

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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NICOLAS A. SALOMON  
PETITIONER,

v.

KROENKE SPORTS & ENTERTAINMENT, LLC,  
OUTDOOR CHANNEL HOLDINGS, INC.,  
SKYCAM, LLC, AND CABLECAM, LLC,  
RESPONDENTS.

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**On Petition for a Writ of Certiorari to the  
Supreme Court of California**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

Does the Federal Arbitration Act preempt California law on the right to counsel in an arbitration proceeding?

Does the Due Process Clause of the Fourteenth Amendment's guarantee of a right to representation extend to arbitration proceedings?

## **PARTIES TO THE PROCEEDINGS**

The parties to the proceedings before this court are as follows:

Nicolas A. Salomon

Kroenke Sports & Entertainment, LLC

Outdoor Channel Holdings, Inc.

Skycam, LLC

Cablecam, LLC

## **LIST OF PROCEEDINGS**

COURT OF APPEAL OF CALIFORNIA, SECOND  
APPELLATE DISTRICT, DIVISION SEVEN

Case No. B320536

KROENKE SPORTS & ENTMT V. SALOMON

Petitioner's Appeal DISMISSED.

Judgment dated February 7, 2023.

SUPREME COURT OF CALIFORNIA

Case No. S279130

KROENKE SPORTS & ENTMT, LLC V. SALOMON

Petition for Review DENIED.

Judgment reported as *Kroenke Sports & Entm't, LLC*

*v. Salomon*, No. S279130, 2023 Cal. LEXIS 2355 (Apr.

26, 2023) and reproduced in the Appendix.

Judgment dated April 26, 2023.

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDINGS.....	ii
LIST OF PROCEEDINGS.....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES.....	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW .....	1
BASIS FOR JURISDICTION IN THIS COURT .....	2
CONSTITUTIONAL PROVISIONS INVOLVED .....	2
STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE .....	4
A. Concise Statement of Facts Pertinent to the Question Presented.....	4
REASONS TO GRANT THIS PETITION .....	8
I. THE FEDERAL ARBITRATION ACT DOES NOT PREEMPT CALIFORNIA LAW ON THE RIGHT TO COUNSEL IN AN ARBITRATION PROCEEDING.....	8
II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEES A RIGHT TO REPRESENTATION IN ARBITRATION PROCEEDINGS.....	10

CONCLUSION .....	21
APPENDIX	
Appendix A	En Banc Order Denying Petition for Review in the Supreme Court of California (April 26, 2023) ..... App. 1
Appendix B	Remittitur (dated April 27, 2023) and Opinion in the Court of Appeal of the State of California, Second Appellate District, Division Seven (February 7, 2023) ..... App. 2
Appendix C	Minute Order in the Superior Court of California, County of Los Angeles, Civil Division, Central District (March 25, 2019) ..... App. 24
Appendix D	Judgment in the Superior Court of California, County of Los Angeles, Civil Division, Central District (March 25, 2019) ..... App. 27
Appendix E	Minute Order in the Superior Court of California, County of Los Angeles, Civil Division, Central District (January 23, 2019) ..... App. 33
Appendix F	Certificate of Mailing in the Superior Court of California, County of Los Angeles, Civil Division, Central District (January 23, 2019) ..... App. 35

