No. 18-1437

IN THE

Supreme Court of the United States

WINSTON & STRAWN LLP,

Petitioner,

v.

CONSTANCE RAMOS; THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Are the arbitration-specific requirements and rules in *Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal. 4th 83 (2000), preempted by the Federal Arbitration Act?

2. Is *Armendariz*'s arbitration-only severability rule preempted by the FAA?

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus curiae* before this Court in important Federal Arbitration Act cases. See, e.g., *Epic Systems Corp. v. Lewis*, 136 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). And it has published many articles on arbitration—including articles on the California courts' struggles to follow this Court's FAA rulings—

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[*] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, WLF notified counsel of record for Winston & Strawn LLP, the petitioner, and Constance Ramos, the respondent who is the real party in interest, of WLF's intent to file the brief. Counsel for both parties consented to the brief's being filed.

Because this appeal follows a successful petition for a writ of mandate in California state court, the Superior Court of California, County of San Francisco, is technically another respondent. But the trial court is a nominal party with no interest in the appeal's outcome. See Cal. Civ. Prac. Procedure § 31:19 (2019) ("The real party in interest is generally the party who opposes the petition for the writ. In such a case, the respondent [court] is merely a nominal party."); 8 Witkin, Cal. Proc. Writs § 166 (5th ed. 2008) ("[I]f . . . mandamus is sought against a court[,] . . . the tribunal . . . has no interest in the matter . . . any greater . . . [than] it may have when an ordinary appeal is taken from its order or judgment.") (quoting *In re De Lucca*, 146 Cal. 110 (1905)). The trial court also has no "counsel of record" who could be notified of the filing of this brief. See Sup. Ct. Rule 37.2(a) ("An *amicus curiae* filing a brief . . . shall ensure that *the counsel of record* for all parties receive notice of its intention to file an *amicus curiae* brief[.]") (emphasis added).

by outside experts. See, e.g., John F. Querio, *Courts in California Enable End-Run of Federal Arbitration Act by Expanding Obscure State Labor Law*, WLF Legal Backgrounder, www.bit.ly/2vNjfDn (June 16, 2017).

The FAA empowers parties to resolve legal conflicts using "efficient, streamlined procedures tailored to the type of dispute." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). To operate properly, however, the FAA must apply consistently across the nation. California's courts have repeatedly created *in*consistency. They have done so in this case, using a state-court decision, *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), to flout this Court's rulings in *Concepcion*, 563 U.S. 333, and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013). California's courts plainly need to be told—again—how to apply the FAA. WLF urges the Court to grant review.

STATEMENT OF THE CASE

In *Armendariz*, 24 Cal. 4th 83, the California Supreme Court created three arbitration-specific rules:

- An arbitration clause in an employment contract must meet certain "minimum requirements." The clause must, among other things, provide "for all of the types of relief that would otherwise be available in court" and not require an employee "to pay . . . any arbitrators' fees or expenses." *Id.* at 102.

- An arbitration clause in an employment contract must not be overly "one-sided"—as judged by a court on a case-by-case basis. *Id.* at 117-18.

- If an arbitration clause contains more than one unconscionable term, a presumption arises that those terms cannot be severed, and that the entire arbitration agreement is void. *Id.* at 124.

In this appeal, Winston & Strawn LLP ("the firm") contends that each of these rules violates the FAA. See 9 U.S.C. § 2.

Here are the facts. Constance Ramos became an income partner at the firm in 2014. Like every partner at the firm, she signed a partnership agreement with an arbitration clause. See Pet. App. 49a-51a.

Ramos left the firm, then sued it, in 2017. In defiance of the arbitration clause, she sued in California state court. She asserts only state-law claims. *Id.* at 3a-4a.

The firm moved to compel arbitration. The trial court voided terms in the arbitration clause setting a venue, requiring cost-splitting, and barring an award of attorney's fees. *Id.* at 46a-47a. It severed those terms from the agreement, but it otherwise granted the motion and compelled arbitration. *Id.*

Ramos sought, and the Court of Appeal granted, a writ of mandate. In declaring the entire arbitration agreement unenforceable, the Court of Appeal

applied each of *Armendariz*'s three arbitration-specific rules:

- The court concluded that a term requiring the arbitrator to respect the firm's business judgment violated the *Armendariz* "minimum requirement" that the arbitration offer all types of relief available in court. *Id.* at 28a-30a. It reached the same conclusion about the agreement's no-fee-award clause. *Id.* And it declared that the agreement's cost-sharing term violated the "minimum requirement" excusing an employee from paying "any arbitrator's fees or expenses." *Id.* at 33a.

