

No. 25-1008

IN THE
Supreme Court of the United States

AVIAGAMES, INC.,

Petitioner,

v.

ANDREW PANDOLFI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

In the unpublished, unanimous decision below, the Court of Appeals affirmed the District Court's finding that the delegation and arbitration clauses in the specific consumer contract at issue in this case contained sufficient bases of procedural and substantive unconscionability to render them unenforceable under California law. Petitioners do not challenge the lower courts' substantive unconscionability holdings and they challenge only one among the multiple interconnected bases of procedural unconscionability discussed in the decision below. The petition is limited to two discrete, non-dispositive issues:

1. Whether the decision below correctly acknowledged that, under generally applicable rules of California law, tying the interpretation of a contract to third-party documents that did not exist at the time of contract formation can support a finding of procedural unconscionability when considered together with multiple other indicia of procedural unfairness.

2. Whether the decision below correctly holds that the District Court did not abuse its discretion in concluding that, under California's generally applicable severability doctrine, the unconscionable provisions of the particular arbitration agreement at issue in this case should not be severed from the agreement's permissible provisions.

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INTRODUCTION

Petitioner AviaGames, Inc. (“Avia”) requires players of its real-money mobile games to accept an arbitration agreement that shortens limitations periods only for claims brought by players (but not for claims brought by Avia) and forces “coordinated” claims into sequential resolution by batch, creating a substantial risk of delay. After three rounds of briefing and multiple separate hearings, the District Court for the Northern District of California declined to enforce the arbitration provision, citing its dense and hard-to-read text, insufficient notice of substantial changes to its terms, the one-sided statute-of-limitations restriction, and the delays inherent in the batching provision. In a five-page memorandum disposition, a panel of the Ninth Circuit unanimously affirmed, noting that the arbitration agreement “carries a modest degree of procedural unconscionability” as well as “multiple substantively unconscionable provisions.” Pet. App. 5a–6a. Because the agreement was plagued by multiple forms of procedural and substantive unconscionability, the panel also ruled that the District Court did not abuse its discretion in declining to sever the offending contractual provisions. The Ninth Circuit denied both rehearing and *en banc* review.

Neither of the questions presented by Avia’s petition warrant this Court’s review.

Petitioner’s first question attacks a straw man. Avia cherry-picks one subsidiary component of the panel’s procedural unconscionability analysis, claiming that the memorandum somehow created an automatic rule that incorporating third-party rules into an arbitration

agreement is always procedurally unconscionable. That is neither what the panel held nor consistent with the facts. The Ninth Circuit affirmed the District Court’s fact-intensive finding of procedural unconscionability for several reasons, one of which was that inadequate notice of changing rules can create unfair surprise. The panel did not issue any novel legal proclamation, much less any “rule deeming arbitration agreements procedurally unconscionable when they incorporate the American Arbitration Association’s [“AAA”] rules.” Pet. i. The holdings actually announced by the courts below create no legal conflict, whether among circuits or with the Federal Arbitration Act (“FAA”).

Petitioner’s second question, which Avia did not raise below, also does not merit review. California has no “arbitration-specific” severability doctrine because its severability rule applies with equal force to both arbitration agreements and non-arbitration contracts. Neither this case nor other cases applying California law treat arbitration agreements more or less favorably than other contracts in a way that conflicts with this Court’s decision in *Concepcion* or the broader principles of the FAA. Indeed, this Court has declined to review Avia’s second question presented in a number of previous petitions. It should do the same here.

STATEMENT OF THE CASE

A. Factual background

Avia operates mobile games, including “Solitaire Clash,” “8 Ball Strike,” and “Blockolot,” which are ostensibly multiplayer versions of games like solitaire,

pool, or Tetris. Avia tells users they are competing in skill-based challenges in real-time for real money against other real users. As it turns out, Avia's representations about its games are untrue. In fact, players compete against non-human bots, and Avia is able to control outcomes. What is more, Avia holds an undisclosed stake in the outcome of the games it hosts.

In 2023, after Plaintiffs Andrew Pandolfi and Mandi Shawcroft had initially started playing Avia's games, Avia amended the arbitration agreement contained in its Terms of Use. The modifications included adding a "delegation clause" specifying that any disagreement over whether a particular dispute is arbitrable must be resolved by the arbitrator rather than a court, incorporating the "AAA's Consumer Arbitration Rules," and laying out a new "batching" procedure for resolving "coordinated" cases. Pet. App. 10a–12a, 112a. Once claims are deemed "coordinated" under the batching provision (a term that the provision does not define), they are sorted into groups of 20 to be resolved one at a time. No case in any batch is allowed to proceed until all individual arbitrations in all previous batches are resolved. *Id.* at 115a–116a. As a result of the new delegation clause, disputes over arbitrability are also subject to the batching procedure.