## INDEX OF AUTHORITIES

### Cases

<i>AT&amp;T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011) .....	8, 9, 14
<i>Curtiss-Wright Corp. v. Gen. Elec. Co.</i> , 446 U.S. 1 (1980) .....	18
<i>Elmore v. Plainview-Old Bethpage Cent. Sch. Dist., Bd. of Educ.</i> , (N.Y. Sup. Ct. 1999) 690 N.Y.S.2d 842 .....	16
<i>Fallick v. Kehr</i> , 369 F.2d 899 (2d Cir. 1966) .....	12
<i>Garfinkle v. Superior Court of Contra Costa Cty.</i> , 21 Cal. 3d 268 (1978).....	12, 13, 14
<i>Gray v. New England Tel. &amp; Tel. Co.</i> , 792 F.2d 251 (1st Cir. 1986).....	11
<i>Hawthorne v. BJ's Wholesale Club</i> , (E.D. Va. Aug. 26, 2016) 2016 WL 4500867.....	20
<i>Horn v. Gurewitz</i> , 261 Cal. App. 2d 255 (1968) .....	15, 17
<i>Jones-Mixon v. Bloomingdale's, Inc.</i> , (N.D. Cal. June 11, 2014) 2014 WL 2736020.....	20
<i>McCuin v. Texas Power &amp; Light Co.</i> , 714 F.2d 1255 (5th Cir. 1983) .....	11
<i>Mortensen v. Bresnan Communs., LLC</i> , 722 F.3d 1151 (9th Cir. 2013) .....	8, 9

<i>Paxton v. Macy's W. Stores, Inc.</i> , (E.D. Cal. Sept. 7, 2018) .....	20
<i>Rembert v. Ryan's Fam. Steak Houses, Inc.</i> , (Mich. Ct. App. 1999) 596 N.W.2d 208 .....	16
<i>Rosenberg v. Piller</i> , (N.Y. App. Div. 2014) 116 A.D.3d 1023.....	15
<i>Sears, Roebuck &amp; Co. v. Mackey</i> , 351 U.S. 427 (1956) .....	18
<i>Sniadach v. Family Fin. Corp.</i> , 395 U.S. 337 (1969) .....	12, 14, 15
<i>Texas Catastrophe Prop. Ins. Ass'n v. Morales</i> , 975 F.2d 1178 (5th Cir. 1992) .....	11
<i>Turner v. Centaurus Fin., Inc.</i> , (Cal. Ct. App. May 1, 2013) 2013 WL 1819250.....	15
<i>Volpe v. Cortes</i> , (N.Y. App. Div. 2005) 16 A.D.3d 675 .....	15, 16
<i>Weiner v. Original Talk Radio Network</i> , (N.D. Cal. Mar. 14, 2011) 2011 WL 873246.....	15, 16

## **Statutes**

9 U.S.C. Ch. 1 § 10(a)(4) .....	2, 18
9 U.S.C.S. § 2 .....	2, 18
Cal. Civ. Proc. Code § 1282.4(a) .....	2, 8, 10, 15
D.C. Code Ann. § 16-4416 .....	15

Haw. Rev. Stat. Ann. § 658A-16 .....	15
Kan. Stat. Ann. § 5-438 .....	15
Mich. Comp. Laws Ann. § 691.1696.....	15
Minn. Stat. Ann. § 572B.16.....	15
N.J. Stat. Ann. § 2A:23B-16.....	15
N.M. Stat. Ann. § 44-7A-17 .....	15
N.Y. C.P.L.R. 7506.....	15
Nev. Rev. Stat. Ann. § 38.232 .....	15
Or. Rev. Stat. Ann. § 36.670.....	15
Tex. Civ. Prac. & Rem. Code Ann. § 171.048 .....	15
W. Va. Code Ann. § 55-10-18.....	15
Wash. Rev. Code Ann. § 7.04A.160.....	15

### **Other Authorities**

Anthony J. Sebok, <i>The Unwritten Federal Arbitration Act</i> , 65 DEPAUL L. REV. 1301, 707 (2016) .....	9
Edward Brunet, Replacing Folklore Arbitration with a Contract Model of Arbitration, 74 Tul. L. Rev. 39 (1990) .....	13



Richard C. Reuben, <i>Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice</i> , 47 UCLA L. Rev. 949, 1079 (2000) .....	11
Stephen L. Hayford and Alan J. Palmiter, <i>Arbitration Federalism: A State Role in Commercial Arbitration</i> , 54 FLA. L. REV. 175 (2002) .....	10
Stephen L. Hayford, <i>Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act</i> , 2001 J. DISP. RESOL., 76 (2001). .....	9
<b>Rules</b>	
American Arbitration Association Employment Arbitration Rules and Mediation Procedures .....	16
Code for Ethics for Arbitrators in Commercial Disputes .....	17
JAMS Employment Arbitration Rules & Procedures .....	17
JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness .....	16
<b>Constitutional Provisions</b>	
U.S. Const. amend. XIV. ....	2