- The court concluded that the business-judgment term, the no-fee-award term, the cost-sharing term, and a confidentiality clause were all "one-sided" and substantively unconscionable. *Id.* at 33a (citing the *Armendariz* test), 36a-40a (applying the test).

- The court declared the entire arbitration agreement void, in part because it contained "more than one unlawful provision." *Id.* at 44a-45a & n.14 (quoting *Armendariz*).

The California Supreme Court denied a petition for review. *Id.* at 48a. Justice Chin voted to grant the petition. *Id.*

SUMMARY OF ARGUMENT

The Supremacy Clause is simple. It says that federal law trumps contrary state law. U.S. Const. art. VI, cl. 2. The FAA is simple too. It says that an arbitration clause in a contract involving commerce

is valid and enforceable. 9 U.S.C. § 2. True, the FAA contains a saving clause, but it as well is pretty unpretentious. It says that an arbitration clause may be invalidated based on any ground "for revocation of any contract"—based, that is, on a generally applicable contract defense. *Id.* Like every other area of law, arbitration law is sure to generate the occasional thorny question. On the whole, however, arbitration clauses should cause little fuss in state court. Enforce them, Congress has instructed, unless you spot one that is a sham, a fraud, a travesty, or the like.

For years now California's state courts have insisted on making things complex. They have upheld state laws that disfavor arbitration; invented reasons to let state law obstruct the FAA; created rules that apply only to arbitration clauses; and, when applying ostensibly neutral rules, held arbitration agreements to a higher standard. None of this is allowed under the FAA, and this Court has repeatedly said so. Yet California's courts just can't (or won't) keep it simple.

Armendariz, 24 Cal. 4th 83, is a key cog in the California courts' Rube Goldberg approach to arbitration. *Armendariz* says that an arbitration agreement challenged as unconscionable must meet special "minimum requirements"; that it must undergo a peculiar case-by-case "one-sidedness" test; and that, unlike other agreements, it faces a presumption of complete invalidity if more than one of its terms is declared void. As the firm explains in its petition, *Armendariz* violates the FAA six ways from Sunday. The Court should dispatch it.

We write to set *Armendariz* in context. *Armendariz* is one of many California decisions that misapply the FAA. Some of these decisions this Court has reversed; others (like *Armendariz*) have so far slipped by. Unfortunately, the California Supreme Court often makes a heroic effort to conclude that this Court's latest and plainest word on arbitration—a word not infrequently written while reversing a decision out of California—has little or no effect on California's separate and not-so-simple body of arbitration law. The California high court has made such an effort with *Armendariz*. *Concepcion*, 563 U.S. 333, says that a court must treat an arbitration clause like other contracts. And *Italian Colors*, 570 U.S. 228, strongly suggests—and its dissenting opinion asserts explicitly—that a court may not treat an arbitration clause *un*like other contracts as part of an effort to "vindicate" a state law or policy. The California Supreme Court has repeatedly declared, quite implausibly, that *Armendariz*'s rules and animating principles survive both these decisions. It has even applied *Armendariz* in new areas and with new twists. Not only should the Court discard *Armendariz*; it should tell California's courts to stop putting curlicues on this Court's straightforward FAA decisions.

We will also discuss the occasional subtlety of the California courts' bias against arbitration clauses. Although those courts often use a purportedly general rule to void an arbitration clause, a review of the case law as a whole reveals that they are "covertly . . . disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). This

Court should remind California's courts once again of the FAA's demand that neutral rules be applied neutrally.

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA COURTS NEED GUIDANCE ON APPLYING *CONCEPCION* AND *ITALIAN COLORS*.

For decades this Court has been reversing California court rulings that discriminate against arbitration. In spite of these frequent reversals, California's courts have persisted in giving the FAA short shrift. *Concepcion*, which bluntly demands compliance with the FAA, and *Italian Colors*, which forecloses the "vindication" method of bypassing the FAA, should have resolved almost every doubt about the FAA's scope and brought California into line. But so far they haven't. If anything, California's outlier status has become even clearer.

