–2013)).

2. As Justice Chin's dissent in *Sanchez* suggests, the anti-arbitration animus underlying the "lack of mutuality" standard, the unconscionability doctrines, and the heightened scrutiny they generate is hardly a secret: according to *Armendariz,* "even a fair arbitration system" is filled with "disadvantages" and a "lack of choice" for employees, such that courts "must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement." 6 P.3d at 690, 692.

Consistent with that underlying suspicion of arbitration, *Armendariz* also applies an arbitration-specific standard of severability that permits California courts to invalidate arbitration agreements while saving ordinary agreements by applying the traditional severability doctrine.

Animated by an inherent bias against arbitration, *Armendariz* restates the facially neutral contract interpretation principle that a court may "refuse to enforce the contract as a whole if it is perme-

ated by … unconscionability," 6 P.3d at 695, but then creates a special rule for arbitration agreements: They are "permeated" by unconscionability, and therefore, incapable of severance, where they have "more than one unlawful provision." *Id*. at 696–97. Under *Armendariz*, multiple unlawful provisions purportedly "indicate a systematic effort" to promote an "unlawful purpose"; namely, "to impose arbitration on an employee not simply as an alternative to litigation, but as *an inferior forum* that works to the employee's disadvantage." *Id*. (emphasis added).

This flawed logic conflates the desirability of severance with its feasibility. Instead of examining the interplay between the relevant contractual provisions and asking whether the arbitration agreement is *capable* of being enforced (as California courts do with ordinary contracts, *see, e.g., Marathon Entm't v. Blasi*, 174 P.3d 741, 751 (Cal. 2008)), the *Armendariz* rule allows a court to ask whether a given arbitration agreement *should* be enforced. And it permits the court to answer in the negative for just about any reason.

The *Armendariz* rule flies in the face of this Court's repeated admonition that courts may not "'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Concepcion*, 563 U.S. at 341 (quoting *Perry*, 482 U.S. at 493 n. 9). This warning has gone largely unheeded in California: California courts apply *Armendariz*'s "two-strikes-you're-out" rule to arbitration agreements when they would not do so to ordinary agreements, as to which there is supposedly a "strong legislative and judicial preference [of] sever[ing] [an] offending term and enforc[ing] the balance of the agreement." *Roman v.*

Superior Court, 92 Cal. Rptr. 1462, 1477–78 (Ct. App. 2009).

The traditional severability rule, which flows from section 1599 of the Civil Code, is quite different. It provides that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Under this rule, California courts typically treat ordinary agreements with deference, enforcing those agreements regardless of how many unenforceable provisions they contain or how indivisible they are. In *Marathon Entertainment*, a case involving an actor and a talent agency, the California Supreme Court rejected the plaintiff's argument that an entire agreement for the procurement of employment should be voided because it had been pervaded by "illegal" provisions and would undermine certain statutes governing the relationship between actors and talent agencies. 174 P.3d at 775. The Court did not take the "two-strikes" route here: instead, citing the traditional severability rule set forth in section 1599, it dutifully examined the lawful portions of the contract and determined that they "feasibly may be severed." *Id*. at 751.

Marathon is not an isolated example: In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 13 (Cal. 1998), the California Supreme Court once again applied the traditional severability rule to sever offending provisions instead of invalidating the contract in its entirety. In *Birbrower*, a client sued its law firm for breach of the parties' fee agreement for legal services performed in New York and California because the firm had performed legal work in California without a li-

cense. *Id*. at 4. The California Supreme Court agreed that the firm had engaged in the unauthorized practice of law in California and that the parties' fee agreement "became illegal" when it did so, but nevertheless upheld the portion of the agreement permitting fees for the work lawfully performed in New York. *Id*. at 12–13.

Likewise, in *MKB Management Inc. v. Melikian*, 108 Cal. Rptr. 3d 899, 903 (Ct. App. 2010), the California Court of Appeal reversed the trial court's ruling that a property management agreement providing for multiple services was unenforceable because its "principal object" was for the defendant, who had no real estate license, to provide services for which a real estate license was required. The trial court, which had applied *Armendariz*-like reasoning, had stated that severance of the provisions relating to services for which the license was required would be impossible because it would "undermine the real estate licensing statutes." *Id*. at 906. But the Court of Appeal disagreed with that premise and did not apply anything resembling the *Armendariz* "two-strikes" rule. Instead, it declared that it could not conclude "as a matter of law … that all of the services provided under the property management agreement were dependent upon or inextricably related to the acts for which a real estate broker license was required" and declined to invalidate the entire agreement. *Id*.