**PETITION FOR A WRIT OF CERTIORARI**

Petitioner Salomon respectfully requests that a Writ of Certiorari be issued to review the dismissal of appeal by the Court of Appeal of California, Second Appellate District, Division Seven and the subsequent denial of petition for review by the Supreme Court of California.

**OPINIONS BELOW**

The February 7, 2023, order dismissing Petitioner's appeal from the Court of Appeal of California, Second Appellate District, Division Seven is reproduced in the Appendix ("Pet. App. 2b").

The April 26, 2023, order from the Supreme Court of California is reproduced in the Appendix. ("Pet. App. 1a"). This order is published as *Kroenke Sports & Entm't, LLC v. Salomon*, No. S279130, 2023 Cal. LEXIS 2355 (Apr. 26, 2023).

### **BASIS FOR JURISDICTION IN THIS COURT**

The Supreme Court of California entered judgment on April 26, 2023. This Court has jurisdiction under 28 U.S.C. § 1257.

### **CONSTITUTIONAL PROVISIONS INVOLVED**

The Fourteenth Amendment to the Constitution of the United States:

No person shall be deprived of life, liberty, or property without due process of law.

### **STATUTORY PROVISIONS INVOLVED**

Cal. Civ. Proc. Code § 1282.4(a) provides:

A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title.

9 U.S.C. Ch. 1 § 10(a)(4):

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

## 9 U.S.C.S. § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

## STATEMENT OF THE CASE

### A. Concise Statement of Facts Pertinent to the Question Presented.

The crux of this case involves Petitioner being deprived of his constitutional right to counsel during an arbitration proceeding. As a result, the Petitioner was unable to properly defend himself. The arbitrator substantially prejudiced Petitioner by postponing Petitioner's request for advancement of attorney's fees until after deciding liability. The practical effect of the arbitrator's postponement was constructively barring Petitioner from obtaining counsel.

Petitioner was President of SkyCam and CableCam from 2009 until his termination in 2014. (Pet. App. 6b). SkyCam and Cable Cam are wholly owned subsidiaries of Outdoor Channel Holdings, Inc. ("Outdoor") which is wholly owned by Kroenke Sports & Entertainment, LLC<sup>1</sup> ("KSE") (collectively "Respondents"). Petitioner executed an indemnification agreement ("Indemnification Agreement") which granted Petitioner broad and mandatory advancement rights. Section 7 of the Indemnification Agreement states: "The Corporation shall pay the expenses incurred by Indemnitee in

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<sup>1</sup> *SkyCam and CableCam provide aerial camera technology on sports and entertainment broadcasts, including NFL Football. Stan Kroenke, the owner of the Los Angeles Rams and Arsenal, owns and controls KSE. This dispute involves the status of records tied to a 2013 public company acquisition by KSE. There is ongoing anti-trust litigation involving NFL Sunday Ticket. Additionally, Mr. Salomon has raised SEC whistleblower claims in supporting litigation.*

defending any proceeding in advance of its final disposition . . .” (Pet. App. 11b). However, Respondents failed to do so. As a result, Petitioner was unable to properly defend himself. (Pet. App. 11b).

On March 21, 2018, Petitioner wrote an email to the arbitrator’s administrator stating that he would like to have counsel for the upcoming arbitration hearing, attaching the indemnification agreement which entitled him to the same. (Pet. App. 7b). In March 2018, Petitioner participated in a hearing without counsel, informing the arbitrator that he was unable to retain counsel. (Pet. App. 7-8b). Petitioner reiterated that Respondents were contractually obligated to advance his attorney’s fees in the arbitration proceeding but, rather than scheduling a hearing to determine Petitioner’s contractual rights, the arbitrator reserved the issue of indemnification until a later date. (Pet. App. 7-8b).

