No. 19-875

In the Supreme Court of the United States

OTO, L.L.C.,

Petitioner,

v.

KEN KHO AND
LILIA GARCÍA-BROWER, CALIFORNIA LABOR COMMISSIONER,

Respondents.

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

BRIEF IN OPPOSITION FOR THE CALIFORNIA LABOR COMMISSIONER

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April 29, 2020

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts the application of California's general unconscionability defense to render an employer's arbitration agreement unenforceable based on the state court's conclusions that the employee's assent was obtained through oppression and surprise, and that the agreement's terms are substantively unfair.

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner OTO, L.L.C.; respondent Ken Kho; and respondent Lilia García-Brower, California Labor Commissioner. (García-Brower was appointed California Labor Commissioner on June 21, 2019, and is substituted as respondent in place of Julie A. Su, the previous Labor Commissioner. *See* S. Ct. R. 35(3).)

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INTRODUCTION

The Federal Arbitration Act generally requires courts to enforce arbitration agreements, but expressly provides that agreements may be held unenforceable on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That exception "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (internal quotation marks omitted), provided that such defenses are applied evenhandedly to arbitration agreements and other types of contracts.

Under generally applicable California law, unconscionability has both a procedural and a substantive element. In this case, the California Supreme Court examined the particular circumstances surrounding the arbitration agreement's execution and concluded that they exhibited an unusual degree of oppression and surprise. Where such a high degree of procedural unconscionability is present, California law directs that a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable. The state court held that this particular agreement entailed enough substantive unconscionability to render it invalid—but emphasized that "the same contract terms might pass muster under less coercive circumstances." Pet. App. 30a-31a. That decision correctly applies general California contract law to the unique facts of this case. It is consistent with this Court's arbitration precedents. There is no need for further review.

STATEMENT

1. Respondent Ken Kho was hired as a mechanic by petitioner OTO, L.L.C., an auto dealership doing business as One Toyota of Oakland. Pet. App. 3a & n.2.[1] In 2013, several years into his employment, a human resources "porter" approached Kho at his workstation and presented him with several documents. *Id.* at 3a. Kho was required to sign and return the documents immediately, and he did so within three or four minutes. *Id.* Kho had no opportunity to read the documents; no one offered to explain their contents to Kho, whose first language is Chinese; and, after signing, he was not given copies of any of the documents. *Id.*

One of the documents was entitled "Comprehensive Agreement—Employment At-Will and Arbitration." Pet. App. 3a. A copy of that agreement, as it appeared to Kho, is attached to the intermediate appellate court's decision. CT 5-6, *available at* https://www.courts.ca.gov/opinions/revpub/A147564.PDF#page=24.[2] The agreement contains well over 1,200 words, compressed into one and a quarter pages, in "quite small" font.[3] *Id.*; *see* Pet. App. 4a n.4. The first paragraph consists of three lines stating that Kho's employment and compensation "can be terminated . . . at any time, with or without cause and/or

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[1] The facts summarized here are undisputed. Pet. App. 3a.

[2] Citations to "CT" are to the Clerk's Transcript in the state intermediate appellate court.

[3] As retyped and reformatted for legibility in the petition appendix, the agreement takes up almost five pages and the arbitration paragraph alone spans more than three pages. Pet. App. 120a-124a. Petitioner asserted the font was 8.5 points; Kho asserted it was 7 points. *Id.* at 4a n.4.

with or without notice . . . ." Pet. App. 120a. The second paragraph—which runs for 51 lines without paragraph breaks or headings—sets out the terms of the arbitration agreement. CT 5; *see* Pet. App. 120a-123a.

Subject to limited exceptions, the agreement requires both parties to submit employment-related claims to binding arbitration. Pet. App. 4a. Arbitrations must be conducted before a retired superior court judge, with full discovery permitted. *Id*. The agreement provides that "[t]o the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under [California] Code of Civil Procedure Section 631.8." CT 5; *see* Pet. App. 122a. The agreement does not explicitly address who will pay the costs of arbitration, but refers to California Code of Civil Procedure Section 1284.2, which generally provides that parties to an arbitration must bear their own expenses. Pet App. 4a. The agreement also provides that case law or statutes will prevail over the Code of Civil Procedure if there is a conflict. *Id.* It states that "any agreement contrary to the foregoing must be entered into, in writing, by the President of the Company." *Id.* at 123a; *see also id.* at 4a, 17a.

