No.

In the Supreme Court of the United States

OTO, L.L.C., PETITIONER

v.

KEN KHO;
JULIE A. SU, CALIFORNIA LABOR COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a State from invalidating an arbitration agreement as substantively unconscionable on the ground that it provides procedural protections akin to civil litigation, rather than to the streamlined administrative proceeding that would be available under state law in the absence of the agreement.

CORPORATE DISCLOSURE STATEMENT

Petitioner OTO, L.L.C., has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

California Superior Court (Alameda County):

One Toyota of Oakland v. *Kho*, Civ. No. RG15781961 (Dec. 11, 2015) (order on motion to compel arbitration and to stay proceedings)

One Toyota of Oakland v. *Kho*, Civ. No. RG15781961 (Dec. 11, 2015) (order on motion to vacate administrative award)

California Court of Appeal (1st Dist., Div. One):

OTO, L.L.C. v. *Kho*, Civ. No. A147564 (Aug. 21, 2017)

California Supreme Court:

OTO, L.L.C. v. *Kho*, Civ. No. S244630 (Aug. 29, 2019)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 2
  A. Background 4
  B. Facts and procedural history 8
Reasons for granting the petition 12
  A. The decision under review conflicts with decisions of this Court 13
  B. The decision under review presents an exceptionally important question that warrants the Court's review 19
Conclusion 24
Appendix A 1a
Appendix B 92a
Appendix C 125a
Appendix D 127a
Appendix E 141a

TABLE OF AUTHORITIES

Cases:

American Express Co. v. *Italian Colors Restaurant*, 570 U.S. 228 (2013) 6, 17

Armendariz v. *Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000) .... *passim*

AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333 (2011) .... *passim*

Buckeye Check Cashing, Inc. v. *Cardegna*, 546 U.S. 440 (2006) 19

Chamber of Commerce v. *Becerra*, Civ. No. 19-2456 (E.D. Cal. Dec. 30, 2019) 21

Page

Cases—continued:

DIRECTV, Inc. v. *Imburgia*,
136 S. Ct. 463 (2015) 3, 12
Discover Bank v. *Superior Court*,
113 P.3d 1100 (Cal. 2005) 20
Epic Systems Corp. v. *Lewis*,
138 S. Ct. 1612 (2018) 15
Gilmer v. *Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991)...4
Howlett v. *Rose*, 496 U.S. 356 (1990) 20
Kindred Nursing Centers L.P. v. *Clark*,
137 S. Ct. 1421 (2017) 5, 15, 19, 21
Kirby v. *Imoos Fire Protection, Inc.*,
274 P.3d 1160 (Cal. 2012) 8, 14
Marmet Health Care Center, Inc. v. *Brown*,
565 U.S. 530 (2012)..5, 19
Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1 (1983).............................4
Northwestern Mutual Fire Association v. *Pacific Wharf & Storage Co.*, 200 P. 934 (Cal. 1921)..................6
Perry v. *Thomas*, 482 U.S. 483 (1987) 12, 13
Pinnacle Museum Tower Association v. *Pinnacle Market Development (US), LLC*,
282 P.3d 1217 (Cal. 2012) 17
Preston v. *Ferrer*, 552 U.S. 346 (2008) 5, 12, 20
Rent-A-Center, West, Inc. v. *Jackson*,
561 U.S. 63 (2010) 5
Sanchez v. *Valencia Holding Co.*,
353 P.3d 741 (Cal. 2015) 14, 20
Sonic-Calabasas A, Inc. v. *Moreno*,
247 P.3d 130 (Cal.), vacated and remanded,
565 U.S. 973 (2011) 7, 13, 18
Sonic-Calabasas A, Inc. v. *Moreno*,
311 P.3d 184 (Cal. 2013), cert. denied,
134 S. Ct. 2724 (2014) ....*passim*
Southland Corp. v. *Keating*,
465 U.S. 1 (1984)...12, 13, 16

Page

Statutes:

Federal Arbitration Act,
9 U.S.C. 2 ....2, 4, 5, 12
28 U.S.C. 1257(a) 2
Assembly Bill 51, 2019 Cal. Stat. ch. 711 ....20, 21, 22
Cal. Gov't Code § 12953..........21
Cal. Lab. Code § 432.6..........21
Cal. Lab. Code § 432.6(a) 20
Cal. Lab. Code § 432.6(f)..........20, 21
Cal. Lab. Code § 432.6(h)..........20
Cal. Civ. Code § 1670.5(a)..........6
Cal. Code Civ. Proc. § 1294(a) 18
Cal. Lab. Code § 23 21
Cal. Lab. Code § 98 6
Cal. Lab. Code § 98.1 6
Cal. Lab. Code § 98.2 6
Cal. Lab. Code § 98.3 6
Cal. Lab. Code § 98.4 6
Cal. Lab. Code § 98.5 6
Cal. Lab. Code § 98.6 6
Cal. Lab. Code § 98.7 6
Cal. Lab. Code § 98.8 6
Cal. Lab. Code § 218 6
Cal. Lab. Code § 433 21

