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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent Rae Weiler opposes the petition by trying to sow confusion and distraction. She questions the existence of jurisdiction, accuses petitioners of not raising their claims below, and quibbles that the case is a poor vehicle because a single Justice opposes federal review of state-court FAA determinations. Each argument is baseless. None detracts from the importance of the California Court of Appeal's decision, which has contrived one of those "devices and formulas" against written arbitration agreements that will spread unless eliminated. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011).

Specifically, the California Court of Appeal refused to enforce a cost-sharing provision in the parties' arbitration agreement. App. 16a–17a. The court held that the state's interest in providing Weiler a forum she deems affordable "far outweighs the interest, however strong, in respecting parties' agreements to arbitrate." App. 12a. This holding raises important and certworthy questions. First, does the FAA preempt a state rule denying enforcement of a cost-sharing provision of an arbitration agreement without finding that the provision violates a general principle of contract law? Second, does this Court's decision in *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), require arbitrators to decide who pays arbitration costs? Each question warrants this Court's review.

Weiler's assaults on the petition leave the essential facts undisputed. She does not dispute that she

entered a written agreement to divide arbitration costs evenly. Resp. 1. She does not dispute that she brought suit against petitioners for $2.8 million but failed to oppose petitioners' motion to compel arbitration. Resp. 3–4. Nor does she dispute that she asked the arbitrators to excuse her from paying *any* arbitration costs after incurring only $15,000 in expenses. Resp. 4–5. And Weiler does not dispute that the court below decided that state public policy requires petitioners to accept the judicial revision of their cost-sharing agreement or forgo their right to arbitrate. *Id.* at 4, 6.

A few distractions sown by Weiler need to be cleared away. The arbitration agreement here was an arm's-length transaction between sophisticated parties—not an adhesion contract. See *DIRECTV, Inc*. v. *Imburgia*, 136 S. Ct. 463, 476 (2015) (Ginsburg, J., dissenting) (expressing concern about arbitration agreements that "deprive consumers of effective relief against powerful economic entities"). Weiler's age alone does not imply financial vulnerability. Weiler has decades of experience in commercial real estate, and she and her husband shared a net worth of $6.1 million when she entered the arbitration agreement in 2006. Pet. 9, 10. Weiler's assertions of financial hardship are unproven and her demand for judicial relief is extreme. She asked for her cost-sharing obligation to be eliminated, not reduced. Resp. 4. Nor does this case involve high costs to pursue negligible claims. Weiler refused to pay her share of arbitration costs after incurring only $15,000 in expenses while seeking $2.8 million in damages from petitioners. Resp. 4. Without review, two

important and distinct lower-court splits will fester. And unless reversed, the lower court's decision undermines—in the nation's largest and most influential state-court system—this Court's "equal-footing" doctrine, the principle that arbitration agreements are to be enforced as written, and Congress's liberal policy favoring arbitration agreements.

ARGUMENT

I. This Court Plainly Has Jurisdiction.

Weiler argues that the Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the decision below lacks finality. Specifically, she asserts that the California Court of Appeal's decision is subject to " 'further review or correction in any other state tribunal' " and that it is not " 'an effective determination of the litigation and [instead is] merely interlocutory or [involves] intermediate steps therein.' " Resp. 7 (citation omitted). But these objections mistake the nature of petitioners' case. They do not contest that the decision below lets them choose whether to "continue either in arbitration or in court." Resp. 7. Petitioners contend that the decision below violated their rights under the FAA when it supplanted their cost-sharing agreement with a judicially manufactured rule of state law. The decision below is final on that issue and, with the California Supreme Court's denial of review, binding.

Weiler admits that certiorari jurisdiction can be legitimate over state-court judgments that do not terminate a case. Jurisdiction exists when "the federal

issue has been finally decided in the state courts with further proceedings pending," the petitioner in this Court "might prevail on the merits [in the pending proceedings] on nonfederal grounds," and reversing the state court on the federal issue would preclude "any further litigation on the relevant cause of action." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482–83 (1975). Review of such decisions is especially urgent when "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 483.