2. Petitioner terminated Kho in April 2014. Pet. App. 5a; Pet. 8. Thereafter, Kho filed a complaint against petitioner with the Labor Commissioner seeking unpaid wages. Pet. App. 5a. Both parties participated in a settlement conference before a deputy labor commissioner, and petitioner made a settlement offer. *Id.* Kho rejected the offer and requested an adminis-

trative proceeding, commonly referred to as a "Berman" hearing, which was set for August 2015. *Id.*[4] A Berman hearing is California's streamlined administrative process designed to provide a quick, informal, and affordable method for resolving disputes over unpaid wages. *See generally id.* at 7a-9a; Cal. Labor Code §§ 98-98.2, 98.4-98.5. Either party may appeal the decision of the hearing officer to the superior court, which reviews the claim de novo. Pet. App. 8a; *see* Cal. Labor Code §§ 98.1(a), 98.2(a).

On the Friday before the Monday hearing, petitioner filed a petition in the superior court to compel arbitration and to stay the administrative proceeding. Pet. App. 5a. On the morning of the Berman hearing, petitioner notified the Labor Commissioner by fax of its petition and asked that the hearing be taken off calendar. *Id.* The hearing officer refused, and petitioner elected not to participate in the hearing. *Id.* Proceeding without petitioner present, the hearing officer awarded Kho $102,912 in unpaid wages and $55,634 in liquidated damages, interest, and penalties. *Id.*; CT 66-75.

3. Petitioner then filed a motion in the superior court seeking to vacate that award. Pet. App. 5a; *see* CT 77-80. Petitioner also filed a notice of appeal and posted bond, which permitted the superior court to review the award de novo under California Labor Code Section 98.2. Pet. App. 5a. The Labor Commissioner intervened on Kho's behalf. *Id.* The superior court vacated the Labor Commissioner's award, concluding that the hearing should not have proceeded in peti-

[4] The administrative process is named after the assembly member who sponsored the legislation creating it. Pet. App. 7a n.6.

tioner's absence. *Id.* at 5a, 141a-143a. It did not, however, compel arbitration, because it held that the arbitration agreement signed by Kho was both procedurally and substantively unconscionable. *Id.* at 5a-6a, 127a-140a.

4. The court of appeal reversed and directed the superior court to enter a new order compelling arbitration. Pet. App. 92a-119a. It observed that the agreement's presentation and execution exhibited an "extraordinarily high" degree of procedural unconscionability. *Id.* at 109a. But it held that the agreement was not substantively unconscionable, in large part because it anticipates a proceeding that is no more complex than the civil litigation required if the Labor Commissioner's decision is appealed. *Id.* at 114a.

5. The California Supreme Court reversed. Pet. App. 1a-39a. Six justices joined the majority opinion, which emphasized that "an arbitration agreement is not categorically unconscionable solely because it entails a waiver of the Berman procedure." *Id.* at 2a. "Considering the oppressive circumstances present here," however, the court held that "the agreement was unconscionable, rendering it unenforceable." *Id.* at 3a.

The state high court first summarized California's unconscionability doctrine, noting that "the doctrine's application to arbitration agreements must rely on the same principles that govern all contracts." Pet App. 13a. The doctrine has both a procedural and a substantive element. *Id.* Procedural unconscionability addresses the contract's negotiation and formation, focusing on any oppression or surprise due to unequal bargaining power. *Id.* "Substantive unconscionability pertains to the fairness of an agreement's actual terms

and to assessments of whether they are overly harsh or one-sided." *Id.* at 13a-14a. The presence of both procedural and substantive unconscionability is evaluated on "a sliding scale." *Id.* at 14a. Thus, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required; conversely, the more deceptive or coercive the bargaining tactics, the less substantive unfairness is required. *Id.*

