No. 17-694

IN THE

Supreme Court of the United States

THE RITZ-CARLTON DEVELOPMENT CO., INC., ET AL.,
Petitioners,

v.

KRISHNA NARAYAN, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In the decision below, the Hawaii Supreme Court concluded that an arbitration clause incorporated into a contract for the purchase of a condominium was both procedurally and substantively unconscionable because, among other reasons, the clause was buried in an ancillary document, conflicted with dispute-resolution provisions in two other documents, barred the award of punitive damages even for egregious misconduct, precluded respondents from taking discovery necessary to prove their case, and prohibited respondents from disclosing the facts underlying the dispute, thus inhibiting them from fact-gathering.

The question presented is whether the Hawaii Supreme Court faithfully applied settled Hawaii contract law principles when it concluded that the arbitration clause was incorporated into the contract through procedurally unconscionable means and contains substantively unconscionable terms that are not severable from the rest of the clause.

CORPORATE DISCLOSURE STATEMENT

No respondent has a parent corporation, and no publicly traded company owns 10% or more of any respondent's stock.

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STATEMENT

A. Factual Background

This case arises from the abandonment of a condominium development and petitioners' fraudulent concealment of and affirmative misrepresentations related to their decision to stop funding that development. Respondents purchased units in the development and entered into Purchase Agreements for those units with the developer, Kapalua Bay, LLC. Pet. App. 4a.[1]

Although petitioners give the impression that this case involves a single document in which an arbitration clause appears, that is not correct. In fact, this case involves three separate documents, which contain conflicting dispute-resolution provisions. The principal document constituting the contract between respondents and the developer was the Purchase Agreement. Also relevant are two other documents recorded with the Hawaii Bureau of Conveyances prior to respondents' purchases: the Condominium Public Report and the Condominium Declaration.

1. *The Purchase Agreement.* The Purchase Agreement contains two provisions contemplating litigation of disputes. First, a provision labeled "Waiver of Jury Trial" provides that the parties to the contract waive their right to a jury trial and that venue for any dispute between the parties "on any claim or cause of

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[1] The petitioners in this Court are not privy to any contract with respondents. The only party that signed a contract with respondents was the developer, Kapalua Bay LLC. The developer defaulted in the proceedings below, consented to the court's jurisdiction, and did not join petitioners' motion to compel arbitration. *See* No. 15-378 Br. in Opp. 11-13. The developer is not a petitioner in this Court. *See* Pet. iii.

action that is based upon or arising out of this Purchase Agreement" would be in the Second Circuit of Hawaii, which is Maui County. Pet. App. 51a. Second, a provision labeled "Attorneys['] Fees" entitles a prevailing party to recover attorneys' fees in "any legal or other proceeding, including arbitration." *Id.* at 51a-52a.

2. *The Public Report.* The Public Report is required under Hawaii law as a consumer protection measure to ensure that condominium purchasers are informed of material facts related to their purchases. The Public Report provides that "[t]he provisions of these documents are intended to be, and in most cases are, enforceable in a court of law." Pet. App. 54a.

3. *The Declaration.* Hawaii law requires every developer to file a Condominium Declaration with the State.[2] The Declaration in this case is a a 36-page document that does not include an index, table of contents, or headnote. The Declaration states on page thirty-four:

> In the event of the occurrence of any controversy or claim arising out of, or related to, this Declaration or to any alleged construction or design defects pertaining to the Common Elements or to the Improvements in the Project …, the dispute shall be resolved by arbitration[.]

Pet. App. 52a. It is also stipulates that the arbitration must be held in Honolulu, Hawaii. *Id.*

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[2] Under Hawaii law, a condominium declaration must describe or include the number of units in the property regime, the permitted and prohibited uses of each unit, and any rights the developer reserves regarding the condominium property regime, such as development rights and rights to modify the condominium map. Haw. Rev. Stat. § 514B-32(a)(3), (6), (12). The governing statute does not contemplate the inclusion of an arbitration clause.

The arbitration clause includes the following restrictions: (1) the arbitrator may not award "punitive, exemplary, or consequential damages, or any damages excluded by, or in excess of, any damage limitations expressed in this Declaration"; (2) the arbitrator may order disclosure by opposing parties of "nonrebuttable exhibits and copies of witness lists … [but] shall have no other power to order discovery or depositions unless and only to the extent that all parties otherwise agree in writing"; and (3) parties may not "disclose *the facts of the underlying dispute* or the contents or results" of the arbitration "without prior written consent of all parties." Pet. App. 52a-53a (emphasis added).

B. Prior State Court Proceedings

After the project's main lender filed for bankruptcy, petitioners induced respondents into purchasing condominiums by repeatedly assuring respondents that they were standing behind the project. Instead, petitioners made an affirmative decision to put no further money into the project and intentionally allowed the project to fall into foreclosure. Respondents brought suit in the Second Circuit Court of Hawaii, alleging that petitioners had breached their fiduciary duties and failed to provide accurate information about the project's status. Pet. App. 54a.

Petitioners filed a motion to compel arbitration. The trial court denied the motion. Pet. App. 85a. Petitioners appealed to the Intermediate Court of Appeals of Hawaii ("ICA"), which reversed and ordered arbitration. *Id.* at 73a-84a.

The Hawaii Supreme Court reversed the ICA, and held that the arbitration clause was not enforceable. Pet. App. 46a-72a. The court issued two independent

rulings relevant to that decision. First, the court concluded that, taken as a whole, all the documents supposedly making up the agreement among the parties are ambiguous as to whether the parties had entered into an arbitration agreement. *See id.* at 60a. Because the condominium owners did not unambiguously assent to arbitration, the court concluded, the arbitration clause could not be enforced. *Id.* at 47a.

Separately, the Hawaii Supreme Court concluded, applying state-law rules of contract unconscionability, that "the arbitration clause also contains unconscionable terms"—namely, the restrictions on discovery, the confidentiality provision, and the bar on punitive damages. Pet. App. 61a, 67a-71a. The Hawaii Supreme Court noted that this Court's decisions have made clear that, "like other contracts, arbitration provisions 'may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* at 61a (quoting *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 66 (2010)). The court then analyzed the arbitration clause for both procedural and substantive unconscionability, and found that both are present. *Id.* at 63a-71a.