Users were notified of these changes only through an in-app pop-up that read: "We have updated our Privacy Policy and Terms of Service, [b]y continuing to use Aviagames' services, you agree to the updated Terms of Service and acknowledge the Privacy Policy." Pet. App. 72a. Users could click "agree" without reading through the new Terms, and the pop-up made no mention that any changes had been made to the arbitration agreement, let alone the specific changes made.

B. District Court Proceedings

Plaintiffs sued Avia in 2023, on behalf of themselves and a putative class, alleging that Avia willfully misrepresented its products. Specifically, Plaintiffs allege that Avia has disguised bots as human players, rigging the outcome of its games to its own financial benefit. In unrelated patent litigation, it was revealed that Avia in fact fixes its games using bots and keeps the money whenever its bots win. *Skillz Platform Inc. v. AviaGames Inc.*, No. 5:21-cv-02436-BLF (N.D. Cal.).

After Plaintiffs brought suit, Avia moved to compel arbitration based on the Terms of Use. Plaintiffs opposed the motion, arguing that the arbitration agreement is unenforceable under the generally applicable California contract doctrine of unconscionability. The District Court sought and received significant input from both parties on the unconscionability question, reviewing three rounds of briefing. After reviewing the parties' initial briefs, the District Court requested supplemental briefing on the interplay between the delegation clause and batching provision. After issuing a preliminary order denying Avia's motion to compel, the court next asked the parties to submit briefing on the impact of the then-recent California Supreme Court decision *Ramirez v. Charter Commc'ns, Inc.*, 551 P.3d 520 (Cal. 2024), which refined California's contract-by-contract approach to severing unconscionable provisions.

Following the second round of supplemental briefing, the District Court again denied Avia's motion to compel arbitration, concluding that both the delegation clause and the arbitration agreement were unconscionable

for a host of reasons. Applying longstanding California law breaking unconscionability into procedural and substantive components, the District Court followed California precedent requiring it to “apply a sliding scale analysis under which ‘the more substantively oppressive [a] term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’” Pet. App. 14a (*quoting Ramirez*, 551 P.3d at 530).

The District Court first considered the delegation clause and held that it was unenforceable. Looking first to procedural unconscionability, the court found that the delegation clause was procedurally unconscionable because it contained at least three different indicators of unfair surprise. First, the court observed that the clause was “in the middle of 16 numbered paragraphs, most with multiple numbered subparagraphs, within 14 pages of single-spaced, 8-point font in barely readable, light gray text.” Pet. App. 15a. Second, there was “nothing in the text to call players’ attention to the delegation clause,” such as numbers or titles. *Id.* Finally, there was no requirement for players “to sign or initial that [delegation] provision.” *Id.* at 58a. As for substantive unconscionability, the District Court found unconscionability chiefly because the delegation clause was subject to the batching provision, which would lead to significant delay in determining the arbitrability of claims, let alone in resolving those claims. *Id.* at 21a–22a.

Because the delegation clause was unconscionable, the arbitrability of Plaintiffs’ claims became a question for the court to decide. Turning to that question, the District Court also found the broader arbitration agreement

unconscionable, for similar reasons. On the procedural side, the arbitration agreement was not only dense, difficult to see, and buried in the Terms of Use, but it was also presented to Plaintiffs “via pop-up boxes in the game apps” that did not provide “notice of the fact that changes—significant changes—had been made to the arbitration agreement.” *Id.* at 31a–32a.

Substantively, the District Court further determined that the arbitration agreement as a whole was unconscionable based on the batching provision and the provision “that significantly shortens the limitations period for Plaintiffs’ statutory claims” compared to what would be available in court. *Id.* at 35a.

Finally, the District Court exercised its discretion not to sever the unconscionable elements of the arbitration agreement, finding that under California law, enforcing an agreement with so many interrelated unconscionable features was against the interests of justice.

C. Ninth Circuit Proceedings

The Ninth Circuit affirmed in a unanimous, non-precedential memorandum. Just like the District Court, the panel recognized that “unconscionability is a generally applicable contract defense” and applied California’s “sliding scale analysis,” which recognizes that “the more substantively oppressive a term, the less evidence of procedural unconscionability is required,’ and vice versa.” *Id.* at 3a–4a (citation omitted).

