No. _____

In The
Supreme Court of the United States

MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES, INC. AND MARCUS & MILLICHAP CAPITAL CORPORATION,

Petitioners,

v.

RAE WEILER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the cost-sharing provision of an arbitration agreement. Executed as part of a contract to buy a restaurant, the agreement provides that the parties would divide arbitration costs equally. The investment turned sour within a few years, and one of the purchasers, Respondent Rae Weiler, sued petitioners for $2.8 million. After incurring only $15,725 in arbitration costs, Weiler asserted that she could not afford her share and demanded that petitioners pay all arbitration costs or lose their right to arbitrate.

The California Court of Appeal granted Weiler's demand. Without finding that the cost-sharing agreement violated any general contract-law doctrine, such as unconscionability, the court held that the state's public policy favoring access to an affordable forum "far outweighs the interest, however strong, in respecting parties' agreements to arbitrate." App. 12a. The decision below, which rests on a state-law rule that applies only to arbitration agreements, will compel petitioners to pay all arbitration costs or lose their federal right to arbitrate. It also leaves courts free to usurp the arbitrator's traditional role of allocating arbitration costs.

The questions presented are:

1. Whether the Federal Arbitration Act preempts a state rule that denies enforcement of a cost-sharing provision in an arbitration agreement without a finding that the provision violates a general principle of state contract law.

QUESTIONS PRESENTED—Continued

2. Whether this Court's decision in *Howsam* v. *Dean Witter Reynolds, Inc.* requires an arbitrator to decide who pays arbitration costs, as the Fifth Circuit has held, or allows a court to decide, as the California Court of Appeal decided below.

PARTIES TO THE PROCEEDING

Defendants-appellants below, who are petitioners before this Court, are Marcus & Millichap Real Estate Investment Services, Inc. and Marcus & Millichap Capital Corporation.

Plaintiff-appellee below, who is respondent before this Court, is Rae Weiler.

CORPORATE DISCLOSURE STATEMENT

Marcus & Millichap, Inc., a publicly traded company, owns all of the shares of its wholly owned subsidiary, Marcus & Millichap Real Estate Investment Services, Inc. Marcus & Millichap Capital Corporation is a wholly owned subsidiary of Marcus & Millichap Real Estate Investment Services, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Once again, a California appellate court has invented one of those "devices and formulas" against arbitration that merits this Court's review. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011). Instead of respecting the parties' agreement to divide arbitration costs equally, the California Court of Appeal disregarded its mandate under the Federal Arbitration Act ("FAA") to enforce arbitration agreements as written. Instead, the court interposed a judge-made rule designed to advance the state's interest in the availability of an affordable forum.

The decision below thus exemplifies the hostility toward arbitration that too often marks lower court decisions. See *ibid.* ("[T]he judicial hostility towards arbitration that prompted the FAA had manifested itself in a great variety of devices and formulas declaring arbitration against public policy.") (internal quotation marks and citation omitted). Federal questions under the FAA often arise from state courts because "[s]tate courts rather than federal courts are most frequently called upon to apply" the statute. *Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 17 (2012). Illustrations of this pattern are plentiful. See, *e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1425 (2017) (holding that a state judicial rule "that single[d] out arbitration agreements for disfavored treatment * * * violate[d] the FAA"); *Nitro-Lift Techs.*, 568 U.S. at 18, 20 (concluding that the Oklahoma Supreme Court "ignored a basic tenant of the [FAA]" and "disregard[ed] this Court's precedents on the FAA"); *Doctor's*

Assocs., Inc. v. *Casarotto*, 517 U.S. 681 (1996) (holding that the FAA preempted a state law that required special notice to enforce an arbitration clause).

California courts appear to be unusually hostile or skeptical toward federal arbitration rights. See, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346 (2008) (reversing the California Court of Appeal in holding that the FAA preempts a state law displacing arbitration as the appropriate forum when the parties have contracted to settle all disputes in arbitration); *Perry* v. *Thomas*, 482 U.S. 483 (1987) (reversing the California Court of Appeal and holding that the FAA preempted a state law requirement that an action for wage collection is maintained despite a private arbitration agreement); *Concepcion*, 563 U.S. at 333 (holding that a California Court of Appeal rule regarding the unconscionability of class arbitration waiver is preempted by the FAA). Indeed, California's departures from the FAA have occurred so often that some have asked whether these "repeated disagreements" are the product of "a lingering bias against arbitration." Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1439 (2014).

By elevating California's public policy above its fundamental obligation under federal law to enforce a valid arbitration agreement, the decision below infringes on petitioners' federal right to have their arbitration agreement enforced. That decision conflicts with the FAA and this Court's precedents interpreting it, as well as with the decisions of at least four federal

circuits. The decision below also conflicts with the Fifth Circuit's holding that any dispute over the allocation of arbitration costs belongs to the arbitrator, not a court.

The questions presented are recurring and exceptionally important. This Court's intervention is necessary to prevent California from undermining the FAA's core policy of promoting arbitration. The decision below effectively discourages parties from entering arbitration agreements since, at least in California, the wealthier party risks bearing the entire cost of any dispute when the opposing party later asserts an inability to pay its agreed-to share of the costs. Left standing, the decision below threatens the integrity of millions of arbitration agreements in the country's most populous state—making California an outlier in the FAA's otherwise uniform national scheme.