As to the procedural inquiry, the court agreed with both lower courts that the contract at issue here "involved an 'extraordinarily high' degree of procedural unconscionability." Pet. App. 14a. Circumstances establishing "significant oppression" (*id.* at 16a) included that the agreement was presented to Kho in his workspace and without explanation or assistance; Kho was required to sign to keep his job; Kho was expected to sign immediately without examination or opportunity for consultation; in any event, whatever time Kho spent reviewing the agreement would have reduced his pay as a piece-rate employee; and Kho was not given a copy of the agreement he had signed. *Id.* at 16a-17a. Circumstances establishing surprise included that "the text is 'visually impenetrable' and 'challenge[s] the limits of legibility'"; "[t]he sentences are complex, filled with statutory references and legal jargon"; and "[t]he second sentence alone is 12 lines long" and cites a litany of local, state, and federal laws and regulations. *Id.* at 17a-18a. In the court's view, "[a] layperson trying to navigate this block text, printed in tiny font, would not have an easy journey." *Id.* at 18a. The court agreed with the court of appeal "that the agreement appears to have been drafted with an aim to thwart, rather than promote, understanding," *id.* at 19a, and observed that "it is virtually impossible to conclude that Kho knew he was giving up

his Berman rights and voluntarily agreeing to arbitration instead," *id.* at 19a-20a.

As to substantive unconscionability, the court explained that the inquiry is "concerned not with a simple old-fashioned bad bargain" but rather "with terms that are unreasonably favorable to the more powerful party." Pet. App. 20a (quoting *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013) (*Sonic II*), *cert. denied*, 573 U.S. 904 (2014)) (internal quotation marks omitted). The analysis is context-specific: "Substantive terms that, in the abstract, might not support an unconscionability finding take on greater weight when imposed by a procedure that is demonstrably oppressive." Pet. App. 20a.

The court recognized that this case presented a "close question" (Pet. App. 21a), but held that the level of substantive unconscionability here was sufficient to preclude enforcement in light of the high degree of procedural oppression and surprise. It "stress[ed] that the waiver of Berman procedures does not, in itself, render an arbitration agreement unconscionable." *Id.* But "a substantive unconscionability analysis is sensitive to the 'context of the rights and remedies that otherwise would have been available to the parties.'" *Id.*

Here, that analysis involved examining the features of the dispute-resolution mechanism required by the arbitration agreement, as well as the features that would otherwise be available to Kho. Pet. App. 21a. The court observed that "[a]n employee can start the Berman process by filling out a simple form found on the [Department's] website and in local offices." *Id.* at 22a.[5] At the Berman hearing, the presiding deputy

[5] *See* How to File a Wage Claim, Cal. Dep't of Indus. Relations,

labor commissioner typically will admit all relevant evidence, and can assist the employee by, for example, explaining the proceedings and examining witnesses. *Id.* at 23a. If the employee is successful, "the Labor Commissioner is responsible for enforcing the judgment." *Id.* at 24a. If the employer appeals the Labor Commissioner's award and the employee prevails, he or she can collect on the required posted bond. *Id.* And, because of the process's relative simplicity, special fee-shifting rules, and free representation by the Labor Commissioner, an employee using the administrative procedure "can successfully complete the . . . process without paying a cent to an attorney." *Id.* at 30a; *see also id*. at 27a-30a.

In contrast, petitioner's arbitration "agreement does not mention how to bring a dispute to arbitration." Pet. App. 22a. It also requires the employee to submit a formal legal pleading. *Id.* at 23a. What follows is a formal process, presided over by a retired judge, that incorporates "the intricacies of civil litigation," including its formal rules of discovery and evidence. *Id.* at 23a, 25a. "[T]he complexity of [petitioner's] arbitral process effectively requires that employees hire counsel." *Id.* at 28a. Employees who do hire counsel "face a risk that they will not be designated the prevailing party" under the statutes referenced in the agreement, "rendering their fees unrecoverable." *Id.* at 29a. And an employee who is awarded relief at arbitration must take additional action to confirm the award and reduce it to a formal judgment. *Id.* at 24a.

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https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm (last visited Apr. 27, 2020).