The Ninth Circuit’s five-page memorandum briefly reiterated some aspects of unconscionability found by

the District Court. The panel found a “modest degree of procedural unconscionability” in the delegation clause because of its location deep in the Terms of Service and the surprise that its interaction with the batching provision would cause a lay reader. Pet. App. 4a. The Ninth Circuit also noted that some of the third-party procedural rules referenced by Avia are subject to unilateral change without notice. *Id.* All of these factors together, the court concluded, created a degree of procedural unconscionability. The court also affirmed that the delegation clause was substantively unconscionable because the batching provision could result in significant delays in arbitration of the arbitrability question. *Id.*

In so ruling, the Ninth Circuit rejected Avia’s arguments that the AAA’s “Mass Arbitration Supplementary Rules”—rather than the “Consumer Arbitration Rules” referenced in the arbitration agreement—could negate any delays resulting from the unconscionable batching provision by allowing a “process arbitrator” to rule on arbitrability in an expedited fashion. The panel noted that the Mass Arbitration Supplementary Rules did not cure the substantive unconscionability of the batching provision because those rules “did not exist at the time of the arbitration agreement and future versions of the rules were not incorporated” in the arbitration agreement. *Id.* at 5a.

Turning to the arbitration agreement as a whole, the Ninth Circuit held that the District Court did not err in finding the arbitration agreement unconscionable for many of the same reasons. Under California’s sliding-scale unconscionability analysis, the panel chiefly discussed the “multiple substantively unconscionable provisions” found

in the arbitration agreement, including batching and the agreement’s unilateral reduction in the limitations period for claims brought by, but not against, Avia. *Id.* at 6a. In addition, on procedural unconscionability, it again noted Avia’s attempts to rely on changing AAA rules, citing *Heckman v. Live Nation Entm’t, Inc.*, 120 F.4th 670, 682 (9th Cir. 2024), *cert. denied sub nom. Live Nation Entm’t, Inc. v. Heckman*, 146 S. Ct. 96 (2025), for the proposition that oppression—a component of procedural unconscionability focused on one-sidedness—can be made “more onerous when a clause pegs both the scope and procedure of the arbitration to rules which might change.” *Id.* 5a. (citation omitted).

As for the issue of severance, the panel held that the District Court did not abuse its discretion in declining to sever the batching provision from the delegation clause, or the various unconscionable provisions from the arbitration agreement as a whole. The panel identified that California law requires courts to ask “whether unconscionability *should* be cured through severance” by considering whether “the interests of justice would be furthered by such action[.]” *Id.* (citing *Ramirez*, 551 P.3d at 547). The panel also emphasized that the District Court was “within its discretion” to conclude that severance was not in the interests of justice “[g]iven the multiple unconscionable provisions in the arbitration agreement.” *Id.* at 6a.

Avia sought panel rehearing and rehearing on *en banc*, both of which were unanimously denied, with no judge calling for a vote.

REASONS FOR DENYING THE PETITION

Avia’s petition fails to accurately describe the decisions below and fails to identify any conflicting authority. For these reasons, and because the Ninth Circuit’s nonprecedential decision is consistent with well-established FAA standards, the Court should deny review.

I. The first question presented does not merit review.

A. The Ninth Circuit has no “prohibition” against incorporation of AAA rules.

Although Avia asks this Court to decide whether the FAA preempts “a rule deeming arbitration agreements procedurally unconscionable when they incorporate the American Arbitration Association’s rules,” Pet. i. neither the panel’s decision nor Ninth Circuit precedent holds that California law prohibits arbitration agreements from incorporating AAA rules by reference.

Like their counterparts across the country, California courts and Ninth Circuit panels applying California law have recently and consistently enforced arbitration agreements that incorporate third-party procedural rules by reference. *See Vo v. Tech. Credit Union*, 108 Cal. App. 5th 632, 648, (2025), *reh’g denied* (Mar. 4, 2025), *review denied* (Apr. 30, 2025) (denying unconscionability challenge, where agreement incorporated JAMS rules); *Patrick v. Running Warehouse, LLC*, 93 F.4th 468, 481 (9th Cir. 2024) (same); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021, 1033 (9th Cir. 2016) (same, for AAA rules); *cf. Murrey v. Superior Ct.*, 87 Cal. App. 5th 1223, 1242 (2023) (finding arbitration agreement unconscionable

where it did not specify name of arbitration provider, unlike presumably enforceable agreements “incorporating standardized AAA/JAMS rules”); *see also infra* Section I.B (collecting further cases).