Miscellaneous:

Jeffrey Brown & Tyler Runge, *California Supreme Court Casts Doubt on Arbitration Agreements that Require Civil Litigation Procedures for Wage Claims*, JDSupra (Sept. 10, 2019) <tinyurl.com/doubtonwageclaims> 23
Bureau of Labor Statistics, National Occupation Employment and Wage Estimates: United States (May 2018) <tinyurl.com/usemployment-estimates> 22

Page

Miscellaneous—continued:

Bureau of Labor Statistics, State Occupational Employment and Wage Estimates: California (May 2018) <tinyurl.com/caemployment-estimates> 22

Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Apr. 6, 2018) <tinyurl.com/growinguseof-arbitration> 21, 22

Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Dispute Resolution Journal 44 (Nov. 2003-Jan. 2004) 21, 22

Steven Katz, *California High Court Ruling Eschews Arbitration Act Preemption*, Law360 (Sept. 2, 2019) <tinyurl.com/califcourtruling> 22, 23

Lisa Marie Segarra, *California's Economy Is Now Bigger Than All of the U.K.*, Fortune (May 5, 2018) <tinyurl.com/caeconomybigger> 22

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OTO, L.L.C., respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the California Supreme Court (App., *infra*, 1a-91a) is reported at 447 P.3d 680. The opinion of the California Court of Appeal (App., *infra*, 92a-124a) is reported at 222 Cal. Rptr. 3d 506. The opinion of the California Superior Court denying the petition to compel arbitration (App., *infra*, 127a-140a) is unreported.

JURISDICTION

The judgment of the California Supreme Court was entered on August 29, 2019. Justice Kagan extended the time within which to file a petition for writ of certiorari to and including January 13, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> 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.

STATEMENT

In the decision below, the California Supreme Court once again thumbed its nose at the Federal Arbitration Act and this Court, ignoring the Court's clear and repeated mandates that the FAA preempts state rules that discriminate against arbitration. In this case, the California Supreme Court declined to enforce a contract to arbitrate wage disputes based on a substantive unconscionability rule applicable only to such arbitration agreements: the court deemed the arbitration agreement substantively unconscionable because the contemplated arbitration procedures, which had many of the protections of civil litigation, were not as streamlined as the administrative proceeding that would be available under state law in

the absence of the agreement. That result—like others emanating from the California Supreme Court in recent years—is plainly inconsistent with this Court's decisions holding that the FAA preempts any state rule that does not place arbitration agreements on an "equal footing" with other agreements. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-471 (2015); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339-340 (2011).

Petitioner is an auto dealership; respondent Ken Kho worked for petitioner as a service technician. During that time, petitioner and Kho entered an arbitration agreement providing that all disputes arising from Kho's employment, including wage disputes, would be resolved in arbitration. The agreement specified that the arbitration would be conducted by a retired California Superior Court judge in accordance with certain provisions of the California Code of Civil Procedure and Evidence Code also applicable to civil litigation. Petitioner later terminated Kho. In the absence of an arbitration agreement, California law allows for an administrative procedure to resolve unpaid wage disputes. After his termination, rather than following the agreed-upon procedure set out in the parties' arbitration agreement, Kho initiated an administrative proceeding to resolve an unpaid wage dispute. Petitioner sought to compel arbitration under the agreement.

The California Superior Court denied the petition, concluding that the agreement was unconscionable. The California Court of Appeal reversed. But a divided California Supreme Court reversed again, taking the view that "the substantive unconscionability of an arbitration agreement" should be "viewed in the context of the rights and remedies that otherwise would have been available to the parties." App., *infra*, 32a (citation omitted). The court

held that the agreement was substantively unconscionable because the procedure adopted in the arbitration agreement too closely resembled civil litigation, in contrast to the "accessible, informal, and affordable" administrative proceeding available under state law. *Id.* at 9a (citation omitted). Justice Chin dissented, explaining that the FAA preempted the rule applied by the majority because that rule discriminated against arbitration and undermined its fundamental attributes.

The California Supreme Court's decision flies in the face of this Court's FAA precedents. Its unconscionability-by-comparison approach, which applies solely to agreements to arbitrate wage disputes, places certain arbitration agreements on an unequal footing with other contracts, violating the equal-treatment principle. As this case well demonstrates, that approach leads to perverse and preposterous results—invalidating as unconscionable arbitration agreements that offer *too many* procedural protections, rather than too few. This Court should grant review to enforce its clear precedents and once again invalidate an anti-arbitration rule by an arbitration-hostile state court—here, the highest court in the Nation's most populous State. In fact, the decision below is so plainly inconsistent with this Court's decisions that the Court may wish to consider the possibility of summary reversal.