In light of "the unusually coercive setting in which this bargain was entered" and Kho's lack of sophistication, the court concluded that the arbitration agreement "was sufficiently one-sided as to render the agreement unenforceable." Pet. App. 31a. It noted that "the same contract terms might pass muster under less coercive circumstances." *Id.* at 30a-31a. Indeed, had petitioner "set out the terms of its agreement in a legible format and fairly understandable language, or had it given Kho a reasonable opportunity to seek clarification or advice," the court observed that "this would be a different case." *Id.* at 31a.

The court next addressed this Court's precedents involving the Federal Arbitration Act. Pet. App. 31a-34a. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), this Court held that arbitration agreements must "be placed 'on an equal footing with other contracts.'" *Id.* at 31a (quoting *AT&T Mobility*, 563 U.S. at 339). The state court explained that its holding is consistent with the equal-footing doctrine because it "rests on generally applicable unconscionability principles." *Id.* "We have not said *no* arbitration could provide an appropriate forum for resolution of Kho's wage claim, but only that this *particular* arbitral process, forced upon Kho under especially oppressive circumstances and erecting new barriers to the vindication of his rights, is unconscionable." *Id.* at 33a (original emphasis). The court also examined *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), which disapproved application of a "'judge-made exception to the FAA'" that would erect a "'preliminary litigating hurdle' to arbitration[.]" *Id.* (quoting *Italian Colors*, 570 U.S. at 235, 239). The unconscionability doctrine, in contrast, "has long been recognized as a permissible ground for invalidating arbitration agreements under the FAA's savings clause."

Id.; *see* 9 U.S.C. § 2. "If the defense cannot be addressed before arbitration, then the savings clause has no meaning." Pet. App. 33a.

Justice Chin dissented. Pet. App. 40a-91a. He disagreed with the court's analysis of state law, *id.* at 40a-81a, and reasoned that the court's approach to unconscionability was preempted by the FAA, *id.* at 81a-91a.

ARGUMENT

The state court held petitioner's arbitration agreement unenforceable based on an application of general unconscionability principles to the particular circumstances before it, not based on any purported hostility toward arbitration. That application of state contract law does not run afoul of the Federal Arbitration Act or this Court's cases construing it. Petitioner does not argue that the decision below conflicts with any other lower court decision. And petitioner fails to identify any other compelling reason for this Court to review the state court's application of settled standards to the specific facts of this case.

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S FEDERAL ARBITRATION ACT PRECEDENTS

Petitioner argues that the decision below contravenes the "equal footing" doctrine, *see* Pet. 15-16, and that it erects an improper "preliminary litigating hurdle" in violation of this Court's precedents, *see* Pet. 17-19. Those arguments misunderstand the nature and scope of the state court's decision.

A. The State Court Adhered to the "Equal Footing" Doctrine

Petitioner first contends that the decision below "is flatly inconsistent with" (Pet. 12) and "plainly violates" (*id.* at 16) the equal-treatment principle recognized by this Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), and other cases. It argues that the state court's approach "does not 'place[] arbitration contracts on equal footing with all other contracts.'" Pet. 16 (quoting *DIRECTV*, 136 S. Ct. at 468). The state court, however, applied a generally applicable contract defense to the particular circumstances of this case in an evenhanded manner.

1. The Federal Arbitration Act requires courts to enforce valid arbitration agreements as a general matter, and state law that reflects a "hostility" toward arbitration agreements is preempted. *E.g.*, *AT&T Mobility*, 563 U.S. at 339; *see generally* 9 U.S.C. §§ 1 *et seq.* But the FAA does not favor arbitration without regard for traditional contract defenses or equitable principles. Indeed, mutual "[c]onsent is essential under the FAA because arbitrators wield only the authority they are given" by the parties. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). And the FAA includes a savings clause providing that arbitration agreements are "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. That "clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (internal quotation marks omitted); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

Courts applying general contract principles to determine the enforceability of arbitration agreements are subject to two important restrictions. First, they cannot single-out arbitration agreements for "disfavored treatment," *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1425 (2017), but must instead place them on "equal footing" with other types of contracts, *DIRECTV*, 136 S. Ct. at 468. Second, they cannot "target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Sys.*, 138 S. Ct. at 1622; *see also Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (prohibiting covert discrimination against arbitration).

