No. 18-929

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

RESPONDENT'S BRIEF IN OPPOSITION

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April 29, 2019

QUESTIONS PRESENTED

1. Whether the California Court of Appeal's ruling remanding for further proceedings is a final judgment within the meaning of 28 U.S.C. § 1257.

2. Whether petitioners waived their argument that the Federal Arbitration Act preempts a state rule that ensures indigent litigants access to a forum.

3. Whether the California Court of Appeal was right to decide a question referred to it by an arbitration panel.

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INTRODUCTION

Petitioners Marcus & Millichap Real Estate Investment Services and Marcus & Millichap Capital Corporation (collectively, Marcus & Millichap) seek this Court's review of a nonfinal state-court decision on an issue not properly raised below. The decision does not address any issue of federal preemption, does not bar Marcus & Millichap from arbitrating, and does not determine the terms on which arbitration will take place. It only calls for further proceedings in the trial court to decide an issue concerning allocation of arbitration costs. The decision also does not interfere with arbitral authority, because the arbitrators themselves directed the parties to obtain a resolution of the cost-allocation issue from the courts. This Court lacks jurisdiction to review the state court's nonfinal decision, which would not merit review in any event because it does not conflict with any decision of this or any other court and is not erroneous in any respect.

Respondent Rae Weiler is an elderly woman who trusted Marcus & Millichap with her assets. Marcus & Millichap fraudulently induced Ms. Weiler and her husband into making a real estate investment that led to devastating losses. Ms. Weiler pursued claims against Marcus & Millichap in arbitration for nearly three years, but, on the verge of insolvency, she invoked California state law, *see Roldan v. Callahan & Blaine*, 161 Cal. Rptr. 3d 493 (Cal. Ct. App. 2013), to ask the arbitration panel to order Marcus & Millichap to advance her share of the arbitration costs. Concluding that it lacked jurisdiction to apply the *Roldan* rule, the arbitration panel ordered Ms. Weiler back to court to seek a judgment determining whether *Roldan* applied.

In the decision below, an intermediate California appellate court ruled, based on briefing that never referred to the Federal Arbitration Act (FAA), that if Ms. Weiler could prove she was unable to afford further arbitration fees, Marcus & Millichap must be given a choice between paying the fees and continuing the arbitration, or proceeding in court. The appellate court remanded the case to the trial court to determine whether Ms. Weiler could in fact establish her inability to pay further fees. Thus, the decision below neither addressed any preemption argument nor definitively resolved whether Ms. Weiler may be relieved from bearing the costs of arbitration. Rather, it called for the trial court to apply a state-law rule based on the general principle that civil litigants cannot be denied meaningful access to judicial process based on ability to pay—a rule that California applies in a great variety of contexts and that does not single out arbitration for disfavored treatment. In addition, if the trial court ultimately decides that Ms. Weiler cannot bear further arbitration fees, Marcus & Millichap will not be precluded from arbitrating; it will only bear some additional costs in doing so.

Because the decision below is not final, and the federal preemption issue that Marcus & Millichap asks this Court to decide was not properly pressed and passed on below, this Court lacks jurisdiction over this petition under 28 U.S.C. § 1257(a). In any event, review would be unwarranted because this case does not present a question of federal law over which there is any disagreement among federal courts of appeals or state supreme courts. Marcus & Millichap cites no decision holding that the FAA prevents courts from protecting parties against losing their rights because of an inability to afford high arbitration costs. And its

reliance on a single federal appellate decision holding that a court may not intervene to set aside an arbitrator's order on costs says nothing about whether a court may rule on such an issue when an arbitrator declines to assert jurisdiction over it and refers it to the court. The petition for certiorari should be denied.

STATEMENT

Respondent is 84-year-old Rae Weiler. Petitioner Marcus & Millichap is an experienced real estate brokerage and investment advisory firm with extensive market experience in acting as the representative for buyers and sellers in commercial real estate transactions.

In 2006, Ms. Weiler and her husband contracted with Marcus & Millichap to represent them in a property exchange under Internal Revenue Code § 1031. Pet. App. 3a. The couple owned two properties in Las Vegas, Nevada, which they exchanged for a Red Robin restaurant in Abilene, Texas. *Id.* Marcus & Millichap claimed that the Red Robin commercial property was worth $4.1 million, which turned out to be more than double its actual value. *Id.* at 3a–4a. When they acquired the Red Robin, Ms. Weiler and her husband understood that the tenant would be obligated to pay property taxes and make rent payments. *Id.* at 3a. But the tenant failed to pay taxes or rent almost immediately and persisted in default for seven years, costing the couple more than $600,000 in lost income. *Id.* at 4a.