In May 2018, Petitioner participated in another hearing without counsel. (Pet. App. 8b). Petitioner again complained that he was without counsel and reemphasized Respondents’ obligation to advance his attorney’s fees. (Pet. App. 8b). The arbitrator acknowledged that Petitioner was without counsel. Ironically, while simultaneously encouraging Petitioner to obtain counsel, the arbitrator refused to address the contractual provision in the Indemnification Agreement that would have allowed him to do so. (Pet. App. 8b).

After the May 2018 hearing, the arbitrator continued to maintain that the advancement claim was reserved. In July 2018, the arbitrator held a

hearing and issued an award on behalf of the Respondents. (Pet. App. 8-9b). However, each and every finding set forth in the award was not defended by Petitioner because he was unrepresented by counsel at the hearing. Petitioner asserts his fundamental due process right to representation by counsel in his arbitration proceeding.

### **Procedural History.**

On January 18, 2018, Respondents commenced an arbitration proceeding against Petitioner with Judicial Arbitration and Mediation Services (“JAMS”). (Pet. App. 6b). On September 6, 2018, the arbitrator awarded Respondents \$440,126.28 on its claims. (Pet. App. 9b). On November 21, 2018, Respondents filed a petition in Los Angeles County Superior Court to confirm the award. (Pet. App. 9b). The court granted the petition, and on March 25, 2019, it entered judgment confirming the award. (Pet. App. 9b). On March 26, 2019, the arbitrator issued an order giving Petitioner a chance to file and serve a counterclaim, to which Petitioner served counterclaims for express indemnification and declaratory relief. (Pet. App. 10-12b). In September 2019, the arbitrator dismissed with prejudice Petitioner’s counterclaims for indemnification and issued an award in favor of Respondents. (Pet. App. 12-13b).

In January 2020, Petitioner filed a petition in the Los Angeles County Superior Court to vacate the arbitration award. (Pet. App. 13-14b). On July 7, 2020, the court denied Petitioner’s petition to vacate the arbitration award. On September 4, 2020, Petitioner filed a notice of appeal, appealing both the court’s

March 25, 2019, judgment and the July 7, 2020, judgment. (Pet. App. 15b).

On February 7, 2023, the Court of Appeal of California, Second Appellate Division, Division Seven, dismissed the appeal. (Pet. App. 2-23b). On April 26, 2023, the Supreme Court of California denied the petition for review. (Pet. App. 1a).

Now, this Petition for Writ of Certiorari follows.



## REASONS TO GRANT THIS PETITION

### I. THE FEDERAL ARBITRATION ACT DOES NOT PREEMPT CALIFORNIA LAW ON THE RIGHT TO COUNSEL IN AN ARBITRATION PROCEEDING.

The Federal Arbitration Act (“FAA”), and its authority to confirm and vacate arbitration awards, does not preempt California law on the right to counsel in an arbitration proceeding. The FAA is not preempted when the purpose of the state law is to promote arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011); *Mortensen v. Bresnan Communs., LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013).

Cal. Civ. Proc. Code § 1282.4(a) provides:

“[a] party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title.” Section 2 of the FAA makes agreements to arbitrate “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.S. § 2.

In *AT&T Mobility LLC v. Concepcion*, the Court addressed “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.” 563 U.S. 333, 336 (2011). The Court held that “[t]he overarching purpose of the FAA . . . is to ensure the **enforcement of arbitration agreements according to their terms** so as to facilitate

streamlined proceedings.” *Id.* at 344 (emphasis added). In other words, “the FAA was designed to promote arbitration.” *Id.* at 345. Therefore, the Court in *Conception*, “did not simply say that all state laws solely affecting arbitration are preempted.”<sup>2</sup>