A. Background

1. Congress enacted the FAA almost a century ago to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the FAA—the Act's "primary substantive provision," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)—guarantees that "[a] written provision in

* * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 2 reflects "a liberal federal policy favoring arbitration." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). Section 2 requires courts to "place[] arbitration agreements on an equal footing with other contracts and * * * enforce them according to their terms." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010). A court may invalidate an arbitration agreement based on "generally applicable contract defenses," but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility*, 563 U.S. at 339.

The equal-treatment principle applies not only to state-law rules that explicitly treat arbitration agreements differently, see *Marmet Health Care Center, Inc.* v. *Brown*, 565 U.S. 530, 533 (2012) (per curiam), but also to rules that "covertly" discriminate against arbitration by "disfavoring contracts" that "have the defining features of arbitration agreements," *Kindred Nursing Centers L.P.* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). Accordingly, while a state court may invalidate an agreement based on a generally applicable contract defense such as unconscionability, it cannot "rely on the uniqueness of an agreement to arbitrate" to hold that "enforcement would be unconscionable." *AT&T Mobility*, 563 U.S. at 341 (citation omitted). Otherwise, a state court would be able to "effect what * * * [a] state legislature cannot"—an anti-arbitration policy that trumps the FAA. *Ibid.*; see *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008).

In addition, the Court has also made clear that even a generally applicable contract defense cannot escape the FAA's preemptive sweep if application of the defense would "interfer[e] with fundamental attributes of arbitration," including lower costs, greater efficiency and speed, and the ability to choose an expert adjudicator to resolve specialized disputes. *AT&T Mobility*, 563 U.S. at 344, 348. Accordingly, a contract defense is preempted insofar as it erects "preliminary litigating hurdle[s]" that "undoubtedly destroy" the "prospect of speedy resolution" that arbitration was designed to secure. *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 238-239 (2013).

2. Under California law, a court may refuse to enforce any contract deemed to have been unconscionable at the time it was made. See Cal. Civ. Code § 1670.5(a). Because California courts do not lightly invalidate contracts, see, *e.g.*, *Northwestern Mutual Fire Association* v. *Pacific Wharf & Storage Co.*, 200 P. 934, 937 (Cal. 1921), a determination of unconscionability requires both a procedural and substantive element. While the two need not be present to the same degree, a court must find both before it can refuse to enforce a contract; accordingly, even if it deems an agreement highly procedurally unconscionable, a court may invalidate an agreement only if it also finds substantive unconscionability—*i.e.*, some "overly harsh or one-sided result[]." *Armendariz* v. *Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 690 (Cal. 2000) (internal quotation marks and citation omitted).

Of particular relevance here, as an alternative to civil litigation, California law provides an administrative procedure for resolving disputes concerning unpaid wages. See Cal. Lab. Code §§ 98-98.8, 218. A plaintiff may file a claim with the California Labor Commissioner, who may decline to take any further action, prosecute a civil action

on the employee's behalf, or conduct a "Berman hearing"—a streamlined administrative proceeding with limited pleadings, no discovery, and no formal rules of evidence. When the Commissioner conducts a Berman hearing, either party may appeal to the California Superior Court, which reviews the decision de novo. App., *infra*, 7a-9a.

3. As this Court has explained, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *AT&T Mobility*, 563 U.S. at 342. In particular, the California Supreme Court has repeatedly refused to enforce arbitration agreements that displace the administrative procedure for resolving wage disputes, primarily by aggressively applying the unconscionability doctrine to invalidate those agreements. In *Sonic-Calabasas A, Inc.* v. *Moreno*, 247 P.3d 130 (2011) (*Sonic I*), the California Supreme Court held that arbitration agreements waiving Berman hearings were substantively unconscionable as a matter of law. See *id.* at 144-146. This Court subsequently decided *AT&T Mobility*, holding that the FAA preempted a California rule classifying as unconscionable most class-arbitration waivers in consumer contracts, on the ground that the rule violated the equal-treatment principle. See 563 U.S. at 339, 344.

After issuing its decision in *AT&T Mobility*, this Court vacated the California Supreme Court's decision in *Sonic I* and remanded for further proceedings. See 565 U.S. 973 (2011). On remand, the California Supreme Court recognized that its blanket rule against arbitration agreements waiving Berman hearings could not survive. It held that such an agreement was not "by itself" substantively unconscionable where the arbitral scheme approximates the benefits of the Berman procedure by "provid[ing] employees with an accessible and affordable process for resolving wage disputes." *Sonic-Calabasas A,*

Inc. v. *Moreno*, 311 P.3d 184, 204 (Cal. 2013) (*Sonic II*). But the court remanded for a determination of whether the particular agreement at issue was unconscionable. See *id.* at 203, 221. In a dissenting opinion, Justice Chin contended that the majority's new approach continued to undermine the FAA because it required a "minitrial on the comparative costs and benefits of arbitration and the Berman procedure for a particular employee," which amounted to a "preliminary, arbitration-delaying litigating hurdle." *Id.* at 233. This Court denied review. See 134 S. Ct. 2724 (2014).