A. The California Supreme Court Misinterprets The FAA.

Even before *Concepcion* and *Italian Colors*, it should have been obvious to the California high court that under federal law, an arbitration agreement must be treated like any other contract. As far back as *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), this Court declared:

> A court may not . . . construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an

> agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable[.]

Perry is, in fact, one in a series of pre-*Concepcion*/*Italian Colors* cases reversing a California court's misreading of the FAA. See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (the FAA preempts a California law exempting franchise disputes from arbitration; contrary holding of the California Supreme Court reversed); *Perry*, 482 U.S. at 489-92 (the FAA preempts a California law exempting wage disputes from arbitration; contrary holding of the California Court of Appeal reversed); *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (the FAA preempts a California law transferring certain disputes from arbitration to the state labor commissioner; contrary holding of the California Court of Appeal reversed).

Several of the California Supreme Court's pre-*Concepcion*/*Italian Colors* decisions—even apart from the ones this Court reversed—plainly disfavor arbitration agreements. *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1083 (1999), empowers the state legislature to insulate a case from arbitration simply by declaring that a remedy sought by the plaintiff fulfills a "public" purpose. And *Armendariz*, 24 Cal. 4th 83, the precedent at issue here, creates criteria that arbitration agreements, but not other contracts, must satisfy to remain valid. "The *Armendariz* requirements," the California high court has openly acknowledged, "specifically concern arbitration agreements." *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1079 (2003).

The pre-*Concepcion*/*Italian Colors* decisions draw heavily on an "effective vindication" theory—sometimes called an "inherent conflict" theory—found in this Court's FAA jurisprudence. The Court has said that the FAA applies "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The FAA might *not* apply, in other words, when "an inherent conflict" exists "between arbitration and [a] statute's underlying purpose." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987).

But this exception applies only when the FAA runs into "a contrary *congressional* command." *Id.* at 226 (emphasis added). After all, only a federal law can displace another federal law. The Supremacy Clause demands that a state law not be "vindicated" at a federal law's expense, and that an "inherent conflict" between a state law and a federal law not be resolved in the state law's favor. Yet the California high court repeatedly used the "vindication" rationale to raise state law above the FAA. See *Broughton*, 21 Cal. 4th at 1083 ("[the state] legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose"); *Armendariz*, 24 Cal. 4th at 101 (a party must "be able to fully vindicate his or her [state] statutory cause of action in the arbitral forum").

B. *Concepcion* And *Italian Colors* Confirm And Highlight The California Supreme Court's Errors.

Any lingering confusion about the need to treat an arbitration agreement like any other contract, or about the vindication theory's inapplicability to state law, should have been laid to rest by *Concepcion* and *Italian Colors*.

A court, *Concepcion* declares, "must place arbitration agreements on an equal footing with other contracts." 563 U.S. at 339. A state law that "prohibits outright the arbitration of a particular type of claim" is, therefore, "displaced by the FAA." *Id.* at 341. So is a rule that has "a disproportionate impact on arbitration agreements." *Id.* at 342. And so is a rule that "rel[ies] on the uniqueness of an agreement to arbitrate." *Id.* at 341 (quoting *Perry*, 482 U.S. at 493 n.9).

Concepcion is, by the way, yet another of this Court's decisions striking down yet another of California's many efforts to limit arbitration. The Court lamented the "great variety of devices and formulas" that some courts, in their "hostility towards arbitration," have invented to "declar[e] arbitration against public policy." *Id.* at 342. And California's courts in particular, the Court noted, seem "more likely to hold contracts to arbitrate unconscionable than other contracts." *Id.* (citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006), and Susan Randall, *Judicial Attitudes*

Toward Arbitration and the Resurgence of Unconscionability, 52 Buffalo L. Rev. 185, 186–187 (2004)).