C. Prior Proceedings In This Court

Petitioners filed a petition for a writ of certiorari to review the Hawaii Supreme Court's decision insofar as it had ruled that the parties had not unambiguously entered into an arbitration agreement. They did not seek review of the state court's unconscionability rulings. *See* No. 15-378 Pet. While the petition for certiorari was pending, this Court decided *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015). The Court then granted certiorari, vacated the judgment of the Hawaii Supreme Court, and remanded the case for further con-

sideration in light of *DIRECTV*. *See Ritz-Carlton Dev. Co.* v. *Narayan*, 136 S. Ct. 800 (2016).

D. Proceedings On Remand

On remand, the Hawaii Supreme Court reaffirmed its previous holding under Hawaii contract law that the arbitration clause contains terms that are substantively unconscionable and that the arbitration clause itself was incorporated into the contract through procedurally unconscionable means.[3] Pet. App. 4a. After examining this Court's decision in *DIRECTV*, *id.* at 11a-14a, the Hawaii Supreme Court reviewed the unconscionability doctrine under Hawaii law, *id.* at 14a-16a. The court explained that "under Hawai'i law, unconscionability is recognized as a general contract defense." *Id.* at 14a. To establish unconscionability, a party must generally demonstrate procedural and substantive unconscionability, or demonstrate that the agreement is so one-sided as not to require procedural unconscionability. *Id.* at 15a-16a n.5.

The court first examined the factual circumstances of the contracting process. Pet. App. 17a ("In this case, the contracting process for the arbitration clause exhibits elements of procedural unconscionability."). It identified four reasons for its conclusion that the way the arbitration clause had been incorporated into the contract was procedurally unconscionable:

(1) "[t]he party with the superior bargaining strength, the [petitioners], not only drafted the arbitration clause found in the declaration, but they also recorded the declaration in the Bureau of Conveyances

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[3] On remand, the Hawaii Supreme Court did not rely on its separate previous holding that the parties had not entered into an arbitration agreement. Pet. App. 60a.

prior to the execution of the purchase agreements[,]" *id.*;

(2) "[respondents] were required to conform to the terms of the declaration as recorded if they wanted to purchase a Ritz-Carlton condominium on Maui[,]" *id.*;

(3) "there is an element of unfair surprise in that the arbitration clause is buried at the end of the declaration[,]" *id.* at 18a; and

(4) "the controlling documents offer conflicting guidance on dispute resolution, with the declaration mandating arbitration for the parties, while the purchase agreement and public report allow for disputes to be litigated through traditional legal proceedings[,]" *id.* at 18a-19a.

The court then examined specific provisions of the arbitration clause for substantive unconscionability, and found three aspects of the arbitration clause substantively unconscionable:

First, the court concluded that the bar on punitive damages is substantively unconscionable. Pet. App. 20a-22a. The court stressed that "Hawai'i law disfavors limiting damages for intentional and reckless conduct." *Id.* at 20a; *see also id.* at 21a-22a ("Under Hawai'i law, such [damage-limiting] provisions, regardless of whether they are found in arbitration agreements or other contracts, are substantively unconscionable.").[4] Relying on non-arbitration cases in which contractual limitations on liability, even for egregious conduct, had been held unenforceable, the court concluded that "such

[4] Petitioners do not challenge the "Hawaii court's determination that the arbitration agreement's prohibition on the award of the punitive damages is unconscionable[.]" Pet. 23 n.4.

provisions, regardless of whether they are found in arbitration agreements or other contracts, are substantively unconscionable." *Id.* at 21a-22a.

Second, the court ruled that the arbitration clause's drastic restriction on discovery is unconscionable. The court acknowledged that, "[i]n the arbitration context, limitations on discovery serve an important purpose," and that "limitations on discovery may be enforceable in the arbitral forum, so long as they are reasonable and do not hinder a party's ability to prove or defend a claim." Pet. App. 22a. But, the court stressed, "the discovery provision [here] places *severe* limitations on the disclosure of relevant information and hinders [respondents'] ability to prove their claims." *Id.* at 23a (emphasis added). The court also concluded that "the discovery provision violates parts of Hawai'i Revised Statutes (HRS) § 658A, which grant an arbitrator considerable discretion in permitting discovery." *Id.*

Third, the court found that the confidentiality provision is substantively unconscionable because "when read in conjunction with the discovery provision, [the confidentiality provision] impairs [respondents'] ability to investigate and pursue their claims." Pet. App. 26a. As the court explained, "[i]f the confidentiality and discovery provisions in this case were enforced as written, [respondents] would only be able to obtain discovery by consent and would be prevented from discussing their claims with other potential plaintiffs because the confidentiality provision would make them unable to 'disclose the facts of the underlying dispute.'" *Id.*

The court then addressed whether those three provisions are severable from the rest of the arbitration clause. Pet. App. 27a-33a. The court examined Hawaii law on severance of illegal contractual provisions as well

as the law of other States and provisions of the Second Restatement of Contracts and the Uniform Commercial Code on that question. It noted the "general rule" that severance is warranted "when the illegal provision is not central to the parties' agreement," and then reviewed a line of cases holding that, "where unconscionability so pervades the agreement, the court may refuse to enforce the agreement as a whole." *Id.* at 28a.

"Here," the court concluded, "unconscionability so pervades the arbitration clause that it is unenforceable." Pet. App. 29a. The clause is "part of an adhesion contract whose terms were unilaterally determined by the stronger contracting party, and are ambiguous when read together with the other controlling documents." *Id.* Substantively, the arbitration clause as a whole "would enable [petitioners] to curtail liability for even the most outrageous and intentionally harmful conduct," "hinders [respondents'] ability to pursue their claims through extreme discovery and confidentiality limitations," and "goes beyond designating a forum for dispute resolution by depriving [respondents] of a meaningful ability to assert rights that they might otherwise hold." *Id.* As a consequence, the court concluded, the arbitration clause is unenforceable. *Id.*

ARGUMENT

I. THE DECISION BELOW FAITHFULLY APPLIES STATE UNCONSCIONABILITY LAW AND DOES NOT REFLECT HOSTILITY TO ARBITRATION

Petitioners challenge three aspects of the Hawaii Supreme Court's decision—its ruling that the arbitration clause's "discovery provision places severe limitations on the disclosure of relevant information and hinders [respondents'] ability to prove their claims," Pet. App. 23a;

its holding that the clause's confidentiality provision, "especially when read in conjunction with the discovery provision," is so drastic that it "impairs [respondents'] ability to investigate and pursue their claims," *id.* at 26a; and its ultimate conclusion that "unconscionability so pervades the arbitration clause that it is unenforceable," *id.* at 29a. Those rulings reflect an unremarkable application of Hawaii contract law to the facts of this case, and do not warrant review by this Court.