Just before selling the Red Robin at a $2.1 million loss in 2012, Ms. Weiler filed suit against Marcus & Millichap, asserting claims for breach of fiduciary duty, negligence, and elder abuse. *Id.* at 4a. She alleged that she had informed the firm that she knew

very little about commercial real estate investing and wanted a safe and secure investment with a decent return. *Id.* She also alleged that the firm represented that the Texas property would be a prosperous investment and that she had acquired the property for $2 million above fair market value because of petitioner's misrepresentations. *Id.* When Marcus & Millichap moved to compel arbitration, Ms. Weiler did not oppose, and the court ordered arbitration through the American Arbitration Association, staying the underlying court action pending its completion. *Id.*

The arbitration proceeded slowly, and, at every turn, Marcus & Millichap pursued the most expensive options available in the arbitral forum. It insisted, for example, that Ms. Weiler's $2.8 million claim required that the case be heard by a panel of three arbitrators. *Id.* at 4a–5a, 13a. Ms. Weiler argued that one arbitrator was permissible and appropriate, but an arbitrator agreed with Marcus & Millichap and decided that a three-person panel would hear the case, at an hourly rate of $1,450. *Id.* at 5a. The panel set a discovery schedule and the parties proceeded. *Id.*

Nearly three years into arbitration, Ms. Weiler informed the arbitrators that she was unable to continue paying half of the arbitration costs. *Id.* at 5a. Her costs had already exceeded $15,000 and she anticipated that her share would ultimately exceed $100,000. *Id.* Ms. Weiler asserted that the expense would prohibit her from pursuing her claims at all if she were required to continue paying half the fees. *Id.* Ms. Weiler argued that *Roldan v. Callahan & Blaine*, 161 Cal. Rptr. 3d 493, permitted the arbitration panel to order Marcus & Millichap either to "(1) continue with the arbitration and pay the entire cost of it; or (2) have the matter tried in superior court instead." Pet.

App. 5a. The panel concluded, however, that this question fell outside its jurisdiction and directed Ms. Weiler to ask the superior court whether *Roldan* applied. Ms. Weiler thus sought declaratory relief from that court in early 2015. *Id.* at 5a–6a, 27a.

In the 2013 *Roldan* decision, the California Court of Appeal relied on state court decisions dating back to 2003 to conclude that, although the arbitration agreements at issue were enforceable, the plaintiffs, having established that they qualified "to proceed in forma pauperis in the trial court, could likewise be excused from the obligation to pay fees associated with arbitration." 161 Cal. Rptr. 3d at 499 (discussing *Parada v. Super. Ct.*, 98 Cal. Rptr. 3d 743 (Cal. Ct. App. 2009), and *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267 (Cal. Ct. App. 2003)). Recognizing that it could not order the arbitration forum to waive its fees, "as a court would do in the case of an indigent litigant," and that it could not order a defendant to pay plaintiffs' share of those fees, the court gave the defendant a choice: It could choose to pay plaintiffs' share of costs up front and remain in arbitration, or waive its right to arbitrate plaintiffs' claims. *Id.*

In this case, when Marcus & Millichap moved for summary judgment, it characterized Ms. Weiler's claim as one of "unconscionability." *Id.* at 6a. It argued that unconscionability must be determined as of the time the arbitration agreement was entered into and claimed that Ms. Weiler was indisputably wealthy at that time. *Id.* The trial court expressed concern that Ms. Weiler's depleted finances might prevent her from bringing her claims at all, but granted summary judgment to Marcus & Millichap because it believed that state law barred its consideration of Ms. Weiler's current financial status. *Id.* at 29a–30a.

On appeal, Ms. Weiler argued that, under *Roldan*, Marcus & Millichap could not "force her to continue with the arbitration despite the drastic change in her financial circumstances." *Id.* at 9a. She did not argue, however, that the arbitration agreement was itself unenforceable. *Id.* at 16a. Nonetheless, Marcus & Millichap continued to mischaracterize Ms. Weiler's argument as one about unconscionability and, therefore, to argue that the only factor relevant to the inquiry was the parties' financial status when the contract was signed. *Id.* at 6a–7a; *see also id.* at 16a–17a. Nowhere in its brief on appeal did Marcus & Millichap assert that application of the *Roldan* decision to the circumstances of this case would be preempted by the FAA; indeed, the brief did not mention or cite the FAA, and instead relied on a provision of California's arbitration law, California Code of Civil Procedure § 1284.2.