Italian Colors discusses the "judge-made" "vindication exception" to the FAA. 570 U.S. at 235. The exception "originated as dictum," the Court observed, and, every time it has come up, the Court "has declined to apply it to invalidate the arbitration agreement at issue." *Id.*

More than that: in *Italian Colors* all nine justices treated the exception as one that governs *federal* law. The five-justice majority described the exception as addressing whether "*federal* statutory claims are subject to arbitration." *Id.* at 235 n.2 (emphasis added). And the four dissenters were even more explicit. The effective-vindication rule, they explained, ensures that "an arbitration clause may not thwart *federal* law," and that a plaintiff can enforce "meritorious *federal* claims." *Id.* at 240-41 (Kagan, J., dissenting) (emphasis added). "We have no earthly interest (quite the contrary)," they continued, "in vindicating [state] law." *Id.* at 252. The "effective-vindication rule comes into play," therefore, "only when the FAA is alleged to conflict with another *federal* law." *Id.*

C. After *Concepcion* And *Italian Colors*, The California Supreme Court Continues To Misinterpret The FAA.

Concepcion and *Italian Colors* make three things clear. A state may not (1) subject an arbitration agreement to special rules, (2) use ostensibly neutral

rules to disfavor an arbitration agreement, or (3) invalidate an arbitration agreement in order to "vindicate" a state-law-created public right or public policy. The California Supreme Court has elided each of these principles.

Begin with *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013), which claims that *Concepcion* instructs a court merely to protect the "fundamental attributes of arbitration," *id.* at 1143-45, 1151. This reading is flatly contradicted by *Concepcion* itself. A rule of unconscionability could easily have "a disproportionate impact on arbitration agreements" (forbidden under the real *Concepcion*) without interfering with arbitration's "fundamental attributes" (the only constraint in *Sonic-Calabasas*'s version of the case). 563 U.S. at 342; 57 Cal. 4th at 1143. Look no further than the result in *Sonic-Calabasas*, which requires that an employee receive a wage-dispute arbitration hearing at least as "accessible" and "affordable" as an administrative hearing before a deputy labor commissioner. 57 Cal. 4th at 1150. Even if enforcing this requirement does not alter any "fundamental attributes" of arbitration, it still disfavors and disproportionately affects arbitration agreements. In singling out, and treating as suspect, any arbitration clause that does not confer all the benefits of an administrative hearing (e.g., a free translator for the employee), *Sonic-Calabasas* defies *Concepcion*. *Id.* at 1146.

Sonic-Calabasas also relies heavily on the vindication theory. In fact, the decision frames the issue before the court as "whether any barrier to vindicating" the employee's "right to recover unpaid wages" would "make the arbitration agreement

unconscionable." 57 Cal. 4th at 1142. The California high court sidestepped the nine federal justices' apparent agreement on the vindication exception's federal-law-only scope by narrowing *Italian Colors* to its facts. That case, the court said, "involved the harmonization of the FAA with other federal law; it was not a preemption case." *Id.* at 1154. From there on the court just begged the question. It explained, for example, that unlike the federal law at issue in *Italian Colors*, the state law before it was "specifically designed to help vindicate" an employee's administrative-hearing rights. *Id.* at 1154-55. But the whole issue is whether a *state* imperative to "vindicate" a *state* public policy can trump *federal* arbitration rights. *Italian Colors* says it can't.

The California Supreme Court again misapplied *Concepcion* and *Italian Colors* in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). At issue was California's Private Attorney General Act, which empowers an employee to sue her employer for state labor code violations against her and other employees. A PAGA lawsuit is "a type of *qui tam* action"; 75 percent of a recovery goes to the government. *Id.* at 380, 382. *Iskanian* thus concludes that "a PAGA claim lies outside the FAA's coverage" because "it is a dispute between an employer and the *state*." *Id.* at 386.

But this again begs the question. An *employee* signs a contract waiving PAGA rights. Regardless of whom a California court says a PAGA action is ultimately "between," *that* employee has agreed, by contract, not to be the one driving such a lawsuit. State law can reverse that employee's agreement

only by using state public policy to override the FAA. The California high court tacitly conceded this in asserting that "it is *against public policy* for an employment agreement to deprive *employees* of [the] option" of bringing a PAGA suit. *Id.* at 387 (emphasis added). In using state public policy to bypass the FAA and thwart an arbitration clause's representative-action waiver, *Iskanian* neglects this Court's instruction to enforce arbitration agreements "according to their terms." *Concepcion*, 563 U.S. at 339