The Circuit Court’s memorandum in this case outlines many bases for unconscionability and did nothing to depart from the consensus view that California law permits arbitration agreements to incorporate third-party procedural rules. On procedural unconscionability, the panel affirmed that the District Court “did not err in finding the delegation clause unconscionable, because it “carries a modest degree of procedural unconscionability.” Pet. App. 4a. The panel’s memorandum outlined several factors giving rise to its conclusion, namely that the delegation clause was “hidden in the Terms of Service” and that “a layperson would be surprised to find that the delegation clause is subject to the batching provision.” *Id.* And the District Court, whose reasoning the panel adopted, identified several additional factors, including the “unfair surprise” engendered by hiding “significant” changes to the Terms of Service behind “pop-up boxes in the game apps,” Pet. App. 31a, the font and text-size of the arbitration agreement, the failure to use “bolding or underlining to call out any terms” or newly-added provisions, *id.* at 33a, and the overall length and prolixity of the arbitration agreement. *Id.* at 34a n.7.

As an additional factor supporting its conclusion on unconscionability, the Ninth Circuit noted that the arbitration agreement, like the delegation clause, “carries a modest degree of procedural unconscionability because it incorporates AAA rules that are subject to change.” Pet. App. 5a. The panel then quoted *Heckman* for the

proposition that, “[u]nder California law, ‘oppression is even more onerous’ when a ‘clause pegs both the scope and procedure of the arbitration to rules which might change.” Pet. App. 5a (quoting *Heckman*, 120 F.4th at 682). Contrary to Avia’s contention that “[i]n the Ninth Circuit’s view, ‘under California law,’ an arbitration clause evinces ‘oppression’ whenever it incorporates an arbitration provider’s ‘rules which might change,” Pet. 10, the panel did not say that such terms always or even usually result in a finding of procedural unconscionability—just that they can exacerbate other elements of unconscionability when, as here, other such elements are manifold.

Avia does not acknowledge any of the other factors that contributed to procedural unconscionability or the finding that the arbitration agreement “contains multiple substantively unconscionable provisions.” Pet. App. 6a. By ignoring these considerations, the petition distorts the decision below, characterizing it as having relied on a new, categorical rule prohibiting the incorporation of AAA rules. The generally applicable, totality-of-the-circumstances approach taken by the courts below does no such thing.

B. There is no circuit split on the question presented.

Having mischaracterized the Ninth Circuit’s holding as announcing a categorical rule against incorporating third-party procedural rules, Avia argues that this rule conflicts with decisions from other courts. But the holding that the Ninth Circuit *actually* announced is fully consistent with the cases that Avia cites.

Courts applying California law regularly enforce contracts that incorporate procedural rules from third parties both within and outside the context of arbitration. In *Poublon v. C.H. Robinson Co.*, the Ninth Circuit expressly *rejected* the plaintiff’s argument that it was procedurally unconscionable under California law for an arbitration agreement to incorporate third-party rules, including AAA rules, without including a copy of the rules in the agreement. 846 F.3d 1251, 1262 (9th Cir. 2017). *Poublon* relied on *Baltazar v. Forever 21, Inc.*, in which the Supreme Court of California held that an employer’s failure to attach incorporated AAA rules to the challenged contract did not affect procedural unconscionability. 367 P.3d 6, 12–13 (Cal. 2016). If anything, the Ninth Circuit has long taken the permissibility of such incorporation under California law for granted. A 2015 decision joined the “consensus” among sister circuits that “incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (mandating arbitration and denying unconscionability challenge) (*citing Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (“Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association’s (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability”). And, consistent with the Ninth Circuit’s own recognition, these decisions are wholly consistent with the views of other circuits, including the views announced in the cases that Avia cites. *See* Pet. 12–15 (collecting cases).

All jurisdictions further agree with California that procedural unconscionability entails a fact-intensive analysis of the specific circumstances surrounding assent. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (1995) (O’Connor, J., concurring in part and dissenting in part) (describing procedural unconscionability); *Bekele v. Lyft, Inc.*, 918 F.3d 181, 188 (1st Cir. 2019) (stating that contract is procedurally unconscionable, under Massachusetts law, where “the circumstances surrounding the formation of the contract show that the aggrieved party had no meaningful choice and was subject to unfair surprise”); *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 292 (4th Cir. 1989) (finding it legally erroneous to determine unconscionability on the pleadings, given fact-intensive nature of enquiry); *Hines v. Nat’l Entm’t Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025) (examining “the individualized circumstances surrounding the contract” for procedural unconscionability under Ohio law); *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1135 (11th Cir. 2010) (“Under Florida law, a central question in the procedural unconscionability analysis is whether the consumer has an absence of meaningful choice in whether to accept the contract terms.”). The panel’s careful, multi-factor analysis of procedural unconscionability, and its focus on unfair surprise and oppression, aligns squarely with that consensus view.