OPINIONS BELOW

The opinion of the California Court of Appeal (see *infra* App. 1a-18a) is reported at 22 Cal. App. 5th 970. The order of the Supreme Court of California denying review (App., *infra*, 19a) is unreported. The California Superior Court judgment (App., *infra*, 20a-21a) is also unreported. The California Superior Court order granting petitioners' motion for summary judgment (App., *infra*, 22a-30a) is likewise unreported.

JURISDICTION

The Supreme Court of California denied review on August 15, 2018. App. 19a. Justice Kagan granted applications (18A450) extending the time to file until January 12, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution (art. VI, cl. 2), provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon grounds as exist in law or equity for the revocation of any contract.

Section 4 of the FAA, 9 U.S.C. § 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction * * * of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

STATEMENT

A. Legal background

1. Federal Arbitration Act

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 is the FAA's "primary substantive provision." *Moses H. Cone Mem'l Hospital* v. *Mercury Constr.*, 460 U.S. 1, 24 (1983). It provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This language "reflect[s] both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339 (internal quotation marks and citations omitted). Congress directed courts to "place arbitration

agreements on an equal footing with other contracts * * * and enforce them according to their terms." *Ibid*. To this end, courts are empowered to issue "an order directing that such arbitration proceed *in the manner provided for in such agreement*." 9 U.S.C. § 4 (emphasis added).

The FAA requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and *the rules under which that arbitration will be conducted*." *Am. Express Co*. v. *Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (emphasis added and citations, internal quotation marks, and alterations omitted). In short, the FAA requires that courts not only "respect and enforce agreements to arbitrate" but also "respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018).

The parties' agreement to share arbitration costs is quite obviously a rule "under which that arbitration will be conducted." *Ibid.*

To be sure, the saving clause of section 2 permits the non-enforcement of an arbitration agreement on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. But this clause has sharp limits. It "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs.*, 517 U.S. at 687). Yet it does not shield from the FAA's

preemptive force state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.*

Further, some defenses, such as "allegations of waiver, delay, or a like defense to arbitrability" are solely for an arbitrator to decide, not a court. *Moses H. Cone*, 460 U.S. at 25. Likewise, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (internal quotation marks omitted).

2. California law

In California, "courts may refuse to enforce any contract found 'to have been unconscionable at the time it was made,' or may 'limit the application of any unconscionable clause.'" *Concepcion*, 563 U.S. at 340 (quoting Cal. Civ. Code § 1670.5(a)); accord *Parada* v. *Superior Court*, 98 Cal. Rptr. 3d 743, 768 (Cal. Ct. App. 2009) ("[U]nconscionability is determined as of the time the contract was entered into, not in light of subsequent events.").

Unconscionability requires both "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Concepcion*, 563 U.S. at 340 (quoting *Armendariz* v. *Found. Health Pyschcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000)). Also, California uses a "sliding

scale" approach, under which if "the procedural unconscionability, although extant, was not great," then "a greater degree of substantive unfairness" must be shown. *Marin Storage & Trucking, Inc.* v. *Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 656-57 (Cal. Ct. App. 2001), *as modified* (June 8, 2001).

California law also provides—and the holding of the court below turns on—a special public-policy exception for cost-sharing provisions in arbitration agreements. In *Roldan* v. *Callahan & Blaine*, 161 Cal. Rptr. 3d 493 (Cal. Ct. App. 2013), the Court of Appeal held that "elderly" plaintiffs who were "of limited financial means" and who "relied on section 8 housing subsidies to pay for their apartments" could not be held to a provision of their retainer agreements requiring them to pay half of all arbitration costs when seeking to resolve claims against their former attorneys. *Id.* at 495. Without deciding the validity of the cost-sharing agreement, the court excused the plaintiffs from their duty to pay out of concern that enforcing the cost-sharing provision "might effectively deprive them of access to any forum for resolution of their claims." *Id.* at 499. The court conceded that it could not "order the arbitration forum to waive its fees" or to order the non-objecting party to pay the other party's share of arbitration costs. *Ibid.* But what it could do, the court reasoned, was require the non-objecting party to "elect to either pay that plaintiff's share of the arbitration cost and remain in arbitration or waive its right to arbitrate that plaintiff's claim." *Ibid.*

B. Factual history

This case concerns the enforcement of a commercial arbitration agreement that the parties entered into as part of a multi-million-dollar real estate deal. Orange County, California residents Rae Weiler and her husband, Dr. William Weiler, purchased a Red Robin restaurant in Texas in January 2006. C.A. App. 117. Petitioner Marcus & Millichap Real Estate Investment Services, Inc. served as the real estate broker for the transaction, and Petitioner Marcus & Millichap Capital Corporation served as a loan broker. *Id.* at 725-26. A provision of the purchase contract obligated the Weilers to submit any dispute arising out of the transaction to arbitration and to divide arbitration costs evenly. *Id.* at 140, 154, 780.