The California Court of Appeal reversed, holding that "when a party who has engaged in arbitration in good faith is unable to afford to continue in such a forum, that party may seek relief from the superior court." *Id.* at 17a. Finding triable issues of fact as to Ms. Weiler's present ability to pay her agreed share of the anticipated arbitration costs, the court of appeal remanded to the trial court. *Id.* at 3a. The court of appeal did not decide whether Ms. Weiler would ultimately be excused from paying further fees, and its decision does not prevent arbitration from resuming once the trial court determines whether Ms. Weiler is able to pay further arbitration fees. The court did not decide any questions concerning federal preemption because it had been alerted to no respect in which California law supposedly conflicted with the FAA. *See* Pet. App. 13a–14a.

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction because the decision below is not final.

This Court has jurisdiction to review only state courts' "[f]inal judgments or decrees." 27 U.S.C. § 1257(a). "Compliance with the provisions of § 1257 is an essential prerequisite to [this Court's] deciding the merits of a case brought here under that section." *Johnson v. California*, 541 U.S. 428, 431 (2004). As part of its obligation to establish this Court's jurisdiction, a petitioner must demonstrate that a state-court decision satisfies the finality requirement. *See id.*

To be reviewable before this Court, "a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (quoting *Mkt. St. Ry. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)).

The decision below is not final in any sense, and Marcus & Millichap has made no effort to demonstrate that it is. First, the decision is not an "effective determination of the litigation." *Id.* The case continues even now because the California Court of Appeal remanded it to the trial court to determine Ms. Weiler's financial status. Even after the trial court rules, the case will be far from over: Depending on the court's ruling and on Marcus & Millichap's choices, it will continue either in arbitration or in court. In short, the judgment below cannot be final because the case is ongoing.

Second, the decision will not be free from "further review or correction in any state tribunal." *Id.* Should Ms. Weiler be found unable to pay her arbitration costs, Marcus & Millichap will continue to have opportunities to seek review, including appeal from an ultimate final judgment and, potentially, interlocutory appellate proceedings. Furthermore, the decision below is that of an intermediate state court remanding for further proceedings on the question before it—hardly the final word of a final court. The California Supreme Court could yet weigh in when the case has been finally decided by the lower state courts.

This Court has exercised its certiorari jurisdiction over state-court judgments that do not terminate a case in only a "limited set of situations in which [the Court has] found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza,* 456 U.S. 430 (1982) (*per curiam*). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four such categories of cases. *Id.* at 477. Each category applies only where the state supreme court's ruling finally determines a *federal* question on which the petitioner seeks review. None of the four categories can apply here, because Marcus & Millichap did not properly raise its federal claims below—neither preemption nor application of the FAA—and the court below thus never addressed the federal questions on which the petition seeks review. *See supra* p. 6; *see also infra* pp. 10–13. For that reason alone, this case does not fit within any of the *Cox* exceptions.

Even leaving aside that the court below did not decide the federal questions Marcus & Millichap now raises, its decision does not fit any of the four *Cox* categories. This case is not one in which "the outcome

of further proceedings [is] preordained," as the first *Cox* category requires. *Id.* at 479. Marcus & Millichap may still prevail on the financial-circumstances determination or on the merits of Ms. Weiler's claims. Similarly, there is no possibility that, if Marcus & Millichap were to prevail in the state court, the federal issues it now seeks to raise would "survive and require decision regardless of the outcome" of future proceedings, and so the second *Cox* exception is also inapplicable. *Id.* at 480. Third, Marcus & Millichap cannot contend this case is among the rare set of cases (usually criminal proceedings) where there is an insurmountable bar to any further appellate proceedings subject to potential review in this Court no matter the outcome below. *Id.* at 481; *see Florida v. Thomas*, 532 U.S. 774, 779 (2001); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

Finally, this case does not fall within the fourth *Cox* exception, which applies when a "federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 482–83. Even where, unlike here, a federal issue has been finally decided, this exception is reserved for issues of such importance that failing to review now "might seriously erode federal policy." *Id.* at 483. There is no such possibility here. If the trial court finds Ms. Weiler unable to pay her share of arbitration costs, Marcus & Millichap will not be denied its ability to arbitrate: It could opt to pay those costs and proceed in arbitration. That Marcus &

Millichap retains access to arbitration no matter the outcome below means that withholding review of the decision below cannot erode any federal policy favoring arbitration.

This case is thus wholly unlike *Southland Corp. v. Keating*, 465 U.S. 1, 7–8 (1984), and *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987), where this Court held that definitive state-court decisions refusing to compel arbitration were "final" for purposes of § 1257 as construed in *Cox*. Furthermore, the decision whether to review the preemption claim here would be better informed if the Court had the benefit of the state courts' determination of Ms. Weiler's ability to pay and knew whether her claims would be litigated in court or continue in arbitration. It would make little sense to consider review before those matters have been decided.