There is similar agreement that unfair surprise is key to procedural unconscionability. *See OTO, L.L.C. v. Kho*, 447 P.3d 680, 691–92 (Cal. 2019) (unfair surprise key to procedural unconscionability); *Rockstone Capital, LLC v. Caldwell*, 261 A.3d 1171, 1177 (Con. App. 2021) (“Procedural unconscionability is intended to prevent unfair surprise.”); *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d

27, 35 (Or. 2014) (“Procedural unconscionability refers to the conditions of contract formation and focuses on two factors: oppression and surprise.”); *Balogh v. Balogh*, 332 P.3d 631, 643 (Haw. 2014) (same, for “one-sidedness and unfair surprise”); *Constr. Assocs., Inc. v. Fargo Water Equip. Co.*, 446 N.W.2d 237, 241 (N.D. 1989) (considering “factors relating to unfair surprise, oppression, and inequality of bargaining power”). Unfair surprise occurs when a party must assent to terms it could not have known about—including, as in this case, where a party is required to assent to unknown third-party rules not referenced in the arbitration agreement. *See Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013) (finding procedural unconscionability where plaintiff did not have opportunity to review arbitration policy until three weeks after it came into effect, having been given insufficient notice of its existence); *see also Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127 (2d Cir. 2012) (declining to enforce arbitration agreement that was provided to users “after initial enrollment” and was provided to users via separate email); *Bacon v. Avis Budget Grp., Inc.*, 959 F.3d 590, 601 (3d Cir. 2020) (arbitration agreement could not be enforced when contract referred to it by incorrect name and it was never provided to customers, because “a party cannot assent to something he does not know exists”); *Marshall v. Georgetown Mem’l Hosp.*, 112 F.4th 211, 221 (4th Cir. 2024) (same, where the “arbitration statement neither provided nor referred to the actual terms of a proposed agreement”).

Neither circuit decision that Avia cites, Pet. 12, conflicts with the Ninth Circuit’s holding here. Both decisions go to contract enforceability under state law. Neither addresses the federal question whether the

FAA preempts a state-law contract doctrine that, like California's, allows the incorporation of changeable third-party rules to factor into the unconscionability of a consumer contract.

The Sixth Circuit, in *Goff v. Nationwide Mut. Ins., Co.*, despite finding the specific agreement at issue enforceable under Ohio law, clarified that the ability to unilaterally change rules “may also be considered an element of procedural unconscionability as it involves the acquiescence to future, unknown, and uncontrollable terms, subject to change without notice at any time.” 825 F. App'x 298, 304 (6th Cir. 2020). Like the court here, the Sixth Circuit observed that “no single factor alone determines whether a contract is procedurally unconscionable; a court must consider the totality of the circumstances.” *Id.* at 305. Unlike in this case, however, the plaintiff in *Goff* failed to demonstrate that the circumstances in his “individualized” case supported a finding of procedural unconscionability. *Goff* does not hold that the presence of changeable rules guarantees or forecloses a finding of procedural unconscionability. If anything, the Sixth Circuit *agrees* with the Ninth Circuit here that changing terms can contribute to procedural unconscionability.

The Seventh Circuit says no different. *Hawkins v. Aid Ass'n for Lutherans* held only that a plaintiff who had agreed to “delegate decision making power to their elected representative” as part of his membership in a fraternal benefit society could not claim that a contract was unconscionable under Wisconsin law because he had not personally reviewed or negotiated certain contractual terms. 338 F.3d 801, 806 (7th Cir. 2003). Here, of course,

the validity of the delegation is itself at issue. Parties may contract away certain decision-making authority, but that does not mean all such delegations are valid or enforceable.