2. The decision below is consistent with these restrictions. The state court recognized and complied with the equal footing doctrine in assessing whether petitioner's arbitration agreement was enforceable. *See* Pet. App. 31a (citing *AT&T Mobility*, 563 U.S. at 339). The court's "holding rests on generally applicable unconscionability principles," *id.*, and the court acknowledged and complied with the requirement to apply those principles in the same way "for arbitration clauses as for any other contract clause," *id.* at 13a.

Under general California contract law, the unconscionability inquiry required the court to examine the agreement's substance in the context of the procedures used to obtain Kho's apparent assent. Pet. App. 14a (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)). This Court has never called into question California's "sliding scale" approach to determining unconscionability, which considers both substance and procedure, provided that the doctrine is applied evenhandedly to all contract

types. *See, e.g.*, *AT&T Mobility*, 563 U.S. at 340 (summarizing California's approach to unconscionability and citing *Armendariz*, 24 Cal. 4th at 114); *cf. Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 73 (2010) (summarizing Nevada's similar approach).[6]

a. Although petitioner focuses almost entirely on the substantive component of that inquiry (Pet. 2, 4, 10, 12, 15-17), longstanding state law directs that substantive unconscionability cannot be analyzed in isolation, without consideration of any procedural unfairness. The state court thus focused on several factors showing that the arbitration agreement was executed under oppressive circumstances, including that petitioner required Kho to sign the agreement to keep his at-will job, created the impression that Kho had to sign the agreement immediately and without assistance, and failed to provide Kho with a copy of the agreement. *See supra* p. 6. The court also considered factors showing surprise, including the agreement's tiny font, lack of headings, complex sentence structure, and technical language. *Id.* The court's analysis was heavily informed by its conclusion, based on the particular circumstances here, that "the agreement appears to have been drafted with an aim to thwart, rather than promote, understanding." Pet. App. 19a.

Consistent with this Court's precedents, the state court observed that "arbitration is premised on the

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[6] Amicus Atlantic Legal Foundation faults the California Supreme Court (at 3) for citing *Armendariz*, calling it a "pre-*Concepcion* precedent." But the state court merely cited that case for California's generally applicable standard for determining unconscionability, just as this Court did in *AT&T Mobility LLC v. Concepcion*. As *AT&T Mobility* recognized, it is not error to apply a generally applicable contract standard evenhandedly to arbitration agreements and non-arbitration agreements.

parties' mutual consent, not coercion," and held that "the manner of the agreement's imposition here raises serious concerns on that score." Pet. App. 32a (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010)). Under the general California test for unconscionability, because the level of procedural unconscionability here was "'extraordinarily high,'" *id.* at 14a, "even a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable," *id.* at 21a. Petitioner does not challenge the generally applicable "sliding scale" standard, or contend that the state court has failed to apply it evenhandedly to all types of contracts.

b. Petitioner instead argues that the state court's analysis of substantive unconscionability, viewed in isolation, conflicts with this Court's equal-footing precedents. It characterizes the decision below as "deem[ing] the agreement substantively unconscionable because the contemplated arbitration procedures were not as streamlined as the administrative proceeding that would be available under state law absent the agreement." Pet 15; *see also* Civ. Justice Ass'n Br. 2. Based on that characterization, petitioner asserts that the state court "appl[ied] a rule of substantive unconscionability unique to arbitration agreements" (Pet. 15) that "effectively . . . exclude[s] a subset of disputes—wage disputes—from being resolved in arbitration" (*id.* at 16). Petitioner's characterization and its assertion are inaccurate.

As a threshold matter, petitioner oversimplifies the basis of the state court's holding on substantive unconscionability. The court did not simply determine that having access to a Berman process would have been a better bargain for Kho than arbitration, as petitioner suggests. *See* Pet. I, 2-4, 15. The court noted

at least one substantive aspect of the arbitration agreement that was problematic in its own right, regardless of the features of a Berman hearing: the "agreement does not mention how to bring a dispute to arbitration, nor does it suggest where that information might be found." Pet. App. 22a. Because of that omission, some "employees may be so confused by the agreement that they are deterred from bringing their wage claims at all." *Id.* While recognizing that both state and federal law favor arbitration, *see id.* at 10a, 12a-13a (citing Cal. Code of Civ. Proc. §§ 1280 *et seq*. and *AT&T Mobility*, 563 U.S. at 344), the court reasonably concluded that the benefits of arbitration are not realized by an adhesive agreement that effectively blocks a claimant from *all* avenues for resolving disputes—including arbitration itself, *see id.* at 12a; *see also Italian Colors*, 570 U.S. at 236 (discussing "effective vindication" rule).