As sophisticated investors, this was hardly the Weilers' first foray into commercial real estate. Their purchase of a Red Robin was part of a tax-deferred exchange that replaced two restaurant and cocktail lounges in Nevada that the couple had sold; petitioners brokered these transactions. *Id.* at 898, 604-39. The Nevada properties sold in 2005 for approximately $5 million combined. *Id.* at 96, 113. Also, for nearly 30 years, the Weilers owned a 28-unit apartment complex in Orange County, California that was valued at just under $2 million before being sold in 2000. *Id.* at 156, 163. In the same year they bought the Red Robin, the Weilers also purchased a commercial property in San Diego for $1.6 million that they later sold for $2.25 million. *Id.* at 390, 893. Dr. Weiler's personal family trust, of which he was the sole trustee, "own[ed] a large

Restaurant-Bar in North Las Vegas." *Id.* at 156. When buying the Red Robin, the Weilers reported a net worth of $6.1 million, including over $3 million in cash. *Id.* at 156-60, 333, 590-91. Not long after the purchase, the Weilers took out a personal loan and a loan on behalf of Dr. Weiler's trust, together amounting to $5 million.

Before completing the deal, Weiler flew out to inspect the property and eat lunch at the restaurant. *Id.* at 729. Based on the inspection and their considerable experience in commercial real estate, the Weilers agreed to buy the property for $4.08 million. *Id.* at 117, 898.

The purchase contract[1] contained the following arbitration clause:

> The parties have agreed to submit disputes to mandatory arbitration in accordance with the provisions of Exhibit G attached hereto and made a part hereof for all purposes. Each of [the parties] waives the right to commence an action in connection with this Agreement in any court and expressly agrees to be bound by

[1] All parties agree that Weiler is subject to mandatory arbitration and cost-sharing agreements. See App. 16a (noting that Weiler did not "challenge the enforceability of the arbitration provisions" and "acknowledged the court properly granted [petitioners'] motion to compel arbitration"). Because those facts are undisputed, the parties' previous disagreement over whether the controlling arbitration clause is contained in the Texas purchase agreements or also in other agreements has no effect on the Court's jurisdiction or on the suitability of this case as a vehicle to address the questions presented.

> the decision of the arbitrator determined in Exhibit G attached hereto.

Id. at 140.

Exhibit G provided that "[t]he arbitration will be governed by the Commercial Arbitration Rules of the [American Arbitration Association]." *Id.* at 154. Those rules direct that the parties equally bear arbitration expenses:

> The expenses of witness for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

Id. at 780.

Unfortunately, the Weilers' investment didn't turn out as they hoped. Weiler alleges that in late 2008—two years after purchasing the restaurant and deep into a national recession—the tenant operating the Red Robin stopped paying rent and property taxes. *Id.* at 730. A few years later, the Weilers defaulted on their personal and trust loans. In September 2013,

Weiler[2] sold the restaurant for $2 million. *Id.* at 164-77, 900.

C. Lower court and arbitration proceedings

In February 2012, six years after purchasing the Red Robin, Weiler sued petitioners in California Superior Court. *Id.* at 725. She alleged breach of fiduciary duties, negligence, negligent misrepresentation, elder abuse, and intentional infliction of emotional distress; she also sought punitive damages. *Id.* at 725-37. Petitioners moved for an order compelling arbitration, which Weiler did not oppose and the court granted. *Id.* at 739-40.

Weiler waited five months before initiating arbitration. *Id.* at 594, 972. Another year passed before she decided how much to claim in monetary damages ($2.8 million) and paid the associated filing fees. *Id.* at 594, 972.

Thirty-three months after filing her initial complaint against petitioners, Weiler contended for the first time that the arbitration clause could not be enforced because she could not afford to pay her share of arbitration fees and costs.[3] *Id.* at 1034. She admitted

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[2] Dr. Weiler is not a respondent because, before declaring bankruptcy, he transferred all of his shares in the holding company that owned and managed their properties—including the Red Robin—to his wife Rae. C.A. App. 178, 341, 471, 479.

[3] Weiler did not ask the arbitration panel for any of the relief available to her under AAA rules, such as deferring or reducing administrative fees (Rule 49) or allowing the panel to assess

to having incurred only $15,725 in arbitration costs to that point but estimated that her share of those costs could eventually total $100,000. *Id.* at 972, 1034. Weiler argued that petitioners must pay all of her arbitration costs or waive their contracted-for right to arbitration. *Id.* at 1026-27, 1033, 1034-35. The arbitration panel concluded that a court had to decide an issue of unconscionability. *Id.* at 1027, 1044, 1089. It therefore issued an order allowing Weiler to seek a decision by the trial court on unconscionability and scheduled the next conference so that the arbitration could continue after the court ruled. App. 31a-34a.

Weiler then filed for relief in California Superior Court. *Id.* at 16-21. She asked "[f]or a judgment * * * that [petitioners] bear the full financial responsibility of the costs of the arbitration," or "[a]lternatively, for a judgment * * * that [petitioners] have waived their right to arbitration." *Id.* at 21. After granting requests by Weiler to postpone litigation deadlines, and imposing a monetary sanction on her for discovery delays, *id.* at 549, the trial court granted summary judgment for petitioners. App. 20a-21a. It ruled that pursuant to general California contract law, unconscionability must be determined at the time a contract was entered into, and because "it is undisputed that plaintiff could afford the arbitration fees at the time the agreement was entered into," *id.* at 25a; *id.* at 717-20, no law "would authorize this court to interrupt an ongoing arbitration to consider a party's ability to pay arbitration

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expenses against petitioners in the final arbitration award (Rules 44b, 50).

costs." App. 27a. Also, the court stressed that "the question of allocation of fees is one for the arbitrator, not the court," *id.* at 28a, explaining that the "payment of fees is [a] procedural condition precedent for arbitrators to decide." *Ibid.* (citing *Dealer Comput. Servs., Inc.* v. *Old Colony Motors, Inc.*, 588 F.3d 834, 887-88 (5th Cir. 2009)).