B. Facts And Procedural History

1. Petitioner operates One Toyota of Oakland, an automobile dealership. Respondent Ken Kho worked as a service technician for petitioner for several years. During that time, Kho signed an agreement requiring "binding arbitration" of "all disputes which may arise out of the employment context." App., *infra*, 120a. The agreement specified that arbitration would be conducted by a retired California Superior Court judge in accordance with certain provisions of the California Code of Civil Procedure and Evidence Code also applicable to civil litigation. Under the agreement, the employee was entitled to "full discovery." *Id.* at 4a. In addition, under California law, petitioner, as the employer, would cover most arbitration costs and potentially attorney's fees. See *id.* at 28a-29a; *Kirby* v. *Imoos Fire Protection, Inc.*, 274 P.3d 1160, 1164 (Cal. 2012); *Armendariz*, 6 P.3d at 687.

2. After petitioner terminated Kho's employment for poor performance, Kho filed a claim against petitioner for unpaid wages with the California Labor Commissioner, rather than submitting it to arbitration pursuant to the parties' agreement. The Labor Commissioner scheduled

a Berman hearing. Petitioner then filed a petition to compel arbitration and stay the administrative proceedings in the California Superior Court; the Labor Commissioner subsequently intervened in the litigation and is also a respondent here. In light of the petition to compel arbitration, petitioner asked that the Berman hearing be taken off the calendar. The Labor Commissioner refused and proceeded to conduct the Berman hearing without petitioner's participation, ultimately awarding Kho more than $150,000 in unpaid wages, liquidated damages, interest, and penalties. App., *infra*, 5a.

The California Superior Court denied the petition for arbitration, holding that the arbitration agreement was both procedurally and substantively unconscionable. App., *infra*, 127a-140a. The court first concluded that the agreement was procedurally unconscionable because of "unequal bargaining power" in its formation. *Id.* at 131a. It then concluded that the agreement was substantively unconscionable because it resembled civil litigation and "ha[d] virtually none of the benefits afforded by the Berman hearing procedure." *Id.* at 139a. According to the court, the agreement effectively "restore[d] the procedural rules and procedures that create expense and delay in civil litigation." *Id.* at 139a-140a. The court vacated the Commissioner's award, however, on the ground that she should not have conducted the hearing in petitioner's absence. *Id.* at 141a-143a.

3. The California Court of Appeal reversed. App., *infra*, 92a-119a. While the court agreed that Kho had established procedural unconscionability, it explained that the agreement was not substantively unconscionable because the procedures specified in the arbitration agreement provided a suitable process for resolving wage disputes. *Id.* at 106a-116a. Even under a comparative approach such as that contemplated by the California Supreme

Court in *Sonic II*, the court reasoned, the specified arbitration procedure was not so different from the administrative procedure that would apply in the absence of an arbitration agreement: while that administrative procedure begins with a Berman hearing that lacks the formalities of civil litigation, it "anticipates" a subsequent de novo proceeding in Superior Court that is subject to the ordinary rules of civil litigation. *Id.* at 114a.

4. A divided California Supreme Court reversed. App., *infra*, 1a-91a.

a. Like the trial court, the California Supreme Court held that both procedural and substantive unconscionability were present. App., *infra*, 14a-31a.

The California Supreme Court first determined that there was procedural unconscionability, based principally on the size of the text in the agreement and the manner in which the document was presented to Kho. App., *infra*, 14a-20a. Turning to substantive unconscionability, the court then explained that, in the unique context of "compelled arbitration of wage claims," the "substantive unconscionability of an arbitration agreement" is to be "viewed in the context of the rights and remedies that otherwise would have been available to the parties." *Id.* at 26a, 32a. That comparative approach, the court acknowledged, is "different" from the approach used in evaluating unconscionability in other contexts, including "the arbitration of other types of disputes," such as wrongful-discharge claims that would not otherwise be subject to a "Berman-like administrative process." *Id.* at 26a. The court reasoned that the "substantive fairness" of wage-dispute arbitration agreements "must be considered in terms of what [the claimant] gave up and what he received in return." *Id.* at 31a.

Applying that arbitration-specific rule of decision, the California Supreme Court held that the arbitration agreement in this case was substantively unconscionable. App., *infra*, 20a-31a. While the court acknowledged that civil litigation is a "system of statutory and common law carefully crafted to ensure fairness to both sides," it deemed the arbitration procedures substantively unconscionable precisely because they "incorporate[d]" too many "intricacies of civil litigation," unlike the more "speedy, informal, and affordable" Berman hearing. *Id.* at 24a-26a.