Similarly, the district court decisions in *Paduano* and *Uptown* do not conflict with the decision here. Neither case addressed the question whether the FAA preempts state-law unconscionability principles. And, in both cases, the presence of unilaterally modifiable terms was tempered by adequate notice—the lack of which lies at the heart of the procedural unconscionability finding below. *See Uptown Drug Co., Inc. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172, 1181 (N.D. Cal. 2013) (“Caremark complied with its contractual obligation to give advance notice to Uptown each time it amended the Caremark Provider Agreement.”); *Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 427 (E.D.N.Y. 2014) (“Optum complied with its contractual obligation to give advance notice to HMC when it amended the Optum Provider Agreement.”). *See also* Pet. App. 31a (concluding that “there is some unfair surprise because Plaintiffs entered into the arbitration agreements with Avia by agreeing to updated Terms presented to them via pop-up boxes in the game apps”). And the district court in *Paduano*, like the Sixth Circuit in *Goff*, simply agreed that modifiable contract provisions elsewhere in the contract do not *automatically* render arbitration agreements procedurally unconscionable. *See id.* at 417 (“In other words, a provision permitting the unilateral amendment of any term of contract does not, *without more*, render a separate provision, such as an arbitration provision, unenforceable on procedural grounds.”) (emphasis added). Neither lower court in this case reached a contrary conclusion, and Respondents did not ask them to.

Similarly, the Mississippi Supreme Court’s decision in *Virgil v. Sw. Mississippi Electric Power Ass’n* does not state the proposition that the FAA preempts generally applicable state-law procedural unconscionability principles that take account of a contract’s incorporation of third-party procedural rules. *Cf.* Pet. 14. As in *Paduano*, the contract in *Virgil* provided that any section of the contract may be modified by the other party. Plaintiffs argued that the possibility of unilateral modification created procedural unconscionability only as applied to the arbitration clause, thereby singling out the arbitration clause for special treatment. *Virgil v. Sw. Mississippi Elec. Power Ass’n*, 296 So. 3d 53, 63 (Miss. 2020). Instead, the unilateral modification clause would be unconscionable for the contract as a whole or not at all—the FAA prevented the court from raising concerns unique to arbitration. *Accord Patrick*, 93 F.4th at 480 (rejecting unconscionability challenge to unilateral modification clause separate from arbitration agreement). Here, of course, the arbitration agreement *itself* refers to changeable third-party rules—albeit the “Consumer Arbitration Rules,” not the “Mass Arbitration Supplementary Rules” that Avia sought to rely on—and neither the District Court nor the Ninth Circuit unevenly applied unconscionability doctrine to different clauses of the same contract.

There is no split in authority for this Court to address.

C. The panel’s decision presents no conflict with the FAA.

The decision below applied longstanding state contract principles that are not preempted by the FAA. The FAA’s savings clause explicitly provides that arbitration

agreements are unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. For that reason, the Court has consistently held that the FAA requires equal treatment for arbitration agreements, but not preferential treatment. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) (“[T]he FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-preferring procedural rules.”).

The case-specific application of settled legal principles is not an issue that merits this Court’s review. *See* S. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.”). In any event, the Ninth Circuit’s ruling on unconscionability made no new rule and is fully consistent with the FAA’s equal treatment principle.

First, the decision is unpublished and does not announce *any* rule or binding precedent for future decisions of *any* court. *See infra* Section III.A.

Second, the courts below followed the approach to unconscionability that California courts apply to all contracts, irrespective of whether they are agreements to arbitrate. *See Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (noting that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements”). Both the District Court and the Ninth Circuit applied California’s “sliding scale” unconscionability analysis, which weighs procedural and substantive considerations together to reach an overall assessment. *See Armendariz*

v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690–94 (Cal. 2000) (outlining sliding scale approach). This approach, which keys procedural unconscionability to the “oppression” and “surprise” present in the circumstances of contract negotiation, applies to all contracts and was initially formulated in a non-arbitration case. *See A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489–93 (1982) (deciding enforceability of provisions disclaiming warranty and barring consequential damages); *see also*, e.g., *Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1390 (1996) (analyzing oppression and surprise present in employment contract’s compensation provisions); *Chretien v. Donald L. Bren Co.*, 151 Cal. App. 3d 385, 389 (1984) (same) (citations omitted).

Third, the Ninth Circuit’s decision does not “blatantly violate” *Concepcion* and its progeny. *Cf.* Pet. 4. *Concepcion* itself expressly acknowledged and left intact the broader universe of California unconscionability law, including *Armendariz* and its emphasis on “oppression” and “surprise” in analyzing procedural unconscionability. *See* 563 U.S. 333, 340 (2011) (outlining *Armendariz* framework). Both California and Ninth Circuit decisions have regularly reiterated that the continued application of *Armendariz*, which the decision below faithfully applied, is fully consistent with the FAA. *See Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201–03 (Cal. 2013), *cert denied* 573 U.S. 904 (2014); *Ronderos v. USF Reddaway, Inc.*, 114 F.4th 1080, 1103 (9th Cir. 2024) (“Neither California’s standards nor our application of them in this case violate the FAA.”); *Ramirez*, 551 P.3d at 548 (“The approach adopted here is not hostile to arbitration.”).