In *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015), the California Supreme Court adhered to the notion that an arbitration agreement may be set aside in order to vindicate state public policy. It confirmed that, in its view, a state court may make "case-by-case" rulings about whether "unreasonable" arbitration fees render an arbitration agreement unconscionable. *Id.* at 920. And it declared that, regardless what the FAA demands, California public policy requires that arbitration costs not "have a substantial deterrent effect" on someone wishing to bring a claim. *Id.*

The state high court continued to misapply the vindication theory in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017). *McGill* describes *Italian Colors* as teaching that "the FAA does not require enforcement of a provision in an arbitration agreement that . . . eliminates the right to pursue a statutory [right or] remedy." *Id.* at 963. Having thus denuded the vindication exception of its federal-law grounding, *McGill* concludes that the FAA must yield to a state public policy barring an arbitration-clause waiver of

the right to seek injunctive relief under various state consumer-protection laws. *Id.* at 952, 963.

To justify applying the vindication theory to state law, *McGill* points to *Preston*, 552 U.S. 346. *Preston*, it is true, notes that the respondent before it would not, by proceeding to arbitration, "forgo the substantive rights afforded by the [state] statute" there at issue. *Id.* at 359 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628). But *Preston* never treats this fact as dispositive. The absence of waiver in *Preston* appears merely to have *bolstered* the Court's conclusion that the dispute belonged in arbitration. *McGill* seizes on this ambiguous dicta—dicta from, ironically, one of the many cases correcting a California court's overly narrow reading of the FAA—as cause to cast aside the clear and direct mandates of *Concepcion* and *Italian Colors*.

D. California Civil Code § 3513 Changes Nothing.

Armendariz, *Sonic-Calabasas*, *Iskanian*, and *McGill* invoke California Civil Code § 3513, which says that although "any one may waive the advantage of a law intended solely for his benefit," a "law established for a public reason cannot be contravened by private agreement." The California Supreme Court's (mis)use of the vindication theory often follows a formula: (1) declare that a state rule, even when enforced by a private party, benefits "the public," (2) invoke §3513, (3) declare that, to vindicate the state policy §3513 embodies, the court must void an arbitration agreement that limits enforcement of the "public"-oriented state rule.

This is just another of the "great variety" of "devices and formulas" that judges "hostil[e] towards arbitration" use to "declar[e] arbitration against public policy." *Concepcion*, 563 U.S. at 342.

Section 3513 is a California "maxim of jurisprudence." The maxims lie, "almost buried and forgotten," among California's nineteenth-century Field codes. Jeffrey S. Klein, *A Few Clauses to Help Lawyers Along*, L.A. Times, www.lat.ms/2HyLNXK (Sept. 14, 1989). They include such cosmic riddles as "That is certain which can be made certain," and "Things happen according to the ordinary course of nature and the ordinary habits of life." Cal. Civ. Code §§ 3546, 3538. As these examples suggest, the maxims "can mean everything and nothing." Klein, supra. Some of them, in fact, seem to contradict both §3513 and the notion that arbitration clauses should be subjected to discrimination. "He who consents to an act," for example, "is not wronged by it." *Id.* at § 3515. "Private transactions," after all, "are fair and regular." *Id.* at § 3545.

At any rate, the maxims are not even contract defenses that properly trigger the FAA's saving clause. See 9 U.S.C. § 2. They are, rather, "interpretive canon[s] for construing *statutes*." *McGovern v. U.S. Bank N.A.*, 362 F. Supp. 3d 850, 860 (S.D. Cal. 2019) (quoting *Nat'l Shooting Sports Found., Inc. v. State*, 5 Cal. 5th 428, 433 (2018)). And even if the §3513 no-waiving-a-public-interest maxim *were* a contract defense, it would be an unworkable one, because "*every* law is established" for some "public reason" or other. *Id.* at 861 (emphasis added).

The California high court has taken an "any stick to beat a dog" approach to striking down arbitration clauses. As the FAA, *Concepcion*, and *Italian Colors* show, that approach is untenable.