Petitioner also contends that the court's comparison of what the arbitration agreement required Kho to give up (the Berman process) and the benefits it conferred on Kho (the arbitration process prescribed by the agreement) shows an impermissible "policy preference for the Berman procedure." Pet. 16.[7] But examining what is forgone and what is gained is part of the general test for substantive unconscionability under California law. California courts do not apply this

[7] Petitioners fault the state court (at 10, 16) for its statement that this approach is "'different'" from other forms of unconscionability analysis. In context, however, the state court was merely observing that the comparative analysis in this case requires consideration of the Berman procedures, whereas in other circumstances "[t]here is no Berman-like administrative process." Pet. App. 26a.

comparative analysis uniquely to agreements to arbitrate wage disputes, as petitioner asserts. *See id.* at 15-16. In evaluating an arbitration provision in an auto sales contract, for example, the California Supreme Court observed that "the unconscionability of an arbitration agreement is viewed in the context of the rights and remedies that otherwise would have been available to the parties." *Sanchez v. Valencia Holding Company, LLC*, 61 Cal. 4th 899, 922 (2015). And in determining substantive unconscionability in non-arbitral contexts, California courts have engaged in a similar, comparative analysis where relevant. *See, e.g.*, *In re Marriage of Facter*, 212 Cal. App. 4th 967, 983-984 (2013) (waiver of spousal support in premarital agreement held unconscionable; court compared what wife would receive under agreement with what she was "likely to receive in court-ordered spousal support").[8]

Petitioner's suggestion (at 14) that the California Supreme Court has been "emboldened" to adopt an approach to substantive unconscionability that disfavors arbitration "by this Court's denial of certiorari after its

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[8] *See also, e.g.*, *Cubic Corp. v. Marty*, 185 Cal. App. 3d 438, 450 (1986) (agreement assigning employee's invention to employer was not substantively unconscionable because employee was "adequately compensated through the terms of his employment"); *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 926-927 (1985) (in determining whether bank's insufficient fund charge was unconscionable, court should consider, among other things, justification for charge and price paid in marketplace by similarly situated consumers in similar transactions); *Okura & Co. (America), Inc. v. Careau Group*, 783 F. Supp. 482, 495 (C.D. Cal. 1991) (determining that egg supply contracts were not unconscionable and noting that "at times, the contract price exceeded the market price and, at other times during [the relevant period], it did not").

decision on remand in [*Sonic II*]" is unsupported. The state high court has repeatedly held arbitration agreements to be enforceable based on the particular circumstances of the case before it. In *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1241 (2016), the court held that an adhesive agreement to "resolve any employment-related disputes by means of arbitration," signed by a retail worker as a condition of employment, was not unconscionable. In *Sanchez*, the court held enforceable an adhesive arbitration agreement contained in an automobile sales contract that, among other things, waive[d] the right to class action litigation or arbitration." 61 Cal. 4th at 906.[9] In these and other cases, the enforceability of the agreement turned on the particular constellation of facts relevant to procedural and substantive unconscionability—not on any standard that disfavors arbitration.

In this case, too, the result depended on the particular factual circumstances. Better practices in the execution of the agreement likely would have led to an enforceable agreement to arbitrate, notwithstanding any benefit to Kho of the Berman process. As the state court noted, "[w]e have not said *no* arbitration could provide an appropriate forum for resolution of Kho's wage claim, but only that this *particular* arbitral process, forced upon Kho under especially oppressive circumstances and erecting new barriers to the

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[9] Just before *Sonic II*, the court held that it was not unconscionable for a condominium developer to enforce an arbitration clause in a recorded declaration of covenants, conditions, and restrictions against a condominium owners' association. *See Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC*, 55 Cal. 4th 223 (2012). It reached that conclusion "even though the association did not exist as an entity independent of the developer when the declaration was drafted and recorded." *Id.* at 231-232.

vindication of his rights, is unconscionable." Pet. App. 33a (original emphasis).