The California Court of Appeal reversed. It declared that "[t]hough the law has great respect for the enforcement of valid arbitration provisions, in some situations those interests must cede to an even greater, unwavering interest on which our country was founded—justice for all." *Id.* at 2a. Viewing the case "from a public policy standpoint," the court fretted that to uphold the trial court's decision would create a scenario of "justice for those who can afford it," and so decided that "[t]he interest in avoiding such an outcome far outweighs the interest, however strong, in respecting parties' agreements to arbitrate." *Id.* at 12a. The court mentioned the FAA and the California Arbitration Act in passing and noted that these statutes were "to be interpreted in a like manner"—meaning that there was no need to "decide which scheme govern[ed] here." *Id.* at 13a n.1.[4] Invoking the special

[4] The decision below did not rest on independent or adequate state grounds. First, the decision below was not independent since the lower court concluded there was no difference in statutory language between the FAA's section 2 and California's arbitration statute. App. 13a n.1. Because the lower court perceived no difference between state and federal law, there is no independent ground of state law. See *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) (holding that the Court has jurisdiction "when

judge-made exception in *Roldan*, 161 Cal. Rptr. 3d 493, the court reasoned that when a party like Weiler complains that she is unable to afford her share of arbitration costs the opposing party must agree to pay all fees and costs (if not ordered to by the arbitrator), or the case may proceed in trial court. *Id.* at 16a-17a. The court concluded that "[w]ith the rising costs of arbitration, our decision today ensures those compelled to arbitrate will not, as a result, be inherently disadvantaged." *Id.* at 17a.

The court below did not address the trial court's ruling that the division of arbitration costs between the parties lies beyond the courts' jurisdiction, despite the parties' briefing on the issue.

Petitioners sought review in the Supreme Court of California, arguing that the Court of Appeal's decision violated the FAA and conflicted with the U.S. Court of Appeals for the Fifth Circuit. The Supreme Court of California denied review. *Id.* at 19a. This timely petition followed.

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* * * a state court decision fairly appears * * * to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion"). And the lower court's reliance on a state judge-made rule contrary to federal law is by definition inadequate to deprive this Court of jurisdiction. See *Staub* v. *City of Baxley*, 355 U.S. 313, 319 (1958) ("[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." (quoting *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.))).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with numerous decisions of this Court under the FAA holding that "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 17-1272, slip op. at *4 (Jan. 8, 2019) (unanimous). It also conflicts with the Second, Seventh, Eighth, and Ninth Circuits on the question of whether a court may refuse to enforce a cost-sharing provision of an arbitration agreement without finding that the provision violates a general principle of state contract law, such as unconscionability. These four circuits have held that when a party complains that it cannot afford to meet its obligations under a cost-sharing provision, the provision must be enforced unless it offends a general principle of state contract law. The special California rule applied in the decision below conflicts with these holdings by allowing courts to disregard a cost-sharing provision without a predicate finding that the provision is invalid under general state contract law. Also, the decision below conflicts with a decision of the Fifth Circuit holding that the allocation of arbitration costs is a question that belongs to the arbitrator, not a court, to decide. Only this Court can resolve these conflicts, and this case is an excellent vehicle to do so.

I. The decision below merits review on whether the FAA preempts a state rule that denies enforcement of a cost-sharing provision of an arbitration agreement without a finding that the provision violates a general principle of state contract law.

A. The decision below contravenes the FAA and conflicts with this Court's precedents.

The California Court of Appeal rendered a decision in direct conflict with this Court's decisions under the FAA when it declined to enforce the parties' cost-sharing agreement because of a special judge-made rule of state law that applies to arbitration agreements but not to contracts generally.

This Court has repeatedly confirmed that the FAA requires courts to "respect and enforce agreements to arbitrate" and to "respect and enforce the parties' chosen arbitration procedures." *Epic*, 138 S. Ct. at 1621. Section 2 of the Act provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 4 empowers courts to issue "an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Together, these provisions seek "to ensure the enforcement of arbitration agreements according to their terms." *Concepcion*, 563 U.S. at 344.

The saving clause in section 2 is narrow. It withholds enforcement of an arbitration clause only on "grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This means that the FAA "places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). The statute "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Concepcion*, 563 U.S. at 339 (internal quotation marks omitted). But the FAA forbids state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 339; see *Kindred*, 137 S. Ct. at 1425 (holding that a state rule of law violated the FAA when it "single[d] out arbitration agreements for disfavored treatment").

The decision below directly conflicts with these precedents.