The California Supreme Court further determined that the Labor Commissioner's award was valid despite petitioner's absence, and it remanded to the Superior Court for further proceedings on appeal from that award. App., *infra*, 34a-39a.

b. Justice Chin dissented. App., *infra*, 40a-91a. While Justice Chin agreed that there was some procedural unconscionability, he reasoned that the majority's substantive-unconscionability analysis had "run[] afoul" of the FAA's equal-treatment principle. *Id.* at 84a. In his view, the majority used the "cloak of unconscionability" to apply an arbitration-specific rule of decision to arbitration agreements covering wage disputes. *Id.* at 85a. Under that rule, the majority invalidated the agreement on the ground that the arbitration procedure was "less advantageous" for Kho "than the Berman procedure." *Id.* at 84a. That approach, Justice Chin explained, was "nothing more than a mere preference" for the administrative procedures for resolving wage disputes otherwise available under state law. *Id.* at 84a-85a (internal quotation marks and citation omitted).

In addition, Justice Chin reiterated his view from his *Sonic II* dissent that the majority's framework established a "preliminary litigating hurdle" that "stands as an

obstacle" to the "purposes and objectives" of the FAA, including "the prospect of speedy resolution" that arbitration is "meant to secure." App., *infra*, 87a (alterations and emphasis omitted). That framework, he explained, required a "minitrial" that created "the very type of superstructure" over arbitration that the FAA prohibits. *Ibid.* (internal quotation marks and citation omitted).

REASONS FOR GRANTING THE PETITION

In the decision under review, the California Supreme Court flouted this Court's clear and repeated mandates regarding the preemptive scope of the Federal Arbitration Act—including mandates directed specifically at California courts. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-471 (2015); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339-340 (2011); *Preston* v. *Ferrer*, 552 U.S. 346, 353-354 (2008); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984).

Most significantly, the California Supreme Court's decision is flatly inconsistent with the FAA's equal-treatment principle, because it discriminates against arbitration on the basis of a bespoke rule of substantive unconscionability applicable only to certain arbitration agreements. The California Supreme Court's comparative approach for assessing the substantive unconscionability of those agreements further offends the FAA by erecting a fact-intensive preliminary litigating hurdle that defeats the speed and efficiency promised by arbitration. And in its zeal to undercut arbitration, the California Supreme Court reached a preposterous result—deeming an arbitration agreement substantively unconscionable on the perverse ground that it offered *too many* of the protections of civil litigation. If allowed to stand, the decision

below will undermine millions of arbitration agreements in the most populous State in the Nation.

This Court's intervention is needed to enforce its clear precedents concerning FAA preemption and to thwart the California Supreme Court's continued defiance of those precedents. The Court should grant the petition for a writ of certiorari. In fact, the decision below is so clearly inconsistent with the Court's decisions that the Court may wish to consider the possibility of summary reversal.

A. The Decision Under Review Conflicts With Decisions Of This Court

It is no secret that the California Supreme Court wants to see less arbitration. Time and again, it has adopted sharply anti-arbitration rules, only to be reversed by this Court. See, *e.g.*, *DIRECTV*, 136 S. Ct. at 468-471; *AT&T Mobility*, 563 U.S. at 352; *Perry*, 482 U.S. at 492 n.9; *Southland*, 465 U.S. at 16 n.11. Most significantly, in *AT&T Mobility*, this Court recently reversed the California Supreme Court in a case in which it invoked substantive unconscionability to invalidate a class-arbitration waiver in an arbitration agreement. The Court reasoned that the application of the unconscionability doctrine violated the equal-treatment principle because it "rel[ied] on the uniqueness of an agreement to arbitrate" as its "basis." 563 U.S. at 341. The class-arbitration rule also impermissibly interfered with the fundamental attributes of arbitration—its informality, speed, and reduced cost. See *id.* at 346-351.

In the aftermath of its decision in *AT&T Mobility*, this Court vacated the California's Supreme Court's decision in *Sonic-Calabasas A, Inc.* v. *Moreno*, 247 P.3d 130 (2011) (*Sonic I*), which invalidated as substantively unconscionable all agreements to arbitrate wage disputes that waived

the state-law administrative procedure. Apparently emboldened by this Court's denial of certiorari after its decision on remand in *Sonic-Calabasas A, Inc.* v. *Moreno*, 311 P.3d 184 (2013) (*Sonic II*), the California Supreme Court has found a way to reach effectively the same result, invalidating the arbitration agreement at issue because it bore more resemblance to civil litigation than to the administrative proceeding provided by state law. That result offends this Court's precedents by placing arbitration agreements on unequal footing with other contracts and undermining the goals of the FAA.

1. In California, the general test for substantive unconscionability is whether the party opposing enforcement has shown a "substantial degree of unfairness beyond a simple old-fashioned bad bargain." *Sonic II*, 311 P.3d at 213 (internal quotation marks and citation omitted). A contract is substantively unconscionable only if it is "so one-sided as to shock the conscience." *Sanchez* v. *Valencia Holding Co.*, 353 P.3d 741, 748 (Cal. 2015) (citation omitted).