The Ninth Circuit’s opinion correctly recognized that, under neutral principles of California contract law, a contract is more likely to be procedurally unconscionable where the substantive scope of its terms is hidden at the time of agreement. *Accord Chavarria*, 733 F.3d at 923 (“[W]e have held that the degree of procedural unconscionability is enhanced when a contract binds an individual to later-provided terms.”). On this point, the panel’s memorandum relies on *Harper v. Ultimo*, in which the operant contract contained a brief reference to the “Better Business Bureau Arbitration Rules.” 113 Cal. App. 4th 1402, 1406 (2003). But unconscionability arose in part because those rules were silent as to “whether an arbitration would be conducted under the . . . rules as of the time of contracting, or at the time of arbitration,” meaning that the ambiguity as to how the Terms operated contributed to procedural unconscionability. *Id.* at 1407. The Ninth Circuit’s decision in *Heckman* likewise relied on *Harper* not to prohibit incorporation by reference but to identify the procedural unconscionability of Ticketmaster’s ability to unilaterally modify its Terms without any notice to users. 120 F.4th at 682; *accord Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 722–23 (2004) (finding procedural unconscionability where employees were notified of new non-mutual exceptions to arbitration agreement only by footnote of brochure that did not contain contractual text).

So, too, here. In the District Court and again on appeal, Avia repeatedly argued that the arbitration agreement’s myriad forms of unconscionability could be cured by Avia’s interpretation of the AAA’s Mass Arbitration Supplementary Rules. Specifically, Avia mused that these rules might allow administrative “process arbitrators” to rule on arbitrability at the outset,

thereby end-running the delays inevitably engendered by the substantively unconscionable batching provision. *Id.* at 56–58. But, as the Ninth Circuit correctly observed, “the Supplementary Rules did not exist at the time of the arbitration agreement” and were not incorporated by the agreement’s reference to “the AAA’s Consumer Arbitration Rules,” meaning that they were not agreed to by users and could not render otherwise unconscionable contract terms enforceable. Pet. App. 4a–5a. *See also Vo*, 108 Cal. App. 5th at 639 (declining to effectuate version of JAMS rules that “were not in effect when the parties signed the arbitration agreement”); *Murrey*, 87 Cal. App. 5th at 1246 (finding some procedural unconscionability where arbitration agreement did not specify which arbitration provider’s rules would apply). Put another way, finding for Avia would have required the court to hinge the enforceability of the contract on AAA rules not cited or referenced in the arbitration agreement. *Accord Fitz*, 118 Cal. App. 4th at 727 (“Replacing the ACT policy’s limitations on discovery with the rules of AAA would be in effect to rewrite the agreement.”). So the memorandum’s discussion of “rules that are subject to change” does not “cast a cloud over innumerable arbitration agreements,” *cf.* Pet. 4, but instead reiterates the baseline principle that the attempted incorporation of unidentifiable contract terms contributes, modestly, to procedural unconscionability.

II. The second question presented does not merit review.

Avia’s second question fares no better. California’s approach to severability, which vests trial courts with discretion to sever unconscionable provisions when doing so would be in the interests of justice, is a generally applicable doctrine codified by statute decades ago. California courts

routinely apply this doctrine to arbitration and non-arbitration agreements alike. Avia identifies no circuit split on whether the FAA preempts such severability principles, and it never raised this preemption argument below. This Court should not address a question that no lower court has considered in this case.

A. Avia has never previously raised the argument that the FAA preempts California’s severability law.

Avia never argued to the District Court or the Ninth Circuit that the FAA preempts California’s severability doctrine. That alone makes the issue inappropriate for review. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (“[I]t is only in exceptional cases . . . that [the Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.”).

Though this Court has the power to review issues never presented below, it ordinarily does so only in “exceptional cases.” *Id.*; *see also United States v. Lovasco*, 431 U.S. 783, 788, n.7 (1977) (“This argument, however, was not raised in the District Court or in the Court of Appeals. Absent exceptional circumstances, we will not review it here.”); *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (“We do not reach this issue because it was not raised or briefed below.”) *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92, n.7 (2000) (declining to reach an argument on which the Court of Appeals “did not pass”).

A routine decision applying severability doctrines that California has recognized for nearly 50 years is not

an exceptional circumstance. Neither the District Court nor any judge in the Ninth Circuit has asked, let alone answered, if California's unconscionability doctrine as applied to this case conflicts with federal authority. This Court should not do so from a blank slate.