* * *

The California Court of Appeal is duty-bound to obey the rulings of its state supreme court. This it has done, faithfully using its high court's precedents—*Armendariz*, in particular—to disfavor arbitration agreements. See, e.g., *Penilla v. Westmont Corp.*, 3 Cal. App. 5th 205, 221, 223 (2016) (applying *Armendariz* to void an arbitration agreement); *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal. App. 4th 227, 250-56 (2015) (same); *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74, 85-89 (2014) (same). California's courts will continue to place *Armendariz* above the FAA—just as the Court of Appeal did here—until this Court steps in.

And there will be no better chance to step in than this one. Because it brings all of *Armendariz*'s three arbitration-specific tests before the Court for review, the firm's petition offers the Court an exceptional opportunity to resolve—perhaps for good—the California courts' misunderstanding of the scope of *Concepcion* and *Italian Colors*.

II. THE CALIFORNIA COURTS NEED A REMINDER THAT ARBITRATION AGREEMENTS MUST NOT BE SUBJECTED TO A SPECIAL STANDARD OF UNCONSCIONABILITY.

Because they explicitly pick out arbitration agreements for disfavored treatment, *Armendariz*'s minimum requirements blatantly violate the FAA. (See Pet. Br. 15-16.) They are an example of the "wolf" that "comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

One Court of Appeal panel quietly revealed how well it understood—yet was unfazed by—the tension between *Armendariz*'s minimum requirements and *Concepcion*. In its initial opinion in *Sanchez v. Valencia Holding Co., LLC*, 200 Cal. App. 4th 11, 23 (2011), the panel wrote that "[*Concepcion*] does not preclude the application of the *Armendariz* principles to determine whether an arbitration provision is unconscionable." (emphasis added). After rehearing, however, the panel issued an amended opinion in which that sentence reads: "[*Concepcion*] does not preclude the application of the unconscionability doctrine to determine whether an arbitration provision is unenforceable." 201 Cal. App. 4th 74, 88 (2011) (emphasis added), reversed, 61 Cal. 4th 899; see *James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1032 n.5 (S.D. Tex. 2012) (noting this telling edit). The court's holding—arbitration agreement void as unconscionable—did not change.

But however clear the contradiction between *Armendariz*'s minimum requirements and *Concepcion* (and *Italian Colors*) may be, it is important not to overlook the California courts' more

general distortion of the unconscionability doctrine as applied to arbitration agreements.

"The ordinary principles of unconscionability," *Armendariz* says, in presenting its case-by-case "one-sidedness" test for arbitration clauses, "may manifest themselves in forms peculiar to the arbitration context." 24 Cal. 4th at 119. Maybe this sentence reveals a distinct suspicion of arbitration agreements; maybe it doesn't. What is clear, though, is that California's courts treat arbitration agreements as suspect in practice.

"It is well known that unconscionability is generally a loser of an argument." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1442 (2008). This is unsurprising, given the rigor of the classic unconscionability test. Under the traditional rule, an unconscionable contract is one that "no man in his senses, not under duress, would make," and that "no fair and honest man would accept." *Hume v. United States*, 132 U.S. 406, 406 (1889). A contract is unconscionable, in other words, if it "shock[s] the conscience." *Eyre v. Potter*, 56 U.S. 42, 60 (1853).

The "shocks the conscience" phrase is still alive in California. See, e.g., *Kinney v. Utd. HealthCare Servs., Inc.*, 70 Cal. App. 4th 1322, 1330 (1999). But the words "so one-sided as to shock the conscience" are now used in tandem with—and are even declared to mean the same thing as—the self-evidently weaker words "unreasonably one-sided." See *Sonic-Calabasas*, 57 Cal. 4th at 1159-60. This muddying of the standard may or may not be a deliberate part of

a push by California's courts to apply a looser unconscionability test to arbitration agreements. But a looser test they have unmistakably applied—a test that has in turn encouraged ever more attacks on arbitration clauses. Consider a pre-*Concepcion* study. It found that in a three-year period, three California appellate districts addressed unconscionability in 119 cases. Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements*, 62 Hastings L.J. 1065, 1083 (2011). The courts found unconscionability in 50.6% of the arbitration cases, but in only 16.7% of the non-arbitration cases. *Id.* And, remarkably, *89* of the 119 cases in the sample (75%) involved an arbitration agreement. *Id.*

Or consider Westlaw's Notes of Decisions for California Civil Code § 1670.5, the state's codification of its unconscionability rule. The Notes often read like little more than a chronicle of challenges to arbitration clauses. In the first section, for example, which addresses §1670.5's "construction and application," more than half the cases discussed (12 of 23) involved an arbitration agreement. The Notes contain 14 sections devoted exclusively to arbitration.