The procedures contemplated by the arbitration agreement in this case plainly do not rise to that level, and the California Supreme Court did not seriously suggest otherwise. The agreement requires that arbitration be conducted by a retired California Superior Court judge in accordance with certain provisions of the California Code of Civil Procedure and Evidence Code also applicable to civil litigation. And it ensures that the employee is entitled to "full discovery." App., *infra*, 4a. Finally, the employer bears most arbitration costs and potentially attorney's fees. See *Kirby* v. *Imoos Fire Protection, Inc.*, 274 P.3d 1160, 1164 (Cal. 2012); *Armendariz* v. *Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 687 (Cal. 2000).

Rather than reaching the straightforward conclusion that the agreement is not substantively unconscionable, the California Supreme Court fashioned a new rule of unconscionability applicable only to certain arbitration agreements: the court deemed the agreement substantively unconscionable because the contemplated arbitration procedures were not as streamlined as the administrative proceeding that would be available to resolve wage disputes under state law absent the agreement. That plainly violates the FAA's familiar and well-established equal-treatment principle, which prohibits state courts from using contract defenses to discriminate against arbitration agreements. See, *e.g.*, *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018); *Kindred Nursing Centers L.P.* v. *Clark*, 137 S. Ct. 1421, 1426 (2017); *AT&T Mobility*, 563 U.S. at 339.

While the court purported to recognize the FAA's mandate that the application of the unconscionability doctrine "must rely on the same principles that govern all contracts," the court proceeded to bulldoze over it by applying a rule of substantive unconscionability unique to arbitration agreements, announcing that, in the unique context of "compelled arbitration of wage claims," the "substantive unconscionability of an arbitration agreement" is to be "viewed in the context of the rights and remedies that otherwise would have been available to the parties." App., *infra*, 13a, 26a, 32a. In other words, the court adopted the position that, when determining whether an arbitration agreement (but not any other type of agreement) is substantively unconscionable, a court must compare the specified arbitration procedures against those available under state law in the absence of the arbitration agreement.

Under that approach, the California Supreme Court concluded that the arbitration procedures contemplated

were substantively unconscionable because they looked too much like civil litigation. The absurdity of that conclusion betrays its impetus: to indulge a policy preference for the Berman procedure over the FAA's requirement to enforce arbitration agreements. As Justice Chin explained in his dissent, that is something the California Supreme Court may not do "under the cloak of unconscionability" or any other contract defense. App., *infra*, 85a. The court's approach in this case plainly violates the equal-treatment principle, because it does not "place[] arbitration contracts on equal footing with all other contracts." *DIRECTV*, 136 S. Ct. at 468 (internal quotation marks and citation omitted).

It would have been bad enough if the California Supreme Court had applied its unconscionability-by-comparison approach to treat arbitration agreements differently from other contracts. But the court went even further, using the rule effectively to exclude a subset of disputes—wage disputes—from being resolved in arbitration. The court expressly acknowledged that the approach it was taking in the context of "compelled arbitration of wage claims" was "different" from the approach used in evaluating substantive unconscionability in other contexts, including "the arbitration of other types of disputes," such as wrongful-discharge claims that would not otherwise be subject to a "Berman-like administrative process." App., *infra*, 26a. Indeed, the court emphasized that "[t]he substantive fairness" of wage-dispute arbitration agreements "must be considered in terms" of what the wage claimant gave up and received in return. *Id.* at 31a. That arbitration-of-wage-dispute-specific approach, like a more generic arbitration-specific approach, violates the equal-treatment principle. See *Southland*, 465 U.S. at 16 n.11.

2. The California Supreme Court's approach for assessing the substantive unconscionability of wage-dispute arbitration agreements violates this Court's precedents and offends the FAA for an additional reason: it erects a fact-intensive preliminary litigating hurdle that defeats the speed and efficiency promised by arbitration.

This Court's decision in *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013), is instructive. In that case, the court of appeals had refused to enforce an arbitration agreement on the ground that the plaintiffs would incur prohibitive costs if compelled to arbitrate individually in light of the agreement's class-action waiver. This Court reversed because that approach created a "preliminary litigating hurdle" that "would undoubtedly destroy the prospect of speedy resolution that arbitration" was "meant to secure": namely, by requiring a court to assess "the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success." *Id.* at 238-239. According to the Court, "[t]he FAA does not sanction such a judicially created superstructure." *Id.* at 239.

The California Supreme Court's comparative unconscionability inquiry, under which the procedures for arbitrating wage disputes must "provide[] employees with an accessible and affordable process," has a similar effect. *Sonic II*, 311 P.3d at 204. That inquiry will necessarily be fact-intensive: a court must weigh the costs and benefits of the particular arbitration procedure against those of a Berman hearing, requiring parties to "submit[] evidence on any number of issues." *Id.* at 233 (Chin, J., dissenting). And if the trial court declines to compel arbitration, an appellate court will be obligated to undertake the same analysis de novo. See Cal. Code Civ. Proc. § 1294(a); *Pinnacle*

Museum Tower Association v. *Pinnacle Market Development (US), LLC*, 282 P.3d 1217, 1225 (Cal. 2012). As Justice Chin observed in this case, such a regime "creates the very type of superstructure" prohibited by the FAA and "undoubtedly destroy[s] the prospect of speedy resolution that arbitration" was "meant to secure." App., *infra*, 87a (internal quotation marks and citation omitted).