The court below held that, contrary to an express provision in the parties' arbitration agreement, petitioners may be compelled to pay all arbitration costs as a condition of retaining their right to arbitrate. See App. 16a-17a.[5] This condition will apply, the court

[5] The judge-made rule applied by the court below reflects an entrenched position in California law. The California Supreme Court has cited *Roldan*, 161 Cal. Rptr. 3d 493, for the principle that a "trial court may not consign indigent plaintiffs to an arbitration process they cannot afford to pursue." *Jameson* v. *Desta*, 420 P.3d 746, 753 (Cal. 2018) (citing *Roldan*). Other decisions by the California Court of Appeal have similarly relied on *Roldan*. See *Penilla* v. *Westmont Corp.*, 207 Cal. Rptr. 3d 473, 486 (Cal.

explained, if on remand Weiler produces "sufficient evidence" that she is "unable to afford" half the arbitration costs and "the court concludes [that Weiler's] financial status is not a result of [her] intentional attempt to avoid arbitration." *Id.* at 16a. The lower court's holding attacks the parties' arbitration agreement by making it conditional on the petitioners' willingness to pay all arbitration costs despite a cost-sharing agreement to the contrary.[6] That holding does not rest on the doctrine of unconscionability, as the lower court went out of its way to stress. See *id.* at 15a ("To be clear, this case is not about 'unconscionability.'"). In fact, the court acknowledged that Weiler "did not argue unconscionability or otherwise challenge the enforceability of the arbitration provisions." *Id*. at 16a. Nor did the court articulate any other generally applicable principle of contract law to justify non-enforcement.

Ct. App. 2016) (citing *Roldan* for the proposition that California law "cannot be interpreted to support an arbitration provision that would deny persons of limited means a forum in which to vindicate their rights"); *Liu* v. *Premier Fin. All., Inc*., No. B284545, 2018 WL 5835354, at *2 (Cal. Ct. App. Nov. 8, 2018) (citing *Roldan* as holding that if a party is unable to share the costs of arbitration, "the court must order the financially solvent party to either pay the moving party's share of the arbitration costs or waive its right to arbitrate that party's claim").

[6] Petitioners' standing to contest the decision below is not affected by the lower court's decision to remand the case for a determination of Weiler's financial condition. Their rights under the FAA were immediately infringed when the court of appeal concluded that the cost-sharing provision of the parties' arbitration agreement would not be enforced as written.

The court of appeal tried to justify its special rule based on a "public policy standpoint" grounded in a concern about not letting arbitration become "so expensive that the plaintiff eventually has no choice but to give up." *Id.* at 12a. As the court saw it, "[t]he interest in avoiding such an outcome *far outweighs* the interest, however strong, in respecting parties' agreements to arbitrate." *Ibid.* (emphasis added). In the contest between the court's sense of correct public policy and an enforceable cost-sharing agreement, the agreement lost.[7]

Of course, Weiler could have turned to the arbitration panel to relieve her financial incapacity. AAA rules allow for deferring or reducing administrative fees (Rule 49) and authorize the panel to assess expenses against petitioners in the final arbitration award (Rules 44b, 50). Weiler never invoked these rules in arbitration. Instead, she invoked California's special rule allowing a court to ignore an express cost-sharing

[7] The logic of the lower court's principle of "justice for all" reaches well beyond cost-sharing agreements. App. 2a. Take an agreement to submit disputes to a three-member arbitration panel. That too might be disregarded as denying "justice for all" to a party that later comes to regret the increased cost. Indeed, an agreement to arbitrate rather than litigate itself is equally vulnerable to the lower court's logic: a party wishing to avoid arbitration can simply contend that courts offer formal procedural protections that arbitration proceedings lack. But this prejudice against informal dispute resolution is exactly the sort of thing that the FAA was intended to eliminate. See *Moses H. Cone*, 460 U.S. at 24.

provision in an arbitration agreement when one party claims arbitration is too expensive.

The decision below cannot be defended as an exercise of the state's authority under the FAA's saving clause because it far exceeds the statute's constraints on permissible state-law defenses to arbitration agreements. Rather than reflecting "generally applicable contract defenses, such as fraud, duress, or unconscionability," *Concepcion*, 563 U.S. at 339, the decision below rests on a principle of state law applicable "only to arbitration or that derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* Whereas the FAA requires courts to respect "the rules under which that arbitration will be conducted," the court below relied on a judge-made rule that excuses a party from a cost-sharing provision of an arbitration agreement without a predicate finding of unconscionability—or some other ground of invalidity under contract law. *American Express Co.*, 570 U.S. at 233.

In addition, the lower court's remedy for Weiler's asserted financial incapacity contradicts the FAA. Section 2's saving clause allows an arbitration agreement to be invalidated based on the same general principles of law that authorize "the revocation of any contract." 9 U.S.C. § 2. Under California law, "courts may refuse to enforce any contract found 'to have been unconscionable at the time it was made,' or may 'limit the application of any unconscionable clause.'" *Concepcion*, 563 U.S. at 340 (quoting Cal. Civ. Code § 1670.5(a)). But neither the FAA nor California contract law invites a court to *rewrite* a cost-sharing

provision in an arbitration agreement. Yet that is exactly what the California Court of Appeal did here. It replaced the parties' agreement to divide costs evenly with court-imposed conditions on petitioners' right to proceed in arbitration: (1) a standardless evaluation of whether Weiler is "unable to afford to continue in such a forum," and (2) petitioners' willingness to pay "all fees and costs of the arbitration." App. 16a. Because the FAA allows a court to invalidate an arbitration agreement but not to rewrite it, the decision below conflicts with the statute in this respect as well.