A review of the Notes confirms that California's courts continue to strike down arbitration clauses at a rapid clip. The Notes contain a number of post-*Conception*/*Italian Colors* cases that use some variation of *Armendariz*'s one-sidedness test (sometimes aided by the minimum requirements and the state-law vindication theory) to void an arbitration agreement. See, e.g., *Penilla*, 3 Cal. App.

5th at 218-23; *Pinela*, 238 Cal. App. 4th 251-52; *Carmona*, 226 Cal. App. 4th at 86-88.

The use of *Armendariz*'s one-sidedness test to disfavor arbitration clauses can be subtle. An egregiously one-sided contract can, after all, be unconscionable even under the conventional unconscionability rule. But as the abiding ubiquity of arbitration clauses in the California courts' unconscionability jurisprudence shows, the conventional rule and *Armendariz*'s rule are not the same.

One factor creating the divide between the immense one-sidedness needed under the conventional unconscionability test, on the one hand, and the mild one-sidedness needed under *Armendariz*'s special test for arbitration clauses, on the other, is the matter of *ex ante* benefits. Section 1670.5 tells a court that it may void a contract that was unconscionable "at the time it was made." Cal. Civ. Code § 1670.5(a); Restatement (Second) of Contracts § 208 (same). A key aspect of a form arbitration agreement, *when it is made*, is the benefits it stands to provide to the many contracting parties who never have a dispute. The use of arbitration lowers a company's dispute-resolution costs, and these cost-savings are generally passed on in the form of higher salaries for employees and lower prices for consumers. Cf. *Carnival Cruise Line, Inc. v. Shute*, 409 U.S. 585, 593-94 (1991) (discussing the *ex ante* benefits of a form contract's forum-selection clause). An unconscionability analysis that ignores these gains has a "glaring flaw." Russell Korobkin, *Bounded Rationality, Standard Form*

Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1273-74 (Fall 2003).

Consider the point this way: a company pays for its arbitration rights. The firm "paid [Ramos] to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution." *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) (Easterbrook, J.). Viewed *ex ante*, the arbitration clause in Ramos's partnership agreement is no more suspect, and no less enforceable, "than any others—or, for that matter, than her salary." *Id.*

California's courts are perfectly capable of conducting this type of examination. Take *Chretian v. Donald L. Bren Co.*, 151 Cal. App. 3d 385 (1984). A real-estate developer contracted to pay a salesperson one commission for finding a house buyer, and another for "servicing" the buyer's purchase "through successful close of escrow." *Id.* at 388. After resigning, the salesperson sued for the second commission on each of his sales for which escrow was *pending*. The salesperson argued that the "servicing" portion of his job was "perfunctory," and that his contract was therefore unconscionable to the extent it permitted the developer to withhold the second commissions on the uncompleted sales. Disagreeing, the Court of Appeal insisted that the contract be "examined prospectively." *Id.* at 389. Looking at the contract this way made it clear that the developer had "negotiated the second commission as a financial incentive for its salespersons to remain with [it] during pendency of escrows." *Id.* The court took account of this *ex ante* incentive, notwithstanding the plaintiff's choice to ignore it by resigning. *Id.*; see

also *Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1392-94 (1996) (similar).

When it comes to arbitration agreements, however, this type of inquiry into *ex ante* benefits generally disappears from the California Reports. *Armendariz*'s minimum requirements exclude consideration of such benefits by definition. *Sonic-Calabasas*, for its part, discusses only the expected *expenses* that exist when an arbitration agreement is signed. 57 Cal. 4th at 1164. And a discussion of *ex ante* benefits is, as a rule, missing from the rest of California's voluminous unconscionable-arbitration-agreement case law.

It is clear, in short, that in California's courts, "'unconscionable' means something quite different when the validity of an arbitration agreement is at issue." Broome, supra, 3 Hastings Bus. L.J. at 67. The Court should put an end to that discrimination. The FAA—and the Supremacy Clause—demands it.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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