In *Mortensen v. Bresnan Communs., LLC*, the Ninth Circuit addressed “the relationship of state and federal law and the concept of preemption . . . .” 722 F.3d 1151, 1153 (9th Cir. 2013). The court similarly held that “*Concepcion* outlaws discrimination in state policy that is unfavorable to arbitration by further limiting the savings clause.” *Id.* at 1160. The court’s holding was rooted in the fact “that the FAA’s purpose is to give preference . . . to arbitration.” *Id.*

That being said, when a state’s arbitration act gives preference to arbitration, the Court should defer to the “state arbitration act, provided [its] rules are intended to foster the arbitration process and do not conflict with the seminal directive of the FAA that otherwise valid contractual agreements to arbitrate are enforceable.”<sup>3</sup> Put another way, “[s]tate regulation that assures the fundamental fairness of arbitration

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<sup>2</sup> Anthony J. Sebok, *The Unwritten Federal Arbitration Act*, 65 DEPAUL L. REV. 1301, 707 (2016).

<sup>3</sup> Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL., 76 (2001).

fosters its legitimacy-consistent with the animating purpose of the FAA.”<sup>4</sup>

Cal. Civ. Proc. Code § 1282.4(a) encourages arbitration while ensuring that parties to arbitration have the right to be represented by counsel. Thus, the deprivation of said right runs afoul, not only of the FAA and California law, but the due process clause of the Fourteenth Amendment.

## **II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEES A RIGHT TO REPRESENTATION IN ARBITRATION PROCEEDINGS.**

The Due Process Clause of the Fourteenth Amendment guarantees a right to representation in arbitration proceedings. The Due Process Clause provides that “[n]o person shall be deprived of life, liberty, or property without due process of law.” Several circuit courts throughout the United States have acknowledged the “fundamental due process right to representation by counsel in a civil proceeding . . . .”<sup>5</sup> “The right to counsel in civil cases is not expressed as an independent constitutional provision.

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<sup>4</sup> Stephen L. Hayford and Alan J. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175 (2002).

<sup>5</sup> *Id.*

Rather it has always been assumed to exist in civil cases.”<sup>6</sup>

Similarly, in *McCuin v. Texas Power & Light Co.*, the Fifth Circuit Court of Appeals addressed whether there is a right to counsel in civil cases. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983). The court held that “the right to counsel in civil cases is no less fundamental [than the right to counsel in criminal cases] and springs from both statutory authority and from the constitutional right to due process of law.” *Id.*

In *Texas Catastrophe Prop. Ins. Ass’n v. Morales*, the Fifth Circuit Court of Appeals further addressed whether “there is a constitutional right to retained counsel in civil cases . . . .” *Texas Catastrophe Prop. Ins. Ass’n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992). The court answered in the affirmative and held that “there is a constitutional right to retained counsel in civil cases, and ... this right may not be impinged without compelling reasons.” *Id.* at 1181. Thus, the Fifth Circuit reaffirmed its acknowledgement to the right to counsel in civil cases.

The First Circuit Court of Appeals in *Gray v. New England Tel. & Tel. Co.* also acknowledged that “a civil litigant does have a constitutional right, deriving from due process, to retain hired counsel in a civil case.” *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986).

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<sup>6</sup>Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1079 (2000).

Several circuit courts have also extended such right to arbitration proceedings. Since arbitration is an adversarial process, the right to counsel “must be as a constitutional matter in arbitration, just as it is at trials and administrative hearings.”<sup>7</sup> For example, in *Fallick v. Kehr*, the Second Circuit Court of Appeals implied the availability of the right to counsel in arbitration proceedings. *See Fallick v. Kehr*, 369 F.2d 899, 901 (2d Cir. 1966).

In *Fallick*, the court addressed the appropriateness of arbitration for questions of dischargeability in bankruptcy. *Id.* at 905. However, the court’s analysis regarding the nature of arbitration included “adequate legal representation possible and apparently available under the aegis of a respected arbitration association.” *Id.* Thus, the Second Circuit, along with the Fifth Circuit, acknowledges the assumption that the right to counsel exists in civil cases, including during arbitration proceedings.