Yet California courts deviate from the traditional severability rule when asked to enforce an arbitration agreement. Instead of examining the lawful portions of the agreement and analyzing whether severability is feasible, courts follow an arbitration-specific severability rule and focus almost exclusively

on whether the agreement contains more than one unenforceable provision. In *Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal. Rptr. 3d 42, 55 (Ct. App. 2014), for example, the California Court of Appeal affirmed an order refusing to sever a single "enforceability" clause from an arbitration agreement because the clause contained four unconscionable provisions demonstrating a "systemic lack of mutuality," even though the contract easily could have been reformed to exclude those "systemic" provisions. *Id.* The court did not examine the remainder of the contract to determine whether anything within it could be enforced. Likewise, in *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 501 (Ct. App. 2012), the Court of Appeal affirmed the trial court's refusal to enforce an arbitration agreement with "multiple defects" without any discussion whatsoever of the lawful portions of the contract.

Parada v. Superior Court, 98 Cal. Rptr. 3d 743, 770 (Ct. App. 2009), applied the same mode of analysis. There, the California Court of Appeal reversed an order compelling arbitration. It invalidated the arbitration agreement not merely because it had more than one offending provision, but because the defendant had supposedly included the offending provisions "deliberately" and for an "improper purpose of discouraging or preventing its customers from vindicating their rights." *Id.*

These are not unique examples. Since the California Supreme Court decided *Armendariz* in 2000, California state courts have used its "permeated" language to invalidate more than 17 arbitration agreements in published decisions, without applying the traditional severability analysis that is used for

other contracts.[2] Only two cases in that set even *mention* the traditional rule set forth in section 1599, and the ones that do mention it fail to apply it.

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[2] *See*, *e.g.*, *Pinela v. Neiman Marcus Grp., Inc.*, 190 Cal. Rptr. 3d 159, 183–84 (Ct. App. 2015) (invalidating arbitration agreement containing three unconscionable provisions); *Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal. Rptr. 3d 42, 55 (Ct. App. 2014) (four unconscionable provisions); *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 799 (Ct. App. 2012) (two unconscionable provisions); *Wherry v. Award, Inc.*, 123 Cal. Rptr. 3d 1, 7–8 (Ct. App. 2011) (three unconscionable provisions); *Lhotka v. Geographic Expeditions*, 104 Cal. Rptr. 3d 844, 852–53 (Ct. App. 2010) (two unconscionable provisions and two provisions that "compounded" the unfairness); *Suh v. Super. Ct.*, 105 Cal. Rptr. 3d 585, 596–97 (Ct. App. 2010) (one unconscionable provision (limiting remedies)); *Trivedi v. Curexo Tech. Corp.*, 116 Cal. Rptr. 3d 804, 813 (Ct. App. 2010) (two unconscionable provisions); *Sanchez v. Western Pizza Enters.*, 90 Cal. Rptr. 3d 818, 838–39 (Ct. App. 2009) (two unconscionable provisions, including class-action waiver); *Ontiveros v. DHL Express. (USA) Inc.*, 79 Cal. Rptr. 3d 471, 488 (Ct. App. 2008) (three unconscionable provisions); *Abramson v. Juniper Networks*, 9 Cal. Rptr. 3d 422, 444–45 (Ct. App. 2004) (two unconscionable provisions); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 106 (Ct. App. 2004) (two unconscionable provisions); *Martinez v. Master Protection Corp.*, 12 Cal. Rptr. 3d 663, 673 (Ct. App. 2004) (three unconscionable provisions); *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 311–12 (Ct. App. 2004) (two unconscionable provisions); *O'Hare v. Mun. Res. Consultants*, 132 Cal. Rptr. 2d 116, 121, 125, 129 (Ct. App. 2003) (two unconscionable provisions); *Mercuro v. Super. Ct.*, 116 Cal. Rptr. 2d 671, 683–84 (Ct. App. 2002) (three unconscionable provisions); *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 385 (Ct. App. 2001) (lack of bilaterality tainted at least two provisions); *Pinedo v. Premium Tobacco Stores*, 102 Cal. Rptr. 2d 435, 440 (Ct. App. 2000) (four unconscionable provisions).