B. The State Court Did Not Erect a "Preliminary Litigating Hurdle" to Arbitration

Petitioner next argues (at 17) that the state court's approach to unconscionability "erects a fact-intensive preliminary litigating hurdle that defeats the speed and efficiency promised by arbitration" in contravention of this Court's decision in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013). But the state court was mindful of *Italian Colors*, and it properly concluded that "the issue here is very different from that in *Italian Colors*." Pet. App. 33a.

Italian Colors considered a class-action waiver contained in an arbitration agreement between merchants and a credit card company. 570 U.S. at 231. The merchants contended that the waiver should not be enforced with respect to their antitrust claims, because no merchant would likely find it cost-effective to pursue such a claim individually. *Id.* at 231-232. This Court noted the existence of "a judge-made exception to the FAA" that would "invalidate agreements that prevent the 'effective vindication' of a federal statutory right," but declined to apply it to invalidate the challenged arbitration agreement. *Id.* at 235-236. Among other things, applying that exception would have required that a "court determine (and the parties litigate) 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. "Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in

particular was meant to secure." *Id.* at 239. The Court concluded that "[t]he FAA does not sanction such a judicially created superstructure." *Id.*

Here, the state court did not impose a hurdle to arbitration not contemplated by the FAA, but instead exercised powers expressly reserved to state courts under Section 2 of that act. As the court observed, "[u]nlike the 'judge-made exception to the FAA' the high court found problematic" in *Italian Colors*, "the unconscionability defense has long been recognized as a permissible ground for invalidating arbitration agreements under the FAA's savings clause." Pet. App. 33a (citing 9 U.S.C. § 2; *AT&T Mobility*, 563 U.S. at 339; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). If such a "defense cannot be addressed before arbitration, then the savings clause has no meaning." *Id.*

Petitioner complains about "the significant delay" involved in adjudicating this case, including the fact that "[i]t took four months for the Superior Court to rule on the petition to compel arbitration." Pet. 18; *see also* Cal. New Car Dealers Ass'n Br. 8. That is an unusual argument for petitioner to make, since petitioner did not even file its petition to compel arbitration until nine months after Kho requested a Berman hearing. Pet. App. 5a. In any event, this is a complaint about "the unconscionability defense itself, which is inherently fact-specific." *Id.* at 33a-34a. We are not aware of any case holding that the time required to litigate general contract defenses such as fraud, duress, or unconscionability—which typically turn on the particular facts of a given case—constitutes the type of "litigating hurdle" that is impermissible under *Italian Colors*. To the contrary, courts across the Nation continue to apply these defenses to

the specific facts of particular cases, while acknowledging this Court's decision in *Italian Colors*. *See, e.g.*, *King v. Bryant*, 795 S.E.2d 340, 346-347, 350-352 (N.C. 2017) (agreement to arbitrate medical disputes unenforceable where obtained in breach of doctor's fiduciary duty to patient); *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 752 S.E.2d 372, 389-390, 397-398 (W.V. 2013) (agreement to arbitrate mortgage-related dispute not procedurally or substantively unconscionable); *see also Janvey v. Alguire*, 847 F.3d 231, 249-250 (5th Cir. 2017) (per curiam) (receiver not bound by arbitration agreements deemed instruments of fraud).

Parties in a position to draft and impose arbitration agreements have the power to make the unconscionability inquiry more or less complicated. Here, for example, "[h]ad [petitioner] set out the terms of its agreement in a legible format and fairly understandable language, or had it given Kho a reasonable opportunity to seek clarification or advice, this would be a different case." Pet. App. 31a. The fact that petitioner's own actions contributed to unusually lengthy litigation is not a reason for holding that the FAA preempts longstanding and generally applicable standards, or for this Court to grant review.