While there are state courts that have refused to extend due process protections to similar situations,<sup>8</sup> such cases are distinguishable, and thus fall within the scope of *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). In *Garfinkle v. Superior Court of Contra Costa Cty.*, the Supreme Court of California addressed whether nonjudicial foreclosure sales constitute state action. *Garfinkle v. Superior Court of Contra Costa Cty.*, 21 Cal. 3d 268, 281 (1978). The

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<sup>7</sup> *Id.* at 1080.

<sup>8</sup> *Horn v. Gurewitz*, 261 Cal. App. 2d 255 (1968); *Garfinkle v. Superior Court of Contra Costa Cty.*, 21 Cal. 3d 268 (1978).

court held that nonjudicial foreclosure sales did not constitute state action because the state was not “significantly involved in the nonjudicial foreclosure procedure so as to bring that procedure within the reach of the due process clause.” *Id.* at 276-77. The court reasoned that, due to the absence of judicial and legislative involvement, the procedure did not constitute state action. *See id.* at 281.

In *Horn v. Gurewitz*, the Court of Appeal of California, First Appellate District, Division Two, addressed whether an arbitrator must advise a party of his right to be represented by counsel. 261 Cal. App. 2d 255, 262 (1968). The court held that “arbitration does not require the formality of judicial proceedings,” and thus due process was not violated when the arbitrator failed to advise the party of his right to counsel. *Id.* This case is distinguishable from *Garfinkle* because of the nature of judicial and legislative involvement<sup>9</sup>.

Here, the arbitration was governed by the FAA and was approved by the courts of California, despite the fact that Petitioner was denied his right to counsel. Similarly, this case is distinguishable from *Horn*. The central reasoning in *Horn* that there is no due process

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<sup>9</sup> See also Edward Brunet, Replacing Folklore Arbitration with a Contract Model of Arbitration, 74 Tul. L. Rev. 39 (1990) (describing the transition from the simple “folklore arbitrations” of the nineteenth and early twentieth centuries, where arbitration often occurred in small trade organizations in connection with contractual disputes and where “informal procedures dominated,” to a more judicialized model of modern arbitrations which resemble litigation with complex procedures).

right of being advised of the right to counsel in arbitration relies on the “informality” of arbitration proceedings. 261 Cal.App.3d at 262. In other words, the “nontechnical,” informal nature of arbitration was viewed in *Horn* as inconsistent with “requiring the formality of judicial proceedings” and the assertion of due process rights. *Id.*

However, as explained in this section of the brief and as demonstrated by the complex arbitration proceeding at issue in this case, the actual reservation of the funding issue and denial of right to counsel was not informal at all.

Here, unlike in *Horn*, Petitioner affirmatively invoked his right to counsel. Notably, this right sat within the confines of the arbitration and indemnification agreements themselves. And the arbitrator’s failure to enforce to the terms of the agreements is directly in conflict with *Conception*. In *Horn*, the appellant simply was not advised of his right to counsel. Here, however, Petitioner knew of his right to counsel, but as described more below, Petitioner invoked this right several times throughout the proceedings.

Since this case is clearly distinguishable from *Garfinkle* and *Horn*, this case is within the scope of *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

In *Sniadach*, the Court addressed whether a state government must provide notice and an opportunity to be heard in order to avoid violating Due Process. The Court held that a prejudgment garnishment procedure, absent notice and a prior hearing, violated the fundamental principles of due

process. *Id.* at 342. *Sniadach* is analogous to this case because the arbitration consisted of a proceeding where Petitioner was not provided with representation. This is not only a breach of contract, but essentially foreclosed Petitioner from obtaining counsel given the reliance on the agreement.<sup>10</sup> Such a result brings this case within the scope of the Supreme Court's jurisprudence in *Sniadach*, and its progeny.

In addition to the circuit courts acknowledging the right to counsel in arbitration proceedings and its protection under the Fourteenth Amendment, several states have also acknowledged the right to counsel in arbitration proceedings.