This case well illustrates the significant delay that regime entails. It took four months for the Superior Court to rule on the petition to compel arbitration, during which time the entire Berman proceeding—which had not been stayed despite the filing of the petition—had run its course. Another year and a half passed before the Court of Appeal reversed. And two more years went by before the California Supreme Court weighed in. All told, the litigation on the threshold question whether the claims were subject to arbitration "consumed * * * *four years*"—surely much longer than the arbitration itself would have taken. App., *infra*, 25a.

In that way, the decision below effectively reinstated one of the primary evils of *Sonic I*, in which the California Supreme Court held that an arbitration agreement waiving a Berman hearing was substantively unconscionable as a matter of law—thereby preventing the parties from proceeding to arbitration until after they had completed the Berman hearing. See 247 P.3d at 144-146. After this Court vacated the judgment in *Sonic I*, the California Supreme Court recognized in *Sonic II* that the *Sonic I* regime had violated the FAA by "impos[ing]" an "unconscionability rule[] that interfere[d] with arbitral efficiency." 311 P.3d at 199. In this case, however, the California Supreme Court proceeded to adopt an approach that has precisely the same effect.

The decision below contravenes the equal-treatment principle and creates a preliminary litigating hurdle that

undermines the goals of the FAA. In both respects, the decision below conflicts with this Court's precedents, and further review is warranted.

B. The Decision Under Review Presents An Exceptionally Important Question That Warrants The Court's Review

If it is allowed to stand, the California Supreme Court's decision will have enormous legal and practical consequences. The Court's intervention is necessary to safeguard the Federal Arbitration Act's commitment to the enforceability of arbitration agreements and to provide clarity and uniformity in the law.

1. As demonstrated by this Court's frequent grants of review in cases involving the FAA, arbitration is a critical part of our Nation's legal system. Among other valuable benefits, arbitration agreements allow private parties to resolve a broad range of disputes while avoiding the costs associated with traditional litigation. For that reason, this Court has not hesitated to grant review when state courts have been unwilling to follow the FAA's mandate to enforce arbitration agreements according to their terms. See, *e.g.*, *Kindred Nursing Centers*, *supra*; *Marmet Health Care Center, Inc.* v. *Brown*, 565 U.S. 530 (2012) (per curiam); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006).

In that regard, the California Supreme Court is a serial offender. That court has repeatedly refused to apply the equal-treatment principle that this Court has affirmed time and again. The California Supreme Court staked out its position some two decades ago when it announced that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 6 P.3d at 693. Since then, the court has "repeatedly" applied its arbitration-specific, comparative version of the unconscionability doctrine—as the court

recognized in reaching its decision in this case. App., *infra*, 32a; see, *e.g.*, *Sanchez*, 353 P.3d at 756; *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005). And this Court has consistently held that the FAA preempts the application of that mutilated unconscionability doctrine, noting that California courts "have been more likely to hold contracts to arbitrate unconscionable than other contracts." *AT&T Mobility*, 563 U.S. at 342; see, *e.g.*, *DIRECTV*, 136 S. Ct. at 471.

Yet as the decision below demonstrates, the message has not gotten through. The California Supreme Court's recalcitrance alone warrants the Court's intervention. It is a basic tenet of federal-state relations that the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990).

The California State Legislature has also strongly resisted the mandates of the FAA and this Court. See, *e.g.*, *Preston*, 552 U.S. at 349-350 (concluding that the FAA preempted a California statute purporting to supersede arbitration agreements by referring certain disputes initially to an administrative agency). Late last year, for instance, the Legislature enacted Assembly Bill 51. 2019 Cal. Stat. ch. 711. That law does not "invalidate" any existing "written arbitration agreement[s] that [are] otherwise enforceable under the [FAA]." Cal. Lab. Code § 432.6(f), (h). Instead, it prospectively prohibits employers from requiring, as a condition of employment, employees' waiver of any forum for adjudicating a violation of any provision of the California Fair Employment and Housing Act or the Labor Code. See *id.* § 432.6(a). Violators are subject to civil liability and criminal punishment, including imprisonment. See *id.* §§ 23, 432.6, 433; Cal. Gov't Code § 12953. The law is obviously meant to undermine

the FAA—not by invalidating arbitration agreements, but by preventing employers from entering into those agreements in the first place.