II. Petitioners waived the issues they raise here.

The petition for certiorari suffers from another fatal flaw: Marcus & Millichap's failure to press below the arguments it raises now. Marcus & Millichap did not cite the FAA in its response brief before the California Court of Appeal, let alone argue that the FAA preempts the *Roldan* rule. Rather, it relied on state-law arguments and, for principles of applicable law, referenced the California Code of Civil Procedure, not the FAA. *See* Cal. Ct. App. Resp. Br. 5–6 (Table of Auths.). Specifically, Marcus & Millichap argued that "California statutes do not provide an in forma pauperis exception to the duty to arbitrate." *Id.* at 22 (capitalization omitted). It claimed that Ms. Weiler's "request is inconsistent with California law," *id.* at 23, and discussed the state legislature's intent with

regard to a fee-splitting rule, *id.* at 24 (citing Cal. Code Civ. Proc. § 1284.2), among other state-law arguments.

This Court does not decide questions "not raised or litigated in the lower courts." *City of Springfield v. Kibbee*, 480 U.S. 257, 259 (1987) (per curiam); *accord United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining petitioner's invitation to consider "new substantive arguments attacking … the judgment when those arguments were not pressed in the court" below, nor "passed upon by it"). This "longstanding rule," *Heath v. Alabama*, 474 U.S. 82, 87 (1985), applies equally to questions of federal preemption, *Clark v. Jeter*, 486 U.S. 456, 459–60 (1988). Marcus & Millichap's failure to raise FAA preemption before the court of appeal, and that court's consequent failure to address it, thus precludes review here.

Marcus & Millichap attempts to cover for this defect by blaming the California Court of Appeal for giving the FAA short shrift in its opinion. *See* Pet. 14 ("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.'"). But because Marcus & Millichap never suggested below that preemption was at issue, it is unsurprising—and entirely proper—that the court did not consider it.

In its petition for review to the California Supreme Court, Marcus & Millichap belatedly mentioned the FAA, but even then only briefly, as an apparent afterthought. *See* Pet. for Review 8 (arguing that the decision below will inject trial courts into the

arbitration process, a result "which the Federal Arbitration Act precludes"); *id.* at 16 (stating that the "FAA creates a presumption in favor of arbitrability and permits courts to refuse to enforce agreements only upon such grounds as exist at law or in equity for revocation of *any* contract"). Yet even had Marcus & Millichap fully articulated a federal-law argument in the petition for review, such an argument would have come too late to preserve the issue: "As a policy matter, on petition for review the [California] Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." Cal. R. of Ct. 8.500(c)(1); *see, e.g.*, *Wilson v. 21st Cent. Ins. Co.*, 171 P.3d 1082, 1090 (Cal. 2007) ("Because 21st Century did not timely raise this issue in the Court of Appeal, however, we decline to address it."). Marcus & Millichap offered the California Supreme Court no explanation for failing to raise the issue in the court of appeal and provided no reason why the state supreme court should overlook that failure. Thus, Marcus & Millichap waived any FAA preemption argument.

Marcus & Millichap's failure to invoke the FAA is not merely a procedural default: It renders the preemption arguments it now belatedly asserts *substantively* invalid. The FAA does not preempt application of a state arbitration statute "where the parties have agreed their arbitration agreement will be governed by the law of [a state]." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989). Marcus & Millichap only turned to the FAA after having lost in the court of appeal under California state law. The briefing in that court gave every indication that both parties agreed they were subject to California arbitration law

and litigated the case according to that belief. The parties' agreement to abide by state law governing arbitration procedures means that, even if the FAA would not itself incorporate the state-law rule applied below concerning allocation of fees, it does not preempt a state court from applying that rule. Although the FAA preempts state laws that "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *Southland Corp.*, 465 U.S. at 10, "it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself," *Volt Info.*, 489 U.S. at 479.

III. The lower courts are not divided over either of the petition's questions presented.

The petition argues that the decision below creates a divide among lower courts on two issues. The first is "whether the FAA preempts a state rule that denies enforcement of a cost-sharing provision of an arbitration agreement without finding that the provision violates a general principle of state contract law." Pet. 17. The second is "whether an arbitrator should decide a dispute over the payment of arbitration costs" under the principles of *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). *Id.* at 23. Both contentions lack merit.

A. There is no conflict over whether the FAA preempts a court from providing relief to a party unable to pay costs of arbitration.