For example, although the FAA is silent about the right to counsel during arbitration, state statutes and courts around the country have recognized such a right. See, e.g., Cal. Civ. Proc. Code § 1282.4; D.C. Code Ann. § 16-4416; Haw. Rev. Stat. Ann. § 658A-16; Kan. Stat. Ann. § 5-438; Mich. Comp. Laws Ann. § 691.1696; Minn. Stat. Ann. § 572B.16; Nev. Rev. Stat. Ann. § 38.232; N.J. Stat. Ann. § 2A:23B-16; N.M. Stat. Ann. § 44-7A-17; N.Y. C.P.L.R. 7506; Or. Rev. Stat. Ann. § 36.670; Tex. Civ. Prac. & Rem. Code Ann. § 171.048; Wash. Rev. Code Ann. § 7.04A.160; W. Va. Code Ann. § 55-10-18; *Turner v. Centaurus Fin., Inc.* (Cal. Ct. App. May 1, 2013) 2013 WL 1819250; *Rosenberg v. Piller* (N.Y. App. Div. 2014) 116 A.D.3d 1023, 1024 (**arbitral award invalid because the plaintiffs were denied their right to**

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<sup>10</sup> See, e.g., *Weiner v. Original Talk Radio Network* (N.D. Cal. Mar. 14, 2011) 2011 WL 873246, at \*3 ("arbitration clause's waiver of legal representation is void"); *Volpe v. Cortes* (N.Y. App. Div. 2005) 16 A.D.3d 675.



**counsel**)(emphasis added); *Weiner v. Original Talk Radio Network* (N.D. Cal. Mar. 14, 2011) 2011 WL 873246, at \*3 (“arbitration clause’s waiver of legal representation is void”); *Volpe v. Cortes* (N.Y. App. Div. 2005) 16 A.D.3d 675; *Rembert v. Ryan’s Fam. Steak Houses, Inc.* (Mich. Ct. App. 1999) 596 N.W.2d 208 (**right to counsel is a critical component of arbitration to ensure its fairness**)(emphasis added); *Elmore v. Plainview-Old Bethpage Cent. Sch. Dist., Bd. of Educ.* (N.Y. Sup. Ct. 1999) 690 N.Y.S.2d 842 (**vacating arbitration award for arbitrator’s misconduct in denying petitioner the right to assistance by counsel during the arbitration hearing**)(emphasis added).

Additionally, the American Arbitration Association Employment Arbitration Rules and Mediation Procedures<sup>11</sup> (“AAA”), provides that “[a]ny party may be represented by counsel or other authorized representatives.”<sup>12</sup>

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<sup>11</sup> *American Arbitration Association Employment Arbitration Rules and Mediation Procedures*. (see section 19 – should be the same clause)  
<https://www.adr.org/sites/default/files/Employment%20Rules.pdf>

<sup>12</sup> In addition to the rules that govern proceedings, which already recognize the right to counsel, arbitral organizations have developed policies or protocols recognizing the necessity of having representation to ensure the fairness of arbitral proceedings. See, e.g., JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness.

Likewise, JAMS Employment Arbitration Rules & Procedures, Section 12(a)<sup>13</sup> brought into the dispute by Respondents, also provides that a party may be represented by counsel. Rule 12(a) states: “The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party’s choice.”

Thus, since JAMS rules apply, Petitioner had a right to counsel during the arbitration proceedings.

Similarly, the Code for Ethics for Arbitrators in Commercial Disputes, developed jointly by the AAA and ABA, provides that the arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

In short, the Due Process Clause of the Fourteenth Amendment, California law, circuit precedent, American Arbitration Association Employment Arbitration Rules and Mediation Procedures and JAMS, all arrive at the same conclusion: Petitioner had a right to counsel in the arbitration proceedings. A right that was violated, in violation of due process. Not only did the arbitrator violate Petitioner’s due process, but the arbitrator also failed to render a final award.