The decision below and the established California rule it applied directly contradict federal law and this Court's precedents. *Epic*, 138 S. Ct. at 1632 ("The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written."). "The Federal Arbitration Act is a law of the United States, and * * * the judges of every State must follow it." *DIRECTV, Inc*. v. *Imburgia*, 136 S. Ct. 463, 468 (2015) (citing U.S. Const. art. VI); see *Southland Corp*. v. *Keating*, 465 U.S. 1, 16 (1984) (describing the FAA as "a substantive rule applicable in state as well as federal courts"). Whatever the merits of California's preference for allowing a party to escape a cost-sharing provision when arbitration supposedly gets too expensive, the FAA preempts it. "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343.

Review should be granted to resolve the conflict between this Court's enforcement of arbitration agreements under the FAA and California's rule that a valid arbitration agreement can be evaded when a court deems arbitration too expensive. This Court has granted certiorari to police state-court incursions on the FAA's policy mandating the enforcement of arbitration agreements, even without conflicts among the lower courts. See *Kindred*, 137 S. Ct. at 1421; *Preston*, 552 U.S. at 346.

B. The decision below conflicts in principle with the decisions of multiple federal circuits.

The decision below conflicts in principle with decisions of the Second, Seventh, Eighth, and Ninth Circuits.[8] Review is warranted for this reason as well.

In *Doctor's Assocs., Inc*. v. *Stuart*, 85 F.3d 975 (2d Cir. 1996), the Second Circuit declined to condemn an arbitration clause in a Subway sandwich franchise agreement as unconscionable because "the franchisee must pay half of the hourly charges of the [AAA] arbitrators, who are often attorneys with high-priced rates." *Id.* at 980. Unconscionability doctrine is intended to "'prevent unfair surprise and oppression,'"

[8] Because consumer agreements and employment agreements raise distinctive concerns about the effect of an unconscionable arbitration agreement on forum accessibility, we have excluded those types of agreements from our analysis of lower court decisions. Lifting that restriction would expand the number of conflicts presented by the decision below.

the court explained, and the contested arbitration agreement "did not ambush these Defendants." *Ibid.* (quoting *David L. Threlkeld & Co.* v. *Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 249 (2d Cir. 1991)). The court of appeals noted that "Defendants were on notice that they were at least liable for their own costs in the arbitration proceedings. Certainly they could have inquired about the typical fees charged by the AAA and its arbitrators." *Id.* at 981. Guided in part by these facts, the court concluded that the arbitration clause was not unconscionable. *Ibid.*; accord *Doctor's Assocs., Inc*. v. *Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (declining to find an arbitration clause of a franchise agreement unconscionable merely because the franchisee complained of having to "share the costs of arbitrating before the AAA").

The Seventh Circuit adhered to the same legal principles in *James* v. *McDonald's Corp*., 417 F.3d 672 (7th Cir. 2005). There, a restaurant patron challenged the restaurant for its alleged failure to award her a prize in a promotional game. When compelled to arbitrate her claims, the patron contended that the arbitration clause in the game rules "should not be enforced because the high up-front costs of arbitration prohibit her from pursuing a remedy in that forum." *Id.* at 678-79. The court of appeals disagreed. Not only did it find that the patron had failed to demonstrate that her arbitration expenses "would make arbitration prohibitive," the court pointed out that "AAA's Commercial Rules contain provisions to protect parties from prohibitive expenses." *Id.* at 679.

Likewise, in *Torres* v. *Simpatico, Inc*., 781 F.3d 963 (8th Cir. 2015), the Eighth Circuit rebuffed the claim of a class of franchisees that an arbitration clause in their franchise agreement was unconscionable. The franchisees argued that "the arbitration provision is unconscionable and should not be enforced because the prohibitively high costs associated with individual arbitration proceeding prevent them from pursuing their claims." *Id.* at 969. And "they point[ed] to terms in the arbitration provision requiring them to prepay filing and other fees and to reimburse [the franchisor's] costs and expenses if [it] prevails in an individual arbitration proceeding." *Ibid.* Although the franchisees produced average evidence of filing fees charged by AAA, along with an estimated number of days to resolve each claim and an affidavit declaring that none of the franchisees could "afford the costs of individual arbitration," the court of appeals concluded that this evidence was insufficient to show that arbitration costs "prevent them from effectively vindicating their rights in the arbitral forum." *Id.* at 970.

The Ninth Circuit adopted the same approach in *Kam-Ko Bio-Pharm Trading Co.* v. *Mayne Pharma (USA) Inc.*, 560 F.3d 935 (9th Cir. 2009). There, the court of appeals rejected the contention that the arbitration clause of a royalty agreement was unconscionable because of the high fees charged by the arbitrator. Applying Washington law, the court reasoned that the agreement was not substantively unconscionable, in part, because the party complaining about the fees drafted the arbitration clause and "effectively

controlled the amount of arbitration expenses and fees by the sum it chose to claim in dispute and by the number of arbitrators it requested." *Id.* at 941. The court added that the legal claim before the arbitral tribunal "exceeds $2.5 million, thereby dwarfing [the complaining party's] $110,000 share of the advance fee sought by the [arbitrator]." *Id.* at 942.

These decisions conflict with the decision below in two important ways.