The Federal Arbitration Act ("FAA") does not prevent state courts from applying "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011); *see* 9 U.S.C. § 2 (preserving state authority based on "such grounds as exist at law or in equity for the revocation of any contract"). In Hawaii, unconscionability is a well established and generally applicable contract defense, and petitioners do not argue otherwise.

Petitioners contend that the Hawaii Supreme Court's decision reflects hostility to arbitration. But the Hawaii Supreme Court straightforwardly applied state law of unconscionability to the arbitration clause at issue here, and on that basis held that three provisions in that clause—which were buried at the end of an ancillary document and if given effect would make it virtually impossible for respondents to prove their case—are both procedurally and substantively unconscionable. The court also concluded, unexceptionally and following generally applicable law on severance, that those provisions are not severable from the rest of the arbitration clause.

None of this reflects hostility to arbitration or departs from the fundamental FAA principle that con-

tract defenses may be invoked in arbitration as long as they are applied in an evenhanded manner. The court relied on general contract principles and non-arbitration cases in which the defense of unconscionability and the law of severance had previously been articulated. Petitioners in essence ask this Court to rule that limits on discovery and confidentiality provisions in arbitration agreements may never be held unconscionable and that unconscionable terms in arbitration clauses must always be severed. But such a ruling would depart from this Court's recognition that state-law defenses to the enforceability of a contract are just as applicable to arbitration agreements as they are to other kinds of contracts.

At bottom, petitioners object to the way that the Hawaii Supreme Court applied state-law contract principles. But the Hawaii Supreme Court did not break new ground in this case, and petitioners' fact-bound objection to its ruling does not warrant this Court's review.

A. Several Aspects Of This Case Make It Unsuitable For Review

As explained below, petitioners are incorrect in arguing that the decision reflects hostility to arbitration or departs from this Court's decisions applying the FAA (*see* pp. 16-33, *infra*). In addition, several aspects of this particular case make it unworthy of review.

1. First, petitioners do not challenge a central part of the Hawaii Supreme Court's decision—that the way in which the arbitration clause was incorporated into the contract was procedurally unconscionable. In reaching that conclusion, the court stressed the "element of unfair surprise in that the arbitration clause is buried at the end of the declaration and is ambiguous

when read in conjunction with the other controlling documents, including the purchase agreement and the public report." Pet. App. 18a.

The Purchase Agreement itself—which is studiously ignored by petitioners, but which is the most natural place one would look to find the terms of the parties' agreement—does not mention a binding agreement to arbitrate, and instead states that "[v]enue for any cause of action brought by Purchaser hereunder shall be in the Second Circuit Court, Hawai'i." Pet. App. 18a. Another document, the Public Report, which is required by law to inform purchasers of all material facts related to the purchase of a condominium unit, similarly states that provisions of various documents, *including the Condominium Declaration*, "are intended to be, and in most cases are, enforceable in a court of law." *Id.*

Only the Condominium Declaration, which the developer had already filed with the State when respondents signed the Purchase Agreement, indicates (at page 34) that arbitration is required—which conflicts with dispute-resolution provisions in the Purchase Agreement and the Public Report. The Declaration, although incorporated into the Purchase Agreement, was not signed by the purchasers, and by statute it pertains to unrelated matters, such as a physical description of the property. *See* Haw. Rev. Stat. § 514B-32(a)(3), (6), (12).[5]

[5] The effect of drafting an agreement with multiple dispute-resolution procedures is to create a forum-shopping option for the drafter. Petitioners attempted to take advantage of that option in a related case, *Nath* v. *Ritz-Carlton Development Co.*, which involves the same documents. Petitioners litigated that case in state court "for more than a year" before seeking to compel arbitration. *See* No. 15-378 Br. in Opp. 5.

As the Hawaii Supreme Court explained, such contradictory provisions in controlling documents—especially where the provision at issue is buried in an ancillary document that is not the most natural location for a dispute-resolution clause—"has the potential to confuse or mislead the non-drafting parties, and deprives those parties from a full and adequate understanding of their rights under contract." Pet. App. 19a. In reaching that conclusion, the court relied on a previous Hawaii case that had found contract provisions to be procedurally unconscionable because of unfair surprise. *Id.* (citing *Balogh* v. *Balogh*, 332 P.3d 631, 643 (Haw. 2014)).[6]

Petitioners' failure to challenge the Hawaii Supreme Court's procedural-unconscionability ruling makes this case unsuitable for review. The court's ruling that petitioners surprised respondents with the arbitration clause was central to its conclusion that the clause is so one-sided as to be unenforceable. Petitioners argue that two of the arbitration clause's terms should not have been ruled *substantively* unconsciona-

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[6] Petitioners argue (at 11 n.2) that the Hawaii Supreme Court failed to reconcile its procedural-unconscionability ruling with its decision not to address "whether ambiguity existed as to the intent to arbitrate." But the two issues are different, even though ambiguity may be relevant to both; on remand the court assumed without deciding that the parties had in fact entered into an arbitration agreement and proceeded to consider whether that agreement was unenforceable because of unconscionability. Petitioners also question why the court did not hold that the *entire* Condominium Declaration, not just the arbitration clause, was procedurally unconscionable, but only the arbitration clause implicates the concern of unfair surprise as it unexpectedly appears in the Declaration and conflicts with dispute-resolution provisions in the other controlling documents. The rest of the Declaration contains exactly what one would expect to find in a condominium declaration.

ble, but in seeking to have the clause upheld on that basis, they are in effect challenging a ruling that the Hawaii Supreme Court never made. Their failure to acknowledge that the court's decision rests on other critical factors, uncontested here, lends their petition a highly abstract character.