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<sup>13</sup> JAMS Employment Arbitration Rules & Procedures, Section 12(a) [www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_employment\\_arbitration\\_rules-2021.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2021.pdf)(last visited \_\_\_\_\_)

As demonstrated by all of these statutes, cases, rules, protocols, and standards, the right to representation is critically important in arbitration. The right to an attorney helps ensure the fundamental fairness of arbitration, and in turn, builds up public trust and confidence in this widespread system of private arbitration, which is supposed to serve as a substitute for the courts. The right to an attorney helps legitimize arbitration as a valid, equitable alternative to the judicial system.

The FAA requires that cases not be left bifurcated and not final. 9 U.S.C. Ch. 1 § 10(a)(4) provides that “[i]n any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration where the arbitrators exceeded their powers, or so *imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.*” (Emphasis added). An order is only final when there is “an ultimate disposition of an individual claim entered in the course of a multiple claims action.” *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)).

Here, the arbitration was bifurcated and not final as the outstanding issue of right to counsel and indemnification was not resolved prior to the final judgment. On March 21, 2018, when Petitioner wrote an email to the arbitrator’s administrator stating that he would like to have counsel for the upcoming arbitration hearing, Petitioner attached the

indemnification agreement which entitled him to the same.

In March 2018, Petitioner participated in a hearing without counsel, informing the arbitrator that he was unable to retain counsel. Petitioner reiterated that Respondents were contractually obligated to advance his attorney's fees in the arbitration proceeding but, rather than scheduling a hearing to determine Petitioner's contractual rights, the arbitrator reserved the issue of indemnification until a later date.

In May 2018, Petitioner participated in another hearing without counsel. Petitioner again complained that he was without counsel and reemphasized Respondents' obligation to advance his attorney's fees. The arbitrator acknowledged that Petitioner was without counsel. However, at the same time that the arbitrator was encouraging Petitioner to obtain counsel, the arbitrator refused to address the contractual provision in the Indemnification Agreement that would have allowed him to do so.

After the May 2018 hearing, and despite the fact that Section 7 of the Indemnification Agreement specifically states that "[t]he Corporation shall pay the expenses incurred by Indemnatee in defending any proceeding in advance of its final disposition . . . .," the arbitrator continued to maintain that the advancement claim was reserved. As a result, Petitioner was unable to properly defend himself.

When the arbitrator held a hearing in July 2018, the arbitrator issued an award on behalf of the Respondents. However, the arbitration was not yet

final. As a result, each and every finding set forth in the award was not defended by Petitioner because he was unrepresented by counsel at the hearing. Thus, Petitioner's fundamental due process right to representation by counsel in the arbitration proceeding was violated. This is fundamentally unfair and inconsistent with established jurisprudence. *Paxton v. Macy's W. Stores, Inc.* (E.D. Cal. Sept. 7, 2018) 2018 WL 4297763, at \*3; *Hawthorne v. BJ's Wholesale Club* (E.D. Va. Aug. 26, 2016) 2016 WL 4500867, at \*6; *Jones-Mixon v. Bloomingdale's, Inc.* (N.D. Cal. June 11, 2014) 2014 WL 2736020, at \*2 ("If the employee elects not to be represented by an attorney, Bloomingdale's is not allowed to have an attorney present at the arbitration proceedings.").

Arbitration contemplates many legal complexities and uncertainties. Over the decades, the United States Supreme Court has judicially created multiple layers of special arbitration doctrines, and by simply reading the text of arbitration statutes, a person could easily miss arcane, complex principles that govern arbitration. It is becoming increasingly burdensome (and impossible) for a lay person to navigate arbitration without counsel.

Consistent with the notions our forefathers contemplated regarding due process, the right to counsel in arbitration helps ensure the fairness of the proceedings, legitimizes the arbitration process, and promotes party autonomy, the most important value in arbitration. A right to be represented by counsel in arbitration helps ensure fundamentally fair arbitration proceedings.

It is crucial for courts to ensure that parties have the right to hire counsel to navigate the arbitration process.

### **CONCLUSION**

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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