Assembly Bill 51 has no bearing on the contract at issue in this case, which squarely falls within the carve-out for "written arbitration agreement[s] that [are] otherwise enforceable under the [FAA]." Cal. Lab. Code § 432.6(f). But the law is in any event almost certainly preempted by the FAA, because it is precisely the type of "covert[]" measure of discrimination against arbitration that this Court has soundly and routinely rejected. See, *e.g.*, *Kindred Nursing*, 137 S. Ct. at 1426. Indeed, a federal district court has already issued a temporary restraining order preventing the law from going into effect. See Dkt. No. 24, *Chamber of Commerce* v. *Becerra*, Civ. No. 19-2456 (E.D. Cal. Dec. 30, 2019).

2. Review in this case is especially warranted because the decision below will have an enormous practical impact on California employers and employees.

There can be no doubt that the implications will be widely felt. Arbitration agreements are increasingly common in the employment context. See, *e.g.,* Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Dispute Resolution Journal 44, 44 (Nov. 2003-Jan. 2004). They are used by more than half of all non-union private-sector employers—and by nearly two-thirds of those with at least 1,000 employees. See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration,* Economic Policy Institute 2, 5-6 (Apr. 6, 2018) (Colvin) <tinyurl.com/growinguseofarbitration>. Roughly 60 million non-union private-sector employees are now subject to them. See *id.* at 2, 5.

In California—often described as the world's fifth-largest economy—arbitration agreements are, if anything, even more ubiquitous. See Colvin 7; Lisa Marie Segarra, *California's Economy Is Now Bigger Than All of the U.K.*, Fortune (May 5, 2018) <tinyurl.com/caeconomybigger>. More than two-thirds of California employers use arbitration agreements for employment disputes—a level "substantially greater" than the national average. Colvin 7; compare Bureau of Labor Statistics, State Occupational Employment and Wage Estimates: California (May 2018) <tinyurl.com/caemploymentestimates>, with Bureau of Labor Statistics, National Occupation Employment and Wage Estimates: United States (May 2018) <tinyurl.com/usemploymentestimates>.

It is little wonder, then, that the California Supreme Court's decision in this case has received considerable attention. Absent this Court's intervention, California employers will have "no choice but to adapt" to the decision below. Steven Katz, *California High Court Ruling Eschews Arbitration Act Preemption*, Law360 (Sept. 2, 2019) (Katz) <tinyurl.com/califcourtruling>. Employers already bound by arbitration agreements must either accept the risk that their existing agreements will not be enforced, or renegotiate the terms of those agreements to comply with the California Supreme Court's decision—and run the significant risk that their efforts to renegotiate will subject them to civil and criminal penalties under Assembly Bill 51 (should that law ever go into effect). See pp. 20-21, *supra*.

It is far from clear, moreover, that any renegotiated agreements would pass muster under California law. For two decades, the California Supreme Court has *required* that any arbitration agreements covering nonwaivable statutory rights provide for the very similarities to civil

litigation that the decision below rejected—namely, "neutral arbitrators," "more than minimal discovery," "all of the types of relief that would otherwise be available in court," and reasonable costs for employees. *Armendariz*, 6 P.3d at 682. The decision below thus creates a Catch-22 for arbitration agreements covering wage disputes: they will comport with preexisting California law only by adopting procedures similar to civil litigation, but they will satisfy the decision below only by adopting procedures dissimilar to civil litigation. As commentators have pointed out, employers who opt to renegotiate their arbitration agreements will thus be forced either to exempt employees' wage-related claims entirely from arbitration or to "craft a process that somehow stakes in the middle, sufficiently informal to satisfy [the decision below] and sufficiently litigation-like to satisfy *Armendariz*." Katz, *supra*; see Jeffrey Brown & Tyler Runge, *California Supreme Court Casts Doubt on Arbitration Agreements that Require Civil Litigation Procedures for Wage Claims*, JDSupra (Sept. 10, 2019) <tinyurl.com/doubtonwageclaims>.

In the meantime, California employers are already paying the price. In light of the immediate fallout from the decision below, this Court's review is urgently needed.

3. This case is an optimal vehicle for the Court's review. It cleanly presents the question whether the FAA preempts an arbitration-specific rule of substantive unconscionability. That is a pure question of law, and it is outcome-dispositive here because substantive unconscionability is required in order to invalidate a contract under California law, regardless of the degree of procedural unconscionability in a particular case. See *AT&T Mobility*, 563 U.S. at 340; *Armendariz*, 6 P.3d at 690. In addition, no factual or procedural issues would impede resolution of the question presented, and the question was

pressed below and passed upon in a lengthy majority opinion and a comprehensive and well-reasoned dissenting opinion.

* * * * *

Not for the first time, the California Supreme Court has issued a decision flaunting its hostility toward the FAA. That decision cannot be reconciled with this Court's decisions in numerous respects. The Court should intervene to correct the California Supreme Court's profoundly misguided approach.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider the possibility of summary reversal; in the alternative, the Court should grant plenary review and set the case for briefing and oral argument.

Respectfully submitted.

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