2. In addition, it is not clear that these parties actually entered into any arbitration agreement—for two separate reasons. First, as just discussed (pp. 11-12, *supra*), the three documents relevant to respondents' agreement to purchase condominiums contain conflicting dispute-resolution provisions. On remand from this Court, the Hawaii Supreme Court did not rely on its previous conclusion that, in light of the ambiguity created by the conflicts among the various documents, the parties had not clearly manifested an intent to arbitrate their disputes. Pet. App. 60a. Nonetheless, it remains unresolved whether the parties entered into any arbitration agreement. And as respondents explained in their opposition to the previous petition for certiorari, under generally applicable Hawaii contract law, which requires in many circumstances that contractual ambiguity be resolved against the drafter, a court can and should conclude as a matter of law that the parties reached no meeting of the minds to arbitrate their dispute. *See* No. 15-378 Br. in Opp. 23-26.

Petitioners also fail to inform this Court that *no* petitioner signed *any* contract with respondents. The only party that signed the Purchase Agreements with respondents, the developer Kapalua Bay LLC, defaulted in the state courts, did not move to compel arbitration, and is not a petitioner here. *See* p. 1, *supra*. To invoke arbitration, petitioners must rely on state-law doctrines of succession and estoppel that are inapplicable here. *See* No. 15-378 Br. in Opp. 11-15. Should this

Court wish to re-examine the relationship between the FAA and state unconscionability law, it should do so in a case where, at a minimum, it is clear that the parties before the Court entered into an arbitration agreement.

B. Unconscionability Doctrine Is A Well Established And Generally Applicable Contract Defense In Hawaii

Since at least 1885, Hawaii has refused to enforce unconscionable agreements. *See McKeague* v. *Kennedy*, 5 Haw. 347, 348 (1885). The doctrine of unconscionability has been applied to a broad array of contracts, including contracts that impose limitations on tort liability without a meaningful opportunity to bargain, *see Kawamata Farms, Inc.* v. *United Agri Prods.*, 948 P.2d 1055, 1081-1082 (Haw. 1997); various kinds of family law agreements, *see Lewis* v. *Lewis*, 748 P.2d 1362, 1365-1368 (Haw. 1988); condemnation clauses in commercial lease agreements, *see City & Cty. of Honolulu* v. *Midkiff*, 616 P.2d 213, 218 (Haw. 1980); and liability-limitation clauses in commercial contracts, *see Earl M. Jorgensen Co.* v. *Mark Constr., Inc.*, 540 P.2d 978 (Haw. 1975).

The general principles of the doctrine are the same regardless of the type of contract to which it is applied. As the Hawaii Supreme Court explained, Hawaii cases have defined unconscionability as encompassing "'two principles: one-sidedness and unfair surprise.'" Pet. App. 15a (quoting *Balogh*, 332 P.3d at 643); *see Lewis*, 748 P.2d at 1366 ("Two basic principles are encompassed within the concept of unconscionability, one-sidedness and unfair surprise."); *Midkiff*, 616 P.2d at 218 ("'Unconscionability has generally been recognized to include an absence of meaningful choice on the part

of one of the parties together with contract terms which are unreasonably favorable to the other party.'" (quoting *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). Hawaii courts have applied the doctrine of unconscionability to arbitration and non-arbitration agreements alike. Thus, as the court concluded, "under the common law of Hawai'i, unconscionability is a generally applicable contract defense." Pet. App. 16a.

The principle that unconscionable provisions may be inseverable from the rest of the contract is also well settled. The Hawaii Supreme Court acknowledged the "general rule" allowing severance of an illegal provision. Pet. App. 28a. But it also noted that a Hawaii statute, the Second Restatement of Contracts, the Uniform Commercial Code, and the law of other States all support the principle that "where unconscionability so pervades the agreement, the court may refuse to enforce the agreement as a whole." *Id.* at 28a-29a & n.10. Unlike other decisions cited by petitioners, therefore, this is not a case where a state court invented a new doctrine hostile to arbitration agreements; the principle that illegal contractual provisions may not be severable is widely recognized.

C. The Hawaii Supreme Court's Application Of State-Law Unconscionability Principles Is Unexceptionable

Petitioners argue (at 15, 18, 21) that the Hawaii Supreme Court's discovery and confidentiality rulings are fundamentally at odds with the nature of arbitration, which allows parties, when they so choose, to resolve their disputes in a streamlined and nonpublic way. That argument rests on an unjustified exaggeration of the decision below. The Hawaii Supreme Court

certainly did not suggest that all limits on discovery or all confidentiality provisions in arbitration are unconscionable; to the contrary, the court recognized that such provisions are often beneficial to parties seeking to resolve their disputes through arbitration. *See* Pet. App. 22a, 25a. But the court found that the discovery and confidentiality provisions in *this* arbitration clause are severe and extreme and would effectively prevent respondents from proving their case. Petitioners do not argue that the court's evaluation of the effect of those provisions is wrong, and such a fact-bound argument would not in any event warrant further review.

1. *Restrictions on Discovery.* The Hawaii Supreme Court observed that, "[i]n the arbitration context, limitations on discovery serve an important purpose because 'the underlying reason many people choose arbitration is the relative speed, lower cost, and greater efficiency of the process.'" Pet. App. 22a (quoting *Kona Vill. Realty, Inc.* v. *Sunstone Realty Partners, XIV, LLC*, 236 P.3d 456, 457 (Haw. 2010)). "As such," it explained, "limitations on discovery may be enforceable in an arbitral forum, so long as they are reasonable and do not hinder a party's ability to prove or defend a claim." *Id.* (citing *Hac* v. *University of Haw.*, 73 P.3d 46, 54 (Haw. 2003)); *see also id.* at 22a-23a (citing *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), for the proposition that arbitration that includes document production, information requests, depositions, and subpoena provisions offers sufficiently fair process).

Here, however, the court concluded that the arbitration clause's restriction on discovery is so severe that it "hinders [respondents'] ability to prove their claims." Pet. App. 23a. The clause provides that, aside from "nonrebuttable exhibits and copies of witness

lists," the arbitrator "shall have no other power to order discovery or depositions unless and then only to the extent that all parties agree in writing." *Id.* Thus, in this complex case involving the collapse of a multi-hundred-million dollar luxury property development, respondents would be effectively prohibited from taking any depositions and severely limited in the written discovery they could request from petitioners.