First, each of these circuits refused to invalidate a cost-sharing provision without a determination that the provision was void under generally applicable state contract law. In contrast, the decision below held that Weiler could be excused from her obligations under the cost-sharing agreement without a finding of unconscionability—or invalidity under any other ground of state contract law. See App. 15a-16a ("To be clear, this case is not about 'unconscionability.' * * * The [trial] court, therefore, erred in focusing on unconscionability as the primary issue to be decided.").

Second, each of these circuit court decisions assessed the challenged cost-sharing provision for unconscionability, in order to decide whether the provision was invalid—not to decide whether to rewrite it. By contrast, the decision below recasts the parties' cost-sharing agreement by compelling petitioners to pay all arbitration costs or to lose the right to arbitrate, if Weiler proves that she is unable to pay. See *id.* at 16a (authorizing the trial court to issue an order that "the arbitration shall continue so long as the other party to

the arbitration agrees to pay, or the arbitrator orders it to pay, all fees and costs of the arbitration").

In both respects, the decision below is irreconcilable with the decisions of at least four circuits. Given the same facts, these circuits would reach the opposite outcome from the court below.

II. The decision below conflicts with the Fifth Circuit on whether an arbitrator should decide a dispute over the payment of arbitration costs.

The California Court of Appeal's decision disregards *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. at 79, and conflicts with a decision by the U.S. Court of Appeals for the Fifth Circuit.

Howsam concluded that an arbitral association's six-year statute of limitations belonged to the "class of gateway procedural matters" that should be decided by the arbitrator rather than the court. *Id.* at 84-85. In so holding, this Court reaffirmed that "'procedural questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." *Id*. at 84 (quoting *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964)). Likewise, "the arbitrator should decide 'allegations of waiver, delay, or *a like defense to arbitrability*.'" *Id*. at 84 (quoting *Moses H. Cone*, 460 U.S. at 25 (emphasis added)).

The Fifth Circuit interpreted *Howsam* in the context of cost-sharing agreements in *Dealer Computer Services, Inc.* v. *Old Colony Motors, Inc.*, 588 F.3d at 884. There, a company and its former client were in arbitration. *Id*. at 885. The client, which had sold its automobile dealership and gone out of business, *id.* at 886, announced that it could not afford to pay its $26,900 portion of the required deposit for arbitration fees, *id*. at 885-86. The arbitrators requested the company to pay the full deposit, which it refused to do. *Id*. at 886. Instead, the company sued its client under section 4 of the FAA to compel payment of the required portion of the deposit. *Ibid*.

The Fifth Circuit observed that under *Howsam*, "absent an agreement to the contrary, * * * the arbitrator, not the courts, should decide certain procedural questions which grow out of the dispute and bear on its final disposition." *Ibid*. Based on that principle, the court concluded that the "[p]ayment of fees is a procedural condition precedent that the trial court *should not review*." *Ibid*. (emphasis added). Because "[t]he AAA Rules allow the arbitrators discretion to order either party to pay the fees upon the failure of payment in full," and because the company "agreed to be bound by the AAA Rules," the court concluded the company's "remedy lies with the arbitrators." *Id*. at 888.

The decision below conflicts with *Dealer Computer Services*. Although the California Court of Appeal ignored the issue under *Howsam* and *Dealer Computer Services*, that issue was squarely addressed by the trial court, App. 28a, and raised by petitioners in their

briefing before the court below, Marcus Cal. Ct. App. Resp. Br. 30-31. Despite its silence on the point, the court below rendered a decision directly at odds with the Fifth Circuit's. By deciding that petitioners must front all arbitration costs or lose their right to arbitrate, the lower court necessarily rejected the trial court's holding that "the question of allocation of fees is one for the arbitrator, not the court." App. 28a; see *ibid.* ("[P]ayment of arbitration fees is [a] procedural condition precedent for arbitrators to decide." (citing *Dealer Comput. Servs.*, 588 F.3d at 887-88)).

What's more, if the Fifth Circuit is correct the decision below conflicts with *Howsam*. This Court should grant certiorari to resolve whether, absent the parties' agreement otherwise, the arbitrator is solely authorized to decide disputes over the payment of arbitration costs and fees when those disputes are not based on a general contract-law defense.

III. The questions presented are exceptionally important and recurring ones that warrant the Court's review.

The questions presented in this petition have significant legal and practical importance. The Court's intervention here is crucial to protect Congress's determination through passage of the FAA to promote arbitration. State-court noncompliance with the FAA is a matter of grave concern that warrants review in its own right. See *Nitro-Lift Techs*, 568 U.S. at 17-18.

By supplanting the parties' cost-sharing agreement to serve California's policy in favor of litigation, the decision below discourages the use of arbitration agreements. Businesses will be less likely to enter an arbitration agreement if they risk bearing the entire cost of any dispute when the other party later claims an inability to pay its agreed-to share of those costs. Also, arbitration becomes more expensive when the parties must return to court to decide the issue of who pays costs. See *Schein*, No. 17-1272, at *7 ("The exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) * * *. We see no reason to create such a time-consuming sideshow."). Because the decision below operates as a penalty on arbitration, it conflicts with the FAA.