Cox explains why jurisdiction exists here. Unless immediately reviewed, the decision below will mislead other California courts into concluding that the pay-or-litigate rule of *Roldan* v. *Callahan & Blaine*, 161 Cal. Rptr. 3d 493 (Cal. Ct. App. 2013), is consistent with the FAA. Pet. 18–19 n.5. This result would "seriously erode federal policy" by permitting California courts to nullify valid arbitration cost-sharing agreements based on a state rule that contradicts the FAA. *Cox*, 420 U.S. at 483; see also Br. for *Amici* The California Building Industry Assoc., et al. 15, *Marcus & Millichap Real Estate Invest. Servs., Inc.*, No. 18-929 (Feb. 19, 2019) ("[T]he decision below threatens to blow a massive hole in the FAA."). Reversal, however, would terminate the judicial dispute. As in *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), *Cox* justifies review. "For [the Court] to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate." *Id.* at 7–8.

Weiler's attempt to distinguish *Cox* fails. She reassures that denying review does not erode federal policy because "Millichap retains access to arbitration no matter the outcome below." Resp. 10. Yet the FAA protects not only the right to arbitrate, but also the right to have agreements enforced "as written." *Epic Sys. Corp*. v. *Lewis*, 138 S. Ct. 1612, 1632 (2018). The court below could no more disregard the parties' cost-sharing agreement than force petitioners to arbitrate in another state. Leaving the decision below unreviewed would "seriously erode federal policy." *Cox*, 420 U.S. at 483.[1]

Weiler's efforts to cast doubt on jurisdiction clash with the Court's "pragmatic approach" under section 1257(a). *Cox*, 420 U.S. at 486. There is no question that the decision below is sufficiently final.

II. The Questions Presented Are Fairly Before the Court.

Weiler mistakenly asserts that petitioners failed to preserve the questions presented. She complains that petitioners "did not cite the FAA in its response brief before the California Court of Appeal, let alone

[1] Weiler's prudential argument against jurisdiction also stumbles. She says that review would be "better informed" once the state court determines Weiler's "ability to pay" and it becomes evident "whether her claims would be litigated in court or continue in arbitration." Resp. 10. But those matters have no bearing on the questions presented. Petitioners' injuries were complete when the court below voided the cost-sharing provision in violation of the FAA.

argue that the FAA preempts the *Roldan* rule." Resp. 10. And, she asserts, petitioners "belatedly mentioned the FAA" in their petition for review to the California Supreme Court. *Id.* at 11.

Weiler's quibbles about preservation are beside the point. True, the Court's "practice, when reviewing decisions by state courts, [is] not to decide federal claims that were not pressed *or* passed upon below." *Clark* v. *Jeter*, 486 U.S. 456, 459–60 (1988) (emphasis added). But this "prudential rule," *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993) (per curiam), "operates (as it is phrased) in the disjunctive," *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

The California Court of Appeal "passed" on the FAA's applicability to the parties' cost-sharing agreement. It ruled that the FAA and California law were "to be interpreted in a like manner." App. 13a n.1; see also *id*. n.2 (citing and quoting the FAA). As a technical and practical matter, the decision below is now binding California precedent on the FAA.

Even if the decision below did not adequately *pass* on the petitioners' federal claims, petitioners *pressed* those claims consistently. They first raised the FAA before the trial court by citing federal case law interpreting the FAA. C.A. App. 1021, 1023. The trial court relied on that precedent in its opinion. App. 28a, 30a. Petitioners then raised federal issues before the California Court of Appeal. Cal. Ct. App. Resp. 30–32 (citing *Dealer Comput. Servs., Inc.* v. *Old Colony Motors,*

Inc., 588 F.3d 844 (5th Cir. 2009); *Howsam*, 537 U.S. 79). That court viewed the FAA as indistinguishable from California law. App. 13a nn.1–2. Petitioners again raised their FAA defense of the cost-sharing agreement in petitioning the California Supreme Court for review. Cal. Sup. Ct. Pet. 8 (FAA), 16 (FAA, *Boghos* v. *Certain Underwriters at Lloyd's of London*, 115 P.3d 68 (Cal. 2005)), 17 (*Dealer*, *Howsam*), 20 (FAA). At every stage, petitioners pressed the claim that the FAA secures the cost-sharing agreement from judicial revision.