1. As to the first purported divide, the petition identifies decisions from four federal courts of appeals, Pet. 23–27, which it claims reveal conflict with the

decision below in two ways. According to the petition, these courts "refused to invalidate a cost-sharing provision without a determination that the provision was void under generally applicable state contract law." *Id.* at 26. Moreover, the petition argues, had one of these courts found a cost-sharing provision unconscionable, the court would not have considered "whether to rewrite" the cost-sharing provision, but would instead have invalidated it. *Id.* These arguments dramatically mischaracterize the cited decisions as well as the decision below.[1]

In three of the four cases Marcus & Millichap cites, the courts found only that the party claiming an inability to pay fees had failed to carry its burden of showing that arbitration was cost-prohibitive—not that a cost-sharing provision could never be prohibitively expensive. *See Torres v. Simpatico, Inc.*, 781 F.3d 963 (8th Cir. 2015); *Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA)*

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[1] The petition does not directly argue that courts disagree over whether cost-sharing provisions can ever render an arbitration agreement unconscionable. That argument would be demonstrably false. *See, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir. 2013) (holding an arbitration agreement unenforceable where its terms imposed significant costs on the employee up front); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 217 (3d Cir. 2003) (affirming the district court's finding that plaintiff was financially unable to share arbitration costs); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (finding an arbitration agreement's cost-splitting provision unenforceable and severable); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (evaluating whether the arbitral forum "is an adequate and accessible substitute to litigation … focus[ing], among other things, upon … whether th[e] cost differential is so substantial as to deter the bringing of claims").

Inc., 560 F.3d 935 (9th Cir. 2009); *James v. McDonald's Corp.*, 417 F.3d 672 (7th Cir. 2005). In the fourth case, the Second Circuit rejected a claim that an arbitration clause was unconscionable, and hence unenforceable, because it did not disclose costs. *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975 (2d Cir. 1996). Ability to pay costs, not their disclosure, is at issue here.

All of these cases couched their holdings in terms of unconscionability because they involved parties who were resisting motions to compel arbitration and who invoked unconscionability as the basis for finding the agreements unenforceable as a matter of state contract law. Here, by contrast, Ms. Weiler has abided by the arbitration agreement to the best of her ability and is not unwilling to continue arbitrating, but she cannot continue to pay the costs of arbitration. The decision below is thus different from those that Marcus & Millichap invokes in multiple significant respects: Procedurally, it does not arise from an opposition to a motion to compel arbitration. Substantively, the consequence of a ruling in her favor will not be to render an arbitration agreement unenforceable. And, unlike in the decisions the petition cites, the court has not yet determined whether Ms. Weiler can carry her burden of showing financial hardship. None of the decisions Marcus & Millichap cites addresses such a situation, let alone holds that the FAA preempts a rule comparable to California's *Roldan* doctrine. To the contrary, the *Roldan* remedy is similar to what courts across the country order in like circumstances.

A more detailed analysis of the decisions Marcus & Millichap cites confirms their inapplicability. In *Torres*, the Eighth Circuit considered whether an

arbitration provision was "unconscionable and should not be enforced because the prohibitively high costs associated with an individual arbitration proceeding prevent [plaintiffs] from pursuing their claims." 781 F.3d at 969. The court explained that the party seeking to establish that arbitration would be prohibitively expensive bears the burden of proving "that it is likely, as opposed to merely speculative, that the prohibitive costs will actually be incurred." *Id.* (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000)). In addition, that party "must establish more than a 'hypothetical inability to pay' the costs of arbitration … so that the court can determine whether the arbitral forum is accessible." *Id.* (quoting *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053–54 (8th Cir. 2004)). The court found that the plaintiffs had adduced insufficient evidence to show that costs would prevent them "from effectively vindicating their rights in the arbitral forum." *Id.* at 970 (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013)).

Torres's approving citation of *Faber* makes clear that the Eighth Circuit has not, as Marcus & Millichap suggests, adopted a rule against granting relief to a litigant who is unable to afford arbitration fees. In *Faber*, the Eighth Circuit remanded a case for determination of the plaintiff's ability to pay and directed that, if the district court found that requiring the plaintiff "to pay half of arbitrators' fees would prevent access to the arbitral forum and preclude him from vindicating his rights, it should sever that clause and then enter an order compelling arbitration." *Faber*, 367 F.3d at 1054. The Eighth Circuit's recognition that proof of a plaintiff's inability to pay arbitration fees would require the court to relieve her

of the obligation to pay is fully consistent with the decision below.