Petitioners do not challenge the court's evaluation of the discovery provision—that it would preclude respondents from making their case. They argue first (at 18-19) that limits on discovery are fundamental to arbitration, and so the Hawaii Supreme Court erred in looking to the State's "'basic philosophy' in discovery" in civil litigation, which favors "allowing parties to access relevant information for their claims." Pet. App. 25a. But the Hawaii Supreme Court did not suggest that the scope of discovery in arbitration must exactly mirror that in civil litigation. To the contrary, the court made clear that limits on discovery in arbitration can often be beneficial and fair, *see id.* at 22a, but found the restrictions in this case to be excessive. And arbitration proceedings—including those governed by rules that petitioners cite—frequently allow discovery that is far more extensive than would be available under the arbitration clause in this case.[7]

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[7] *See* American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* 19-20, 38 (2013) (in all cases, parties may be required to "exchange documents in their possession or custody on which they intend to rely" and "make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents;" and in large and complex cases, "at the discretion of the arbitrator, upon good cause shown … the arbitrator may order depositions"); *see also* American Arbitration Asso-

Second, petitioners argue (at 23-25) that the court violated the FAA when it concluded that the restrictions on discovery violated a Hawaii arbitration statute, Haw. Rev. Stat. § 658A-17, that grants arbitrators the nonwaivable authority to order document production and depositions. According to petitioners, the court's reliance on a state arbitration statute violates this Court's admonition that "[c]ourts may not invalidate arbitration agreements under state laws applicable only to arbitration agreements," *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996).

That argument is misguided for several reasons. As an initial matter, the Hawaii Supreme Court made clear that its consideration of the Hawaii arbitration statute was unnecessary to its ruling. After discussing the severe impact that the discovery restriction had on respondents' ability to prove their case, the court stated that it was holding the restriction unconscionable "[o]n this basis alone." Pet. App. 23a. This Court reviews "judgments, not opinions," *Chevron, U.S.A., Inc.* v. *Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984), and certiorari is not warranted to examine statements in opinions that are unnecessary to the lower court's decision. *See Black* v. *Cutler Labs.*, 351 U.S. 292, 297-298 (1956).

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ciation, *Home Construction Arbitration Rules and Mediation Procedures* 20, 27-28 (2007) (explaining that for disputes where the claims exceed $75,000 or are non-monetary, "recorded and transcribed interview[s]" are a standard part of the discovery procedure and "additional interviews [of non-parties] may be … ordered by the arbitrator"); JAMS, *Comprehensive Arbitration Rules & Procedures* 21-22 (2014) (explaining that parties are required to exchange "all non-privileged documents and other information … relevant to the dispute[,]" "may take one deposition of an opposing Party[,]" and that the arbitrator has the authority to determine if additional depositions are necessary).

In any event, petitioners misapprehend the significance of the court's reference to the state arbitration statute. The Hawaii Supreme Court did not suggest, as petitioners appear to believe, that severe contractual restrictions on discovery are unenforceable *only* in arbitration. Petitioners observe (at 17) that the Hawaii Rules of Civil Procedure do not have a provision analogous to the Hawaii Arbitration Act precluding the parties from waiving the factfinder's discretion to order depositions and written discovery. But it does not follow that the Hawaii courts would uphold a contractual restriction on discovery as severe as this one in a case pending before the Hawaii courts rather than an arbitrator. In fact, the court noted that both courts and arbitrators have broad authority to order discovery. *See* Pet. App. 25a. The plain import of the Hawaii Supreme Court's ruling is that the discovery restriction is unconscionable because it precludes the respondents from proving their case—and that would be true whether in arbitration or civil litigation. In no sense does that ruling discriminate against arbitration.

2. *Prohibition on Disclosure of Underlying Facts*. The Hawaii Supreme Court also properly determined that the arbitration clause's confidentiality provision goes too far in limiting respondents' ability to "adequately discover material information about [their] claim[s]." Pet. App. 25a. Petitioners argue (at 20) that arbitration clauses routinely require the parties to maintain the confidence of the arbitration proceeding and its result. As the court explained, however, the confidentiality provision here goes much further; it bars respondents from "disclos[ing] the facts of the underlying dispute" as well. Pet. App. 26a.

Especially when considered in conjunction with the discovery limitation, that fact-disclosure bar effectively

stops respondents from gathering vital information about the condominium project, including the roles of the various petitioners and the timeline of events that led to the underfunding issue. As the court explained, "[i]f the confidentiality and discovery provisions in this case were enforced as written, [respondents] would only be able to obtain discovery by consent and would be prevented from discussing their claims with other potential plaintiffs because the confidentiality provision would make them unable to disclose the facts of the underlying dispute." Pet. App. 26a (internal quotation marks omitted).

Petitioners argue emphatically about the need for confidentiality in the arbitration process. Pet. 20-22. But again, the Hawaii Supreme Court did not dispute that confidentiality may play an important and useful role in arbitration. *See* Pet. App. 25a ("As is the case with discovery limitations, confidentiality provisions are not *per se* substantively unconscionable."). And petitioners do not address the Hawaii Supreme Court's primary concern with the specific confidentiality provision at issue here, which goes far beyond requiring the parties to keep confidential "the [arbitral] process and the award," Pet. 21, and bars the parties from discussing the *underlying facts* that led to the dispute—effectively precluding them from gathering facts to prepare their case. *See* Pet. App. 26a.