Weiler grumbles that petitioners "never suggested below that preemption was at issue." Resp. 11.[2] But as the record just described demonstrates, petitioners' consistent claim below was that federal *and* state law required courts to respect the terms of the parties' cost-sharing agreement. Petitioners' litigating position sharply distinguishes this case from *Clark*, 486 U.S. at 456, on which Weiler relies. And the fact that petitioners have sharpened their preemption arguments in this Court does not detract from their reviewability. See *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992).

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[2] Weiler asserts that the petitioners' claim of preemption is "*substantively* invalid." Resp. 12. Not so. The FAA does allow parties to govern their arbitration under state law. *Volt Info. Scis., Inc*. v. *Bd. of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468, 470 (1989). But the arbitration agreement here nowhere waived rights under the FAA or agreed to follow California law—*Roldan* and all. Petitioners' references to FAA precedents in their lower-court briefing, Cal. Ct. App. Resp. 30–32 (citing *Dealer*, *Howsam*), rebut the notion that the parties unqualifiedly "agreed they were subject to California arbitration law." Resp. 12.

Finally, Weiler alleges that *Roldan* "is consistent with general principles of California state law applicable outside of the arbitration context." Resp. 23. But only general principles of state *contract law* fit within the FAA's narrow exception. *Concepcion*, 563 U.S. at 339 (holding that the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability' " (citation omitted)). *Roldan* does not reflect a general principle of California contract law. It is an arbitration-specific rule, as the court below, App. 16a–17a, and other California courts have acknowledged, Pet. 18–19 n.5. As such, by relying on *Roldan*, the decision below unmistakably conflicts with the FAA.[3]

III. The Petition Correctly Identifies Lower Court Conflicts Over the Questions Presented.

A. The decision below conflicts with federal appellate decisions requiring parties' compliance with cost-sharing agreements.

Weiler mischaracterizes the first question presented. The issue is not "whether the FAA preempts a court from providing relief to a party unable to pay

[3] Weiler further claims, "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.' " Resp. 23 (quoting App. 12a). But *Roldan* nowhere relies on that principle. App. 12a. Not only that, it was Weiler whose delays postponed the arbitration for 17 months. Pet. 12.

costs of arbitration." Resp. 13. Instead, the issue—and conflict—is that "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*." Pet. 26 (emphasis added). The circuit court decisions cited in the petition directly conflict with the decision below. Pet. 23–26.

Weiler wrongly dismisses these circuit court decisions because they "couched their holdings in terms of unconscionability." Resp. 15. But unconscionability is a *general* rule of state contract law. Pet. 26. The court below, by contrast, applied a *special* public-policy exception for cost-sharing provisions in arbitration agreements. Pet. 14–15, 26; Br. for *Amici* 9–11. This creates the conflicts petitioners describe.[4]

Weiler also insists that the relevant comparisons to the decision below are cases where arbitration is terminated or suspended because of a party's inability or refusal to pay. Resp. 18. But Petitioners are not seeking review to compel Weiler to pay her share of the arbitration costs. They are seeking to reverse the lower court's decision voiding the parties' cost-sharing provision. Without that decision, the parties could freely present cost-sharing disputes to the arbitrators.[5]

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[4] Weiler characterizes *Faber* v. *Menard, Inc.*, 367 F.3d 1048, 1053–54 (8th Cir. 2004) as "fully consistent with the decision below." Resp. 17. But that case also rested on unconscionability.

[5] Weiler could have asked the arbitrators for financial relief under applicable arbitration rules. Pet. 12–13 n.3. Instead, she invoked *Roldan* and asked the arbitrators to impose its harsh pay-or-litigate rule on petitioners. Her failure to request relief

The first question presents material conflicts meriting this Court's review.