Similarly, in *Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA) Inc.*, 560 F.3d 935 (9th Cir. 2009), the Ninth Circuit cited six cases that had held "that high arbitration costs can effectively deny a plaintiff access to a forum to obtain justice and thereby render an arbitration clause unconscionable," but found that the plaintiff "failed to meet its burden" of showing it could not afford to pay. *Id.* at 942. Likewise, in *James v. McDonald's Corp.*, 417 F.3d 672 (7th Cir.), the Seventh Circuit noted that plaintiff had "not provided any evidence concerning the comparative expense of litigating her claims" and so failed to show that being required "to proceed through arbitration … will effectively deny her legal recourse." *Id.* at 679.

Here, the state courts below have not yet determined whether the costs of arbitration will effectively deny Ms. Weiler continued access to the arbitral forum. Nothing in the court of appeal's decision to afford her the opportunity to prove her inability to pay conflicts with the decisions Marcus & Millichap cites holding that a plaintiff who cannot bear that burden is entitled to no relief.

The decision to remand to the trial court the issue of Ms. Weiler's ability to pay is also fully consistent with decisions of many other courts facing like circumstances. *See*, *e.g.*, *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910, 918 (N.D. Ohio 2003) (granting plaintiff leave to show she would be financially unable to pursue her claims in arbitration); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001) (concluding that

plaintiff "carried her burden of proving that costs associated with arbitration would effectively preclude her from vindicating her federal statutory rights"); *Moran v. Riverfront Diversified, Inc.*, 968 N.E.2d 1, 10 (Ohio Ct. App. 2011) (allowing evidentiary hearing, if requested, on plaintiff's ability to pay arbitration costs); *see also Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 607 (Wash. Ct. App. 2002) (finding that plaintiff "made a sufficient showing" that "costs of AAA arbitration would be prohibitively high").

Simply put, there is no disagreement among courts over whether prohibitively expensive arbitration can render a cost-sharing provision unenforceable.

2. In any event, the proper points of comparison for this case are not cases concerning whether an arbitration agreement is enforceable in the first instance, but cases in which arbitration has commenced but been suspended or terminated because a party has stopped paying its arbitration fees or has requested relief from further payment. In such cases, courts do not consider whether the arbitration agreements are unconscionable and unenforceable; they consider how best to enforce arbitration agreements in light of a party's inability or unwillingness to pay. *See*, *e.g.*, *Tillman v. Tillman*, 825 F.3d 1069 (9th Cir. 2016); *Pre-Paid Legal Servs., Inc. v. Cahill*, 786 F.3d 1287 (10th Cir. 2015); *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884 (5th Cir. 2009). No court in such circumstances has held that the FAA preempts consideration of a party's continuing ability to pay or the provision of some form of relief if she proves the costs are beyond her means.

The court of appeal's statement that "this case is not about 'unconscionability'" or enforceability, Pet. App. 15a–16a, is entirely consistent with this body of case law. Thus, Marcus & Millichap's observation that "[u]nconscionability is determined as of the time the contract was entered into, not in light of subsequent events," Pet. 7 (quoting *Parada v. Super. Ct.*, 98 Cal. Rptr. 3d 743, 768 (Cal. Ct. App. 2009)), is beside the point. As the court explained in *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001), whether an arbitration agreement is unconscionable is a different issue from whether its application to the plaintiff would deprive her of a remedy, *id.* at 896 n.2, by making the "arbitral forum … financially inaccessible to her" in the absence of an agreement by the defendant to bear the costs, *id*. at 897.

Where such issues have arisen in the midst of an arbitration proceeding, resulting in the suspension or termination of arbitration, courts have reasoned that their retained jurisdiction over the underlying action (which was stayed pending arbitration)—and the fact that arbitration has been undertaken in accordance with the agreement—allows them to consider a party's request for relief. *See* Pet. App. 13a–16a; *see also Tillman*, 825 F.3d at 1074 (where party lacked resources to make arbitration deposit and the "arbitration had 'been had' pursuant to the agreement," it was proper to proceed in district court given that the other party had declined to cover the deposit when asked by the arbitrators); *Pre-Paid*, 786 F.3d at 1294 (same resolution where recalcitrant defendant refused to pay arbitration fees and arbitration was terminated); *cf. Dealer*, 588 F.3d at 888 (holding that arbitrators acted properly in shifting costs to a party that could pay and in suspending

proceedings until payment was made); *Brandao v. Jan-Pro Franchising Int'l, Inc.*, 95 Mass. App. Ct. 1103, 2019 WL 1244627, at *4 (2019) (unpublished) (remanding the question of one party's ability to pay and holding that, if that party is shown to be unable to pay, the other party must either "agree to bear the arbitration fees or waive the right to proceed in arbitration").