Petitioners do not suggest that arbitration clauses routinely preclude parties from discussing the underlying facts with potential witnesses, as the clause does here. Other courts have invalidated similarly extreme provisions as unconscionable. *See Pokorny* v. *Quixtar, Inc.*, 601 F.3d 987, 1002 (9th Cir. 2010); *Bragg* v. *Linden Research, Inc.*, 487 F. Supp. 2d 593, 610 (E.D. Pa. 2007). The Hawaii Supreme Court's decision poses no threat to the typical arbitration proceedings, which require at

most that the parties maintain the confidentiality only of the arbitral proceedings themselves, not the underlying facts of the dispute.[8]

Petitioners cite a treatise for the proposition that "[o]ne hallmark of arbitration is the confidentiality of the process and the award, unless all parties stipulate otherwise." Pet. 21 (citing Oehmke & Brovins, *Commercial Arbitration* § 10:55 (3d ed. Supp. 2014)). As that treatise explains, however, "[r]equiring confidentiality in arbitration is not unconscionable per se *unless it gives one party a fundamentally unfair advantage*." Oehmke & Brovins, *Commercial Arbitration* § 10:55 (West 2017) (emphasis added); *see also* Hon. Paul A. Crotty & Robert E. Crotty, *Confidentiality*, 5 Bus. & Com. Litig. Fed. Cts. § 53:32 (4th ed. 2016) (confidentiality obligation is intended "to keep the *proceedings* confidential" (emphasis added)); Int'l Inst. for Conflict Prevention & Resol., *CPR Procedures & Clauses Administered Arbitration Rules* 25 (2013) (confidentiality obligation is limited to "proceedings, any related discovery and the decisions of the Tribunal"). It is the confidentiality provisions' "fundamentally unfair advantage" that the Hawaii Supreme Court found unconscionable here.

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[8] *See* American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* 42 ("The parties shall maintain the confidentiality of the mediation[.]"); *see also* American Arbitration Association, *Home Construction Arbitration Rules and Mediation Procedures* 16 (same); JAMS, *Comprehensive Arbitration Rules & Procedures* 28 (requiring confidentiality of only the arbitrator and otherwise providing that "[t]he Arbitrator *may* issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information" (emphasis added)).

3. *Severability*. Finally, petitioners argue (Pet. 23-32) that the Hawaii Supreme Court violated the FAA when it concluded that the arbitration clause was so permeated by procedural and substantive unconscionability that the unenforceable provisions could not be severed from the remainder of the clause. That contention—which again amounts to a fact-specific argument that the court erred in its application of state contract law to the facts of this case—is incorrect, and does not warrant this Court's review.

To the extent that petitioners contend that, under the FAA, a court may *never* refuse to sever unconscionable provisions from the rest of an arbitration clause if the parties' contract contains a severability provision, that argument is meritless. The severability of an illegal provision in a contract is a matter of state law, and as long as a court applies the concept of severability to arbitration and non-arbitration agreements in a neutral fashion, it does not contravene the FAA. *See Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017) ("A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" (quoting *Concepcion*, 563 U.S. at 339). The Hawaii Supreme Court did exactly that; it surveyed a broad array of sources discussing severability of unconscionable contractual provisions, not limited to arbitration agreements, and concluded that where unconscionability "pervades" an agreement, the court "may refuse to enforce the agreement as a whole." Pet. App. 28a & n.10.

Petitioners acknowledge (at 25) that courts have refused to enforce arbitration agreements, notwithstanding the inclusion of a severance agreement, when

unconscionability is pervasive in the agreement. They contend, though (at 26), that the Hawaii Supreme Court erred in concluding that unconscionability is pervasive here. But that argument is little more than a contention that the Hawaii Supreme Court erred in applying its own state law of severability, and does not warrant this Court's review. As long as the Hawaii Supreme Court applied the concept of severability neutrally—and it did—its ultimate conclusion does not violate the FAA.[9]

Petitioners point to the D.C. Circuit's decision in *Booker* v. *Robert Half International, Inc.*, 413 F.3d 77 (2005), as an example of how courts should approach the severability of unconscionable clauses. *Booker* does not conflict with the Hawaii Supreme Court's decision in this case. In *Booker*, the district court concluded (in a ruling not challenged in the court of appeals) that an arbitration clause's bar on punitive damages was unconscionable. *See id.* at 80. The district court and court

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[9] Petitioners cite (at 30 n.7) Hawaii cases that severed the illegal portion of an agreement and enforced the remainder. None of those cases calls into question the decision below. Those cases apply the general rule that severance of illegal contract provisions is typically permissible, but they recognize that severance may be inappropriate in certain circumstances. *See Beneficial Haw., Inc.* v. *Kida*, 30 P.3d 895, 917 (Haw. 2001) ("Thus, the general rule is that severance of an illegal provision of a contract is warranted and the lawful portion of the agreement is enforceable when the illegal provision is not central to the parties' agreement and the illegal provision does not involve serious moral turpitude, unless such a result is prohibited by statute."). Moreover, in *Nishimura* v. *Gentry Homes, Ltd.*, 338 P.3d 524 (Haw. 2014), the Hawaii Supreme Court, after invalidating an arbitrator-selection clause as fundamentally unfair, severed that clause and enforced the remainder of the arbitration agreement, *id.* at 530-532—belying petitioners' intimation that that court is unalterably hostile to arbitration.

of appeals also both concluded that the arbitration clause's provision for discovery (which was much more generous than the discovery allowed here) was not unconscionable, at least on its face. *See id.* at 80, 81-83.

Having concluded that only one other provision affecting remedies was unconscionable, the D.C. Circuit concluded that the provision could be severed and the rest of the arbitration agreement enforced. But the D.C. Circuit did not suggest that unconscionable provisions in arbitration clauses must always be severed, even when the clause contains a severability clause. It noted several cases in which courts had struck arbitration clauses in their entirety. *See* 413 F.3d at 84. It also observed that, although other courts had concluded that illegal provisions should be severed, "[t]he differing results may well reflect not so much a split among the circuits as variety among different arbitration agreements. Decisions striking an arbitration clause entirely often involved agreements without a severability clause … *or agreements that did not contain merely one readily severable illegal provision, but instead were infected with illegality*." *Id.* (emphasis added).

This case, unlike *Booker*, does not involve "only one discrete illegal provision in the agreement." 413 F.3d at 85. Rather, it involves a clause that was "infected by illegality" because it was inserted into the parties' contract through unfair surprise, having been buried in an obscure document that the developer unilaterally prepared and filed with the State before respondents signed their Purchase Agreements. That clause also conflicts with the Purchase Agreement and the Public Report, which "allow for disputes to be litigated through traditional legal proceedings." Pet. App. 18a-19a. An order severing certain substantively unconscionable portions of the arbitration clause but directing enforcement of the

remainder of the clause would do nothing to cure the overreaching by which petitioners managed to insert the arbitration clause into the contract. It would also require the court to rewrite the Purchase Agreement and the Public Report to eliminate the parties' agreement that disputes be resolved in court. Under well settled and generally applicable Hawaii contract law, that is something that the Hawaii court cannot do. *See Fortune* v. *Wong*, 702 P.2d 299, 306 (Haw. 1985).