The decision below likewise undermines arbitration as an essential element of our country's legal system. Applying the lower court's reasoning, any party can delay and potentially evade contracted-for arbitration by claiming an inability to pay. Left standing, the decision below threatens the integrity of millions of arbitration agreements in the country's most populous state—making California an outlier in the FAA's supposedly uniform national scheme.

California's determination to pursue its state policy interests at the expense of the FAA has substantial economic implications for the country. The Golden State, home to Hollywood and Silicon Valley, has the equivalent of the world's fifth-largest economy—larger than the economies of the United Kingdom, France,

and India.[9] Arbitration clauses originating from companies in that state, such as Google, Facebook, Apple, Intel, Disney, and Twitter, are usually governed by California law and often bind individuals and companies in every state. With the gravitational weight of the Nation's most powerful economy, the risk is that "As goes California, so goes the nation."

Also, under the uniform national scheme prescribed by the FAA, it should not matter in which state one enters an arbitration agreement. But the conflicts we have described make that choice outcome-determinative. A cost-sharing provision entered in other states probably will be enforced as written, while a provision entered in California is subject to judicial revision if one of the parties claims an inability to pay. On the question whether arbitration-cost disputes are decided in court or arbitration, the conflict between the decision below and the Fifth Circuit means that the 39.6 million people that live in California,[10] and the 36.3 million people that live in the states covered by the Fifth Circuit,[11] now live under two different versions of

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[9] See Kieran Corcoran, *California's Economy Is Now the 5th-Biggest in the World, and Has Overtaken the United Kingdom*, BUSINESS INSIDER (May 5, 2018), https://www.businessinsider.com/california-economy-ranks-5th-in-the-world-beating-the-uk-2018-5.

[10] California, Quick Facts, U.S. Census Bureau (last visited Jan. 4, 2019), https://www.census.gov/quickfacts/fact/table/ca,US/PST045218.

[11] Texas, Quick Facts, U.S. Census Bureau (last visited Jan. 4, 2019), https://www.census.gov/quickfacts/fact/table/tx,ca,US/PST045218 (28.7 million); Louisiana, Quick Facts, U.S. Census Bureau (last visited Jan. 4, 2019), https://www.census.gov/quickfacts/

the FAA. With respect to an arbitration agreement governed by California law, a court will decide the issue of the division of payment of fees among the parties. But under an arbitration agreement governed by Louisiana law, for instance, that same issue will be handled by the arbitrator—an assignment of responsibility that holds out the possibility of recouping arbitration costs that have been advanced when the final award is issued.

The questions presented are unfortunately recurring. In fact, the decision below made sure of that by holding that California's special rule for cost-sharing provisions will be applied in future disputes over arbitration costs. See App. 17a ("With the rising costs of arbitration, *our decision today ensures those compelled to arbitrate will not, as a result, be inherently disadvantaged.*" (emphasis added)). Nor does California stand alone. Beyond this case, federal and state courts are increasingly facing the problems that arise when a party refuses to pay arbitration costs as agreed.[12] See Neal M. Eiseman & Brian Farkas, *Stiffing the Arbitrators: The Problem of Nonpayment in Commercial Arbitration*, Harv. Negot. L. Rev. 1 (Apr.

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fact/table/la,tx,ca,US/PST045218 (4.66 million); Mississippi, Quick Facts, U.S. Census Bureau (last visited Jan. 4, 2019), https://www.census.gov/quickfacts/fact/table/ms,la,tx,ca,US/PST045218 (2.99 million).

[12] See, *e.g.*, *Pre-Paid Legal Servs., Inc.* v. *Cahill*, 786 F.3d 1287 (10th Cir. 2015); *Tillman* v. *Tillman and Rheinghold, Valet, Rheingold, Shkolnik & McCartney*, 825 F.3d 1069 (9th Cir. 2016); *Hernandez* v. *Acosta Tractors Inc.*, 898 F.3d 1301 (11th Cir. 2018); *Roach* v. *BM Motoring, LLC*, 155 A.3d 985 (N.J. 2017).

21, 2015) (observing that parties "may be able to 'game' the system by refusing to pay its share of arbitration fees," resulting in "a hole in our arbitral system").[13] This threat will not resolve itself. If ignored, lower court confusion and division will only grow more acute.

Finally, this case is an excellent vehicle for the Court to decide the questions presented. Both are pure questions of law that were unambiguously before the lower court. The conflict between the decision below and this Court is stark. The split between the California Court of Appeal and the decisions of four circuits is evident. The division between the lower court and the Fifth Circuit is genuine and straightforward. And the essential facts are undisputed: the parties entered an arbitration agreement containing a cost-sharing provision, which the court below declined to enforce.

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[13] Available online at http://www.hnlr.org/wp-content/uploads/HNLR-Eiseman-and-Farkas-.pdf. See also Richard DeWitt & Rick DeWitt, *No Pay No Play: How to Solve the Nonpaying Party Problem in Arbitration*, 60 Disp. Resol. J. 27, 27-28 (2005) (describing how parties are "using nonpayment of deposits strategically as a means of 'gaming' the arbitration process"); Steven C. Bennett, *What to Do When a Party Fails to Pay Its Portion of Arbitration Fees*, 59 Prac. Law. 57, 57 (June 2013) ("The problem of failure of a party to an arbitration proceeding to pay its share of arbitration administrative expenses and arbitrator fees has long been recognized.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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