The petition persistently fails to acknowledge that the issue the arbitration panel referred to the court was not whether the agreement was unconscionable, but "whether [Marcus & Millichap] must pay [Ms. Weiler's] arbitrator fees as a condition of maintaining their arbitration rights (Roldan v. Callahan & Blaine)." C.A. App. 1044; *see* Pet. 13 (claiming inaccurately that "[t]he arbitration panel concluded that a court had to decide an issue of unconscionability"). As to the issue actually before the court—what remedy is available when an arbitration already underway becomes too costly for one party to bear—the petition does not even attempt to establish a conflict.

B. No conflict exists over whether a court can decide a cost-allocation issue referred to it by the arbitrators.

The petition claims a second purported split over "whether an arbitrator should decide a dispute over the payment of arbitration costs." Pet. at 23. Here, however, Ms. Weiler did exactly what Marcus & Millichap says she should have done: She sought relief in the first instance from the arbitrators. The only reason the issue was presented to the court was that the *arbitrators* concluded that Ms. Weiler's request for relief under *Roldan* was beyond their jurisdiction. Pet.

App. 5a. Marcus & Millichap cites no decisions holding that a court may not decide a question concerning payment of costs when the arbitrators have declined to exercise jurisdiction over it and directed the parties to resolve it in court.

Marcus & Millichap argues that this Court's *Howsam* decision requires 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." Pet. 27 (quoting *Howsam*, 537 U.S. at 84). This general principle is undisputed. But nothing in *Howsam*, or any decision cited by Marcus & Millichap, suggests that this presumption remains where the arbitrators have themselves disclaimed jurisdiction over an issue. *Howsam* thus offers no support for Marcus & Millichap's petition.

Marcus & Millichap's contention that the decision below conflicts with the Fifth Circuit's decision in *Dealer* is equally wide of the mark. In *Dealer*, an arbitral panel resolved a cost allocation question, and the Fifth Circuit held that in such circumstances a court should not set aside the arbitrators' exercise of discretion. *See* 588 F.3d at 887. Specifically, the plaintiff in *Dealer* paid its share of the required fees for arbitration, but the defendant asserted that it was unable to pay. The arbitrators directed the plaintiff to pay the defendant's share and, when it failed to do so, suspended the proceedings. The plaintiff then asked the district court to order the defendant to pay its own share of the fees, and the district court did so. The Fifth Circuit held that order was improper because the matter was a "procedural" one for the arbitrators, and the arbitrators had "discretion" to make the determination they did. *Id.* at 887–88; *see also Pre-Paid*, 786 F.3d at 1297 (discussing *Dealer*).

Dealer nowhere suggests that courts lack power to decide a fee-allocation question when a party has sought relief in arbitration and the arbitrators have disclaimed jurisdiction over the issue and suspended proceedings pending its consideration by the court. Indeed, *Dealer*'s reasoning strongly suggests that, in such circumstances, deference to the arbitrators' understanding of the scope of their authority is proper, and that the court should therefore address the issue that the arbitrators have declined to decide. Since *Deal*, at least two federal courts of appeals have held that a party genuinely unable to make a payment may seek relief from the court, so long as the relief the party requests is not inconsistent with the arbitration panel's orders. *See Tillman*, 825 F.3d at 1076; *Pre-Paid*, 786 F.3d at 1299. The court of appeal in this case did not break with any relevant authority.

Marcus & Millichap cites no other decision, and respondent is aware of none, that addresses the unusual circumstances here, in which a panel of arbitrators declined to address a cost-allocation issue and directed the parties to litigate it in court. Whether and how principles of judicial deference to arbitral decision-making on procedural matters should apply to this situation is a highly factbound question, into which this Court need not delve absent some indication that the issue is recurring and has generated disagreement among the lower courts.

IV. Petitioners' preemption claims lack merit.

Marcus & Millichap's FAA-based arguments would fail on the merits even if they had been properly presented below. The court of appeal's correct application of California law to the facts here does not conflict with any relevant command of the FAA. The

FAA was designed to place agreements to arbitrate "upon the same footing as other contracts" to fulfill "a congressional desire to enforce agreements into which parties had entered." *Volt Info.*, 489 U.S. at 478. The FAA does not preempt the application of even-handed, arbitration-neutral rules that protect litigants from losing their rights because of inability to pay high fees; indeed, this Court has strongly suggested that the FAA itself incorporates similar principles.