In these circumstances, therefore, the "forbidden provision[s] [are] so basic to the whole scheme" (Booker, 413 F.3d at 85) of the arbitration clause that they cannot be severed. [10] *See Alexander* v. *Anthony Int'l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003) ("The cumulative effect of so much illegality prevents us from enforcing the arbitration agreement. Because the sickness has infected the trunk, we must cut down the entire tree."); *Ingle* v. *Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (declining to sever unconscionable provisions because the arbitration agreement presented an "insidious pattern … that function[ed] as a thumb on [Plaintiff's] side of the scale"); *Goodwin* v. *Branch Banking & Tr. Co.*, 699 F. App'x 274, 276 (4th Cir. 2017) (affirming district court's "refus[al] to sever the unconscionable terms from the arbitration provision").

Petitioners' reliance on Judge Gould's dissenting opinion in *Zaborowski* v. *MHN Government Services, Inc.*, 601 F. App'x 461 (9th Cir. 2014), is likewise un-

[10] In *Gannon* v. *Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001), as in *Booker*, the only provision held unconscionable was a bar on punitive damages, and the court concluded that severance was warranted where the only invalid provision was a "minor term[]" in the contract, *id.* at 682—a situation unlike this one, where the invalid provisions concerned the core of the arbitration proceeding and effectively prevented one side from proving its case.

helpful to them. Although *Zaborowski* involved an arbitration clause that had more than one unconscionable provision, those provisions were all ancillary to the core of the arbitral proceeding, and the clause was not imposed through unfair surprise, as in this case. *See id.* at 463-464. Moreover, the court in *Zaborowski* applied an approach to severability that was skewed against arbitration agreements. *See* Pet. 10-16, *MHN Gov't Servs., Inc.* v. *Zaborowski*, No. 14-1458 (U.S. Sept. 11, 2014) (explaining how the severability rule applied in that case differed starkly from California's pro-severance rule in other contract cases). As explained above (pp. 22-23), petitioners have made no showing that the Hawaii Supreme Court failed to apply the law of contract severability neutrally in this case.

Finally, petitioners argue (at 29) that the Hawaii Supreme Court's decision "would make severance clauses in arbitration contracts effectively unenforceable" in all cases. There is no basis for that overstated argument. The court made clear that its holding was limited to the situation where the arbitration clause as a whole is "permeated by the unconscionability." Pet. App. 28a n.10. The court's decision reflects the extraordinary nature of the arbitration clause here, which effectively precludes respondents from making their case. Nothing in the decision suggests it would refuse to sever unconscionable clauses with a more moderate effect.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S FEDERAL ARBITRATION ACT PRECEDENTS

Petitioners argue more generally that the decision below conflicts with this Court's decisions emphasizing the FAA's "national policy favoring arbitration" (Pet. 32). The Hawaii Supreme Court's decision is entirely

consistent with this Court's FAA precedents, and nothing in those decisions required it to reach a different conclusion.

1. Nothing in the decision below conflicts with this Court's decision in *DIRECTV*. In that case, the Court examined a mandatory-arbitration clause that (a) waived class arbitration and (b) provided that, if that waiver was unenforceable under "the law of your state," then the entire arbitration provision was unenforceable. 136 S. Ct. at 466. The California appellate court had rendered an unusual construction of that clause, reading "the law of your state" to include invalid California decisional law precluding waivers of class arbitration, even after this Court had ruled that decisional law to be preempted by the FAA. *See id.* at 469-470. This Court ruled that the California court's construction of the "law of your state" clause conflicted with "well-established law" requiring state courts to "place arbitration contracts 'on equal footing with all other contracts.'" *Id.* at 471 (quoting *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006)).

The Hawaii Supreme Court took careful notice of this Court's decision in *DIRECTV*. Pet. App. 12a-13a. It properly concluded that the problem with the California court's reading of the contract in that case was that "'California courts would not interpret contracts other than arbitration contracts the same way.'" *Id.* at 12a (quoting *DIRECTV*, 136 S. Ct. at 468). It also specifically identified the "equal footing" doctrine as being central to the FAA. *Id.* at 13a.

As the Hawaii court explained, however, this case does not involve any rule fashioned specifically for arbitration cases. To the contrary, it followed this Court's recognition that, under the FAA, "arbitration agree-

ments, like all other contracts, 'may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.'" Pet. App. 14a (quoting *Rent-A-Center, W. Inc.* v. *Jackson*, 561 U.S. 63, 68 (2010))). The Hawaii court did not depend on an arbitration-specific rule or interpretive lens to reach the conclusion that the specific arbitration clause at issue here is unconscionable.

Furthermore, the considerations that led this Court "to conclude that the [California] court's interpretation of th[e] arbitration contract [was] unique, [and] restricted to that field," *DIRECTV*, 136 S. Ct. at 469, are not present here:

First, this Court found that the contract language at issue in *DIRECTV* was not ambiguous, *DIRECTV*, 136 S. Ct. at 469; but the contract language at issue here is ambiguous because two of the three relevant documents would lead any reasonable buyer to conclude that Hawaii state court was a proper venue for resolving disputes, Pet. App. 18a-19a.

Second, in *DIRECTV*, this Court concluded that "California case law itself clarifie[d] any doubt" about the proper interpretation of the relevant clause and favored an interpretation requiring arbitration. 136 S. Ct. at 469. Here, by contrast, the Hawaii Supreme Court straightforwardly applied the doctrine of unconscionability to conclude that the arbitration clause is unconscionable—a conclusion that petitioners disagree with only in part.

Third, "nothing in the Court of Appeal's reasoning suggest[ed] that a California court would reach the same interpretation of 'law of your state' in any context other than arbitration." *DIRECTV*, 136 S. Ct. at 469. But here, the Hawaii court emphasized the general ap-

plicability of the doctrines it applied. Pet. App. 14a. (applying the general rule for unconscionability); *id.* at 15a (relying on a family law case for the proposition that "[u]nconscionability encompasses two principles: one-sidedness and unfair surprise."); *id.* at 16a ("Thus, under the common law of Hawai'i, unconscionability is a generally applicable contract defense.").