Abramson v. Juniper Networks, 9 Cal. Rptr. 3d 422, 444–45 (Ct. App. 2004); *Sanchez v. Western Pizza Enters.*, 90 Cal. Rptr. 3d 818, 838–39 (Ct. App. 2009). And the Ninth Circuit, applying California law, has done the same on several other occasions. *See*, *e.g.*, *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1180 (9th Cir. 2003) (six provisions combined to "stack the deck unconscionably" in favor of the defendant); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 787 (9th Cir. 2002) (three unconscionable provisions). That asymmetric treatment suggests not merely an improper exercise of judicial discretion, but a systematic effort to disfavor arbitration agreements relative to other contracts. This double standard could not conflict more with the purpose of the FAA, which was to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010).

III. THIS COURT SHOULD REVERSE THE NINTH CIRCUIT'S DECISION AND ENFORCE THE FAA'S COMMAND TO RESPECT THE CONTRACTUAL EXPECTATIONS OF THE PARTIES

California courts' discrimination against arbitration agreements based on the belief that arbitration by its nature is inferior to litigation has persisted despite this Court's numerous attempts to prevent and correct it.

Two recent cases are illustrative. In *Iskanian v. CLS Transport Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), and *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), the California Supreme Court and the Ninth Circuit invoked California law in refusing to enforce provisions in arbitration agreements that would have required an em-

ployee to waive the right to bring a representative action under the Private Attorneys General Act (PAGA). In both cases, the courts reasoned that the FAA did not permit private parties to circumvent California's efforts to enforce its Labor Code by agreeing to waive PAGA actions in arbitration. *See Iskanian*, 327 P.3d at 149 (observing that allowing employees to waive the right to bring PAGA actions would "disable one of the primary mechanisms for enforcing the Labor Code" and would undermine statutes providing that laws established for a public purpose may not be contravened by a private agreement); *Sakkab*, 803 F.3d at 439 (noting that the court's conclusion that "the FAA does not preempt the *Iskanian* rule is bolstered by the PAGA's central role in enforcing California's labor laws").

The logic of *Iskanian* and *Sakkab* cannot be reconciled with this Court's clear holding in *Concepcion* that states "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 563 U.S. at 341; *see also Sakkab*, 803 F.3d at 449 (N.R. Smith, J., dissenting) ("[I]f a state law violates or frustrates the FAA, the state law must give way, even if such a decision prevents the state's interest from being vindicated."). Nor can their logic be reconciled with this Court's subsequent holding in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013), that policy interests behind particular legislation do not override Congress's desire for arbitration agreements to be enforced.

The *Iskanian* rule, like the now-defunct rule set forth in *Discovery Bank v. Superior Court*, 113 P.3d 1110 (Cal. 2005), *overruled by Concepcion*, 563 U.S. 333, interferes with the parties' contractual expecta-

tions and deprives them of the benefits of arbitration by making arbitration "more costly," "slower," and more prone to generate a "procedural morass." 803 F.3d at 445 (N.R. Smith, J., dissenting) (citing *Concepcion*, 563 U.S. at 348); *see also Concepcion*, 563 U.S. at 349–50 (adding that class-action waivers may be desirable to protect the rights of absent class members and to reduce the financial risk to defendants).

The *Sakkab* majority defended the *Iskanian* rule by reasoning that the parties could theoretically agree to procedures to simplify the arbitration of the representative PAGA claims or could agree to arbitrate high-stakes issues posing greater financial risk to defendants. *See* 803 F.3d at 437–38. But that defense of *Iskanian* ignores that the FAA's overriding purpose is to ensure that *the parties* are empowered to make those decisions, not a court bent on achieving policy objectives. *See id.* at 448 ("Parties to an arbitration *could agree* to arbitrate high stakes issues. However, a state court cannot 'force such a decision.'").

* * *

As this Court stated nearly three decades ago in *Perry*, courts may not use "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." 482 U.S. at 492 n. 9. Cognizant that the FAA *should* preempt state laws that are inconsistent with the goals of arbitration (such as PAGA), *Iskanian*, *Sakkab*, and the instant case circumvent that obstacle by disguising those same policy objections as "neutral" state-law unconscionability principles, and proceeding to apply those principles

unequally to arbitration agreements just as the California Supreme Court did in *Armendariz*.

All three cases thus reflect the same embedded animus against arbitration, and engage in the same kind of judicial second-guessing that the FAA was enacted to eradicate. *See Granite Rock*, 561 U.S. at 302. On the whole—particularly in light of the long history of other California decisions undermining the FAA at every turn—the anti-arbitration prejudices that these cases display demonstrate the urgent need for this Court to reverse the Ninth Circuit's decision in this case and put an end to California's discrimination against arbitration once and for all.

CONCLUSION

For the reasons stated above and in Petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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