II. PETITIONER HAS IDENTIFIED NO OTHER COMPELLING REASON FOR THIS COURT'S REVIEW

Petitioner does not allege that this case implicates any conflict between the lower courts. *See* Pet. 12-24.[10] Instead, it argues that review is warranted "be-

[10] Petitioner all but concedes that it is seeking error correction by repeatedly urging the Court to summarily reverse. Pet. 4, 13, 24.

cause the decision below will have an enormous practical impact on California employers and employees." *Id.* at 21. But the decision below emphatically does not foreclose wage-dispute arbitration agreements, *see* Pet. App. 2a, or even the particular contract terms at issue here, *see id.* at 30a-31a. The state court made clear that its decision hinged on the particular circumstances of this case, including undisputed facts establishing what the lower courts viewed as "an 'extraordinarily high' degree of procedural unconscionability in the agreement's execution." *Id.* at 6a; *see supra* p. 6. To the extent that other employers have imposed arbitration agreements in a similarly surprising and oppressive manner and choose to "adapt" their practices (Pet. 22) to avoid having those agreements held unconscionable, that is hardly a compelling reason for further review by this Court. Indeed, any such adjustments will presumably help to ensure mutual consent with respect to arbitration, which is "essential under the FAA." *Lamps Plus*, 139 S. Ct. at 1416.

Moreover, recent experience has disproven any dire predictions that no wage-dispute arbitration agreements will "pass muster under California law" after the state court's decision, Pet. 22, or that the decision "creates a near de facto categorical exemption from arbitration" for employee wage claims, Cato Inst. Br. 14. At least two courts have had occasion to apply the decision to such agreements; both held that the

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As explained above, however, the decision below is consistent with this Court's precedents on FAA preemption—and it certainly is not "so clearly erroneous . . . that full briefing and argument would be a waste of time." Shapiro et al., Supreme Court Practice § 5.12(a) (11th ed. 2019).

challenged agreement was enforceable under the particular circumstances. *See Martinez v. Vision Precision Holdings, LLC*, 2019 WL 7290492 (E.D. Cal. Dec. 30, 2019) (hourly retail worker required to arbitrate her wage claims); *Lefevre v. Five Star Quality Care, Inc.*, 2019 WL 6001563 (C.D. Cal. Nov. 12, 2019) (personal-care worker at senior-living facility required to arbitrate various wage and labor claims).[11] These cases illustrate that the decision below should pose no problems for employers who use arbitration agreements not as a means of thwarting their employees' claims, but to facilitate the fair, streamlined, and expeditious resolution of those claims.[12]

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[11] Amicus Cato Institute contends (at 12) that the decision in *Ramos v. Superior Court*, 28 Cal. App. 5th 1042 (2018), *cert. denied sub. nom. Winston & Strawn LLP v. Ramos*, 140 S. Ct. 108 (2019), shows that review should be granted here, because the arbitration agreement there was held unenforceable. But *Ramos* does not rely on or even cite the decision in this case. Moreover, the *Ramos* court held the agreement unconscionable largely because it effectively required a law partner to waive her sex-discrimination claims. *Id.* at 1046-1047, 1060-1061, 1063-1067. The court noted that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 1056 (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

[12] Petitioner also chides the California Legislature (at 20) for recently enacting California Labor Code Section 432.6. That provision prohibits an employer from requiring any applicant for employment or employee to waive any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or the Labor Code. *Id.* § 432.6(a). It also provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 *et seq.*)." *Id.* § 432.6(f). As petitioner correctly acknowledges, this statute "has no bearing on the contract at issue in this case." Pet. 21.

Finally, petitioner's characterization of this case as "an optimal vehicle for the Court's review" (Pet. 23) is substantially overstated. This case does not present "a pure question of law," *id.*; the state court made quite clear that even "the same contract terms might pass muster under less coercive circumstances," Pet. App. 30a-31a. Even if petitioner prevailed on the preemption question presented here, it still might not be entitled to the relief it seeks: the state court noted the Labor Commissioner's argument that petitioner had "forfeited its right to arbitrate" to the exclusion of the Berman process, but did not reach that argument in light of its conclusion that the arbitration agreement was unenforceable. *Id.* at 31a n.20. And petitioner is free to pursue relief from the Labor Commissioner's award through the de novo appeal process established by the California Labor Code. *See id.* at 38a-39a (citing Cal. Labor Code §§ 98.2, 98.4). These factors make this case an especially poor vehicle for considering petitioner's arguments about preemption—which, in any event, lack merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 29, 2020