Fourth, this Court found it significant that the California Court of Appeal framed the interpretive question as solely concerning arbitration. *DIRECTV*, 136 S. Ct. at 470 ("Framing the question in such terms, rather than in generally applicable terms, suggests that the Court of Appeal could well have meant that its holding was limited to the specific subject matter of this contract—arbitration."). The same cannot be said of the Hawaii Supreme Court's analysis. The Hawaii Supreme Court framed the interpretive question about the applicability of unconscionability doctrine in general terms, and it relied on non-arbitration cases. *See* Pet. App. 14a-15a.

Fifth, this Court was concerned that the California Court of Appeals "reasoned that invalid state arbitration law" barring waivers of class arbitration "maintained legal force despite this Court's holding" to the contrary. *DIRECTV*, 136 S. Ct. at 470. The Hawaii Supreme Court's decision does not give legal effect to any state law or doctrine overturned by this Court.

Finally, this Court stressed that the California Court of Appeals had failed to invoke any other principle that would suggest that the same interpretation would be applied in a different context. *DIRECTV*, 136 S. Ct. at 470. The Hawaii Supreme Court, by contrast, has given every indication that it will apply the same unconscionability principles to contractual agreements

whether they be commercial lease agreements, family law agreements, or arbitration agreements. *See* Pet. App. 14a-15a (relying on unconscionability cases concerning various types of agreements).

2. The decision below also does not conflict with this Court's decision in *Kindred Nursing Centers*. In that case, this Court ruled the Kentucky Supreme Court contravened the FAA when it refused to give effect to arbitration agreements executed by individuals holding powers of attorney, absent a clear statement that the attorney-in-fact had the power to waive the principal's right to trial by jury—even though state law authorized an attorney-in-fact to act for his principal in many other circumstances without such a clear statement. *See* 137 S. Ct. at 1427-1428. As the Court explained, the Kentucky courts' singling out of arbitration agreements as requiring authorization beyond that required for any other kind of contract contravened the fundamental FAA principle that courts must "put arbitration agreements on an equal plane with other contracts." *Id.* at 1427; *see also id.* ("And so it was that the court did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial.").

Unlike the Kentucky courts in *Kindred Nursing Center*, the Hawaii Supreme Court did not promulgate an arbitration-specific rule for the purpose of disallowing arbitration agreements. And unlike the Kentucky court's rule, the Hawaii Supreme Court's decision does not "make it trivially easy for States to undermine the Act" or "to wholly defeat it." 137 S. Ct. at 1428. Instead, the Hawaii Supreme Court's decision erects a reasonable limit on the extent to which contracts may hinder a party's ability to gather facts central to resolv-

ing the dispute. Nothing in the decision below prevents parties from agreeing to reasonable discovery limits and confidentiality provisions in arbitration, especially if those limits are not buried in obscure documents. *See* Pet. App. 22a (recognizing that "limitations on discovery may be enforceable in the arbitral forum, so long as they are reasonable and do not hinder a party's ability to prove or defend a claim"), 25a (noting that, "[a]s is the case with discovery limitations, confidentiality provisions are not per se substantively unconscionable").

3. Finally, the decision below does not conflict with this Court's decision in *Concepcion*, which held that California's *Discover Bank* rule, precluding waivers of class arbitration, was preempted by the FAA. 563 U.S. at 352. In so holding, the Court concluded that the FAA does not permit a state to have a public policy against class-arbitration waivers in arbitration agreements. *Id.* at 346-347. The Court concluded that California's policy, by allowing a party to insist on procedures (class proceedings) that are largely foreign to arbitration, interfered with Congress's intent in the FAA to facilitate enforcement of arbitration agreements. *See id.* at 344-347.

This case does not involve any effort by the Hawaii courts to insist on procedures that are foreign to arbitration. Although many arbitration agreements do aim to streamline discovery in the interest of cost-saving and expedition, limited discovery, including fact-gathering from third parties, is not foreign to arbitration. *See* American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* 19-20, 38 (various types of discovery available to parties*); see also* American Arbitration Association, *Home Construction Arbitration Rules and Mediation Procedures* 27-28 (procedures for obtaining non-party interviews);

JAMS, *Comprehensive Arbitration Rules & Procedures* 21-22 (various types of discovery available to the parties). To be sure, this Court noted in *Concepcion* that it would be impermissible for States to demand that arbitration agreements include "judicially monitored discovery" or compliance with the Federal Rules of Evidence—procedures that would similarly be fundamentally inconsistent with arbitration. *See* 563 U.S. at 341-342. But the Hawaii Supreme Court's decision does not require "judicially monitored discovery," compliance with the full scope of discovery otherwise available under the Hawaii Rules of Procedure, hearings consistent with the Federal Rules of Evidence, or any other trial-like means of proceeding. Instead, the Hawaii Supreme Court merely requires that the terms of an arbitration agreement not be so onerous that they altogether prevents one side from ascertaining facts relevant to the dispute. *See* Pet. App. 25a, 27a.

Petitioners argue (at 19) that the Hawaii Supreme Court is "[t]reating the provisions in an arbitration agreement as unconscionable because they do not track the discovery procedures of the state rules of civil procedure." Pet. 19. As explained above, however, the Hawaii Supreme Court made no such ruling. And nothing in *Concepcion* precludes a court from concluding that a restriction on fact-gathering procedures may be so onerous as to prevent parties from proving their case, and therefore unenforceable. *Concepcion* left it to state courts to determine when an arbitration agreement is unenforceable due to fraud, duress, or unconscionability, so long as they do not deem it *per se* unconscionable for an arbitration agreement to limit cer-

tain trial-like procedures. The Hawaii Supreme Court's decision is entirely consistent with that requirement.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] This Court denied the petition for certiorari in *Kindred Hospitals East* v. *Klemish*, No. 17-365. Accordingly, to the extent that petitioners argue (at 5, 34) that both cases should meet the same fate, this Court should deny the petition for certiorari in this case as well.