The protection that the *Roldan* rule offers to litigants who might otherwise lose their rights because of high forum costs is consistent with general principles of California state law applicable outside of the arbitration context. California courts afford "indigent civil litigants the ability to obtain meaningful access to the judicial process in a great variety of contexts." *Jameson v. Desta*, 420 P.3d 746, 752 (Cal. 2018). For example, California case law allows indigent civil litigants to obtain a jury trial without prepayment of fees, to proceed in forma pauperis, to file appeals without paying fees, to obtain an injunction without providing a bond, and to have an affordable, privately compensated discovery referee, among other accommodations. *See id.*

The *Roldan* rule is also consistent with the contract-law principle that "hindrance of the other party's performance operates to excuse that party's nonperformance." Pet. App. 12a (quoting *Erich v. Granoff*, 167 Cal. Rptr. 538 (Cal. Ct. App. 1980)). As the court below explained, that principle is implicated here because the "very reason [Ms. Weiler] filed the underlying court action" was that defendants' alleged wrongful acts cost the Weilers a significant amount of money and that "defendants' tactical decisions" appear to have "further contributed to [Ms. Weiler's]

financial ruin." Pet. App. 12a. This Court has confirmed that "applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement" is appropriate so long as "due regard" is "given to the federal policy favoring arbitration." *Volt Info.*, 489 U.S. at 475–76.

The decision below thus rests on principles that do not single out arbitration for disfavored treatment. Moreover, application of the *Roldan* rule, both generally and in the circumstances of this case, does not "undermine the central benefits of arbitration itself," *Lamps Plus v. Varela*, No. 17-988, slip op. at 9 (U.S. Apr. 24, 2019), or "interfer[e] with fundamental attributes of arbitration," *id.* at 11. Allocation of costs to impecunious parties is hardly an inherent feature of arbitration. And taking steps to ensure that arbitration remains affordable is fully consistent with the expectation of those who enter into arbitration agreements that arbitration will proceed in a manner consistent with the "virtues" of "speed and simplicity and inexpensiveness." *Id.* at 8.

The court of appeal's application of *Roldan* endorsed and gave effect to the strong public policy in favor of enforcing arbitration agreements by withholding judicial intervention until after "arbitration had 'been had' pursuant to the agreement of the parties" and the proceedings had been suspended, Pet. App. 15a (citing *Tillman*, 825 F.3d at 1074), and by ensuring that, whatever the outcome, Marcus & Millichap would be able to elect to continue the arbitration. That approach, consistent with the most

pertinent federal appellate authority, *Tillman* and *Pre-Paid*, fully accords with the FAA's policies.[2]

The result below is also consistent with this Court's construction of the FAA. The Court has suggested that the FAA does not permit arbitration terms that impose "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Am. Express*, 570 U.S. at 236. Likewise, in *Randolph*, the Court indicated that the FAA does not countenance "the existence of large arbitration costs" that could prevent a plaintiff from vindicating her rights, 531 U.S. at 90. The Court indicated that a party complaining that arbitration costs are "prohibitively expensive … bears the burden of showing the likelihood of incurring such costs," *id.* at 92—a statement that implies the potential availability of a remedy should the party carry that burden. The decision below, which does no more than give Ms. Weiler the opportunity to carry her burden of showing entitlement to such a remedy, while ensuring protection of Marcus & Millichap's ability to arbitrate should it so choose, is entirely consistent with this Court's construction of the FAA.

V. A state-court decision presents a poor vehicle for review of FAA issues.

Even if Marcus & Millichap's assertion that the FAA limits a court's ability to provide relief to a litigant who cannot afford high arbitration costs had some arguable merit, the lingering disagreement

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[2] *See also Hernandez v. Acosta Tractors Inc.*, 898 F.3d 1301, 1306 (11th Cir. 2018) (citing *Tillman* for the proposition that "a party's good faith inability to afford the arbitration fees would be a factor properly considered to weigh against" sanctioning the party that failed to pay its arbitration fees).

within this Court over whether the FAA applies in state-court actions would make this case a poor vehicle for exploring those limits. Marcus & Millichap's questions presented, and all of the arguments in its petition, presuppose that the FAA applies in state courts. Although a majority of this Court so held (over substantial dissents) in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), one Justice of this Court continues to adhere to the view that the FAA does not apply to actions in state courts. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting). As *Kindred* and *Imburgia* illustrate, that view will determine the vote of at least one member of the Court in any case that originates in state court and raises an FAA issue.

This continuing disagreement makes a state court case an exceedingly poor candidate for resolving any significant FAA issue because such issues have often closely divided the Court. *See*, *e.g.*, *Lamps Plus*; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Even if Marcus & Millichap's arguments here were strong enough to command any votes at all, the likelihood that one Justice would vote to affirm on the ground that the FAA does not apply to state courts would create a significant chance that no holding on any issue would command a majority of the Court. *See, e.g.*, *Bazzle*, 539 U.S. at 460 (Thomas, J., dissenting). Review would then consume the time and efforts of the Court but contribute nothing to the definitive resolution of any question of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 29, 2019