B. The decision below conflicts with the Fifth Circuit's decision that cost-sharing disputes belong to the arbitrator.

Incredibly, Weiler maintains that the decision below does not conflict with the Fifth Circuit's application of *Howsam*. She recasts the issue as "whether a court can decide a cost-allocation issue referred to it by the arbitrators." Resp. 20. But that is not the question petitioners pose. Their question is whether disputes over arbitration costs are for arbitrators to decide. Pet. 27–29. On that issue, the Fifth Circuit held, following *Howsam*, that "[p]ayment of fees is a procedural condition precedent that the trial court should not review." *Dealer*, 588 F.3d at 887. The court reasoned that since "[t]he AAA Rules allow the arbitrators discretion to order either party to pay the fees upon the failure of payment in full," and since the company "agreed to be bound by the AAA Rules," the company's "remedy lies with the arbitrators." *Id.* at 888. The same logic applies here.[6]

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under the arbitration rules distinguishes this case from the decisions that Weiler cites, where an arbitration panel resolved cost-allocation disputes under agreed-to arbitration rules. Resp. 18.

[6] Although Weiler asserts that the arbitrators "disclaimed jurisdiction" and "suspended proceedings," Resp. 22, the record demonstrates that the arbitrators merely referred the question of unconscionability to the trial court and scheduled the next arbitration conference. C.A. App. 1027; App. 32a.

Weiler is equally wrong that "deference to the arbitrators' understanding of the scope of their authority is proper." Resp. 22. Judicial scrutiny of an arbitrator's authority is well-established. See, *e.g.*, *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 537 (2019). Review of the conflict between the decision below and the Fifth Circuit is therefore needed.[7]

C. Even without lower court conflicts, this Court should grant review.

This Court should grant review even without lower-court conflicts, as it has previously done in FAA cases arising from state courts. See, *e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421 (2017); *Preston* v. *Ferrer*, 552 U.S. 346 (2008). The decision below violated the FAA in at least three respects: the "equal-footing" doctrine, enforcing arbitration agreements according to their terms, and the liberal federal policy favoring arbitration agreements. Pet. 17–23; Br. for *Amici* 7, 9–11.

IV. This Case Is an Excellent Vehicle for Resolving the Questions Presented.

Weiler's reasons for condemning the petition as a poor vehicle for review, Resp. 25–26, are unconvincing.

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[7] Weiler argues that the decision below comports with this Court's FAA precedents, but she relies on dicta from cases where arbitration was conducted to vindicate federal statutory rights—which Weiler has not asserted. See Resp. 25.

With respect, Justice Thomas's opposition to federal review of state-court FAA decisions does not amount to "lingering disagreement" embroiling the entire Court. Resp. 25. A single justice's views are not a bar to granting review, as demonstrated by the number of FAA cases arising from state court. Pet. 1–2.

Nor is granting review bound to encounter an equally-divided Court. Resp. 26. Some FAA decisions are divided, but arbitration is an area of the law remarkable for its broad consensus. See, *e.g.*, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (unanimous); *New Prime Inc.*, 139 S. Ct. 532 (unanimous); *Kindred Nursing Ctrs.*, 137 S. Ct. 1421 (7-1). Besides, Weiler's argument proves too much. It calls into question the "great importance" of ensuring state-court fidelity to the FAA when "[s]tate courts rather than federal courts are most frequently called upon to apply [the statute]." *Nitro-Lift Techs., L.L.C.* v. *Howard*, 568 U.S. 17, 17–18 (2012) (per curiam). Supervision is critical here. As Weiler's response confirms, the decision below is part of a growing trend where cost-sharing agreements are challenged by parties who assert an inability or unwillingness to pay. Resp. 14–22 & n.1, 25 n.2.[8]

This case thus presents an ideal vehicle to decide the questions presented. Both are questions of law that the court below passed on or petitioners raised. The

[8] Summary reversal would not resolve the lower-court conflicts petitioners describe or even end California's reliance on *Roldan* to ignore cost-sharing agreements.

conflict between the California Court of Appeal and decisions of this Court is unmistakable. The split between the decision below and multiple circuits is genuine, as is the separate conflict with the Fifth Circuit. And the essential facts remain undisputed: the parties entered an arbitration agreement containing a cost-sharing provision that the court below refused to enforce for reasons that the FAA does not permit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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