B. California's severability doctrine is not preempted by the FAA.

The FAA does not preempt California's severability doctrine because it applies evenly to all contracts, not only to arbitration agreements. California courts have long held that if a "court as a matter of law finds . . . any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract." *Armendariz*, 6 P.3d at 689. The basis for the rule is nearly 50-year-old legislation: California Civil Code Section 1670.5, which vests a district court with discretion to sever unconscionable provisions of a contract or to decline to enforce the contract as a whole. The California Supreme Court's more recent decision in *Ramirez* emphasizes that this statute "appears to contemplate the latter course only when an agreement is 'permeated' by unconscionability." *Ramirez*, 551 P.3d at 544 (quoting *Armendariz*, 6 P.3d at 695). Holistically, California law empowers courts to consider the "interests of justice," which requires invalidating an entire agreement where "severance of unconscionable terms would function to condone an illegal scheme." *Id.* at 547.

Although *Ramirez* arose in the arbitration context, California courts rely on both *Armendariz* and *Ramirez* to apply California's severability doctrine outside the context of arbitration. For example, a 2008 California

Supreme Court case applied the *Armendariz* test to examine the severability of unconscionable provisions in a talent-management contract, reiterating the rule that courts must “look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced.” *Marathon Entm’t, Inc. v. Blasi*, 174 P.3d 741, 743 (Cal. 2008) (quoting *Armendariz*, 6 P.3d at 696).

Furthermore, recent California decisions apply *Ramirez’s* “interests of justice” standard outside of arbitration, refusing to sever unconscionable provisions in order to deter companies from drafting them. *See e.g., Hardy v. Forest River, Inc.*, 108 Cal. App. 5th 450, 460 (2025), *as modified* (Jan. 31, 2025) (declining to sever unconscionable choice of law provision where doing so “would function to condone an illegal practice and the multiple defects in the agreement indicate that the stronger party engaged in a systematic effort to secure a forum that would work to its advantage”); *Diaz v. Thor Motor Coach, Inc.*, 118 Cal. App. 5th 589, 662 (2026) (declining to sever an unconscionable choice of law provision because severance would “incentivize Thor to continue to include admittedly unenforceable terms in its warranty” and therefore “not further the interests of justice”); *Lathrop v. Thor Motor Coach, Inc.*, 105 Cal. App. 5th 808, 820–21 (2024) (same).

Moreover, California courts regularly exercise their discretion to enforce arbitration contracts after severing their unconscionable provisions. *See Bolter v. Superior Ct.*, 87 Cal. App. 4th 900, 910 (2001) (“It is not necessary

to throw the baby out with the bath water, *i.e.*, the unconscionable provisions can be severed and the rest of the [arbitration] agreement enforced.”). The caselaw directly contradicts Avia’s claim that analyzing severance with an eye towards either the “interests of justice” or “deterrence” only targets arbitration agreements, nor only “derive[s its] meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339.

California’s approach to severability is longstanding and stable, having been laid out in statute half a century ago, refined by *Armendariz* and its progeny for more than 25 years, and reaffirmed by *Ramirez* recently. There is nothing unique about the law or its application to arbitration. In all cases, California courts may in their discretion refuse to sever unconscionable provisions where doing so would reward a party for loading up an agreement with unconscionable terms or otherwise not serve the interests of justice. That is precisely the analysis performed here, consistent with how California courts would approach the question of severability in connection with any other contract. There is accordingly no FAA preemption.

C. California’s law is consistent with other states and the Ninth Circuit’s affirmance is consistent with other circuits.

Avia does not argue that any circuit has held that the FAA preempts the numerous state-law severability doctrines that resemble California’s. After all, neither California’s severability law nor the Ninth Circuit’s application thereof is at odds with the law of other states or circuits.

Other states approach severability doctrines in a similar way to California, often using similar language. *See e.g., Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197, 1199–1200 (Wash. 2013) (“Severance is the usual remedy for substantively unconscionable terms, but where such terms ‘pervade’ an arbitration agreement, we ‘refuse to sever those provisions and declare the entire agreement void.’”); *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 758 (S.C. 2022) (“However, severability is not always appropriate to remedy unconscionable contractual provisions. In particular, courts are reluctant to sever the unconscionable provisions when illegality pervades the entire agreement ‘such that only a disintegrated fragment would remain after hacking away the unenforceable parts.’” (citations omitted)); *Narayan v. The Ritz-Carlton Dev. Co., Inc.*, 400 P.3d 544, 556 (Haw. 2017) (“However, where unconscionability so pervades the agreement, the court may refuse to enforce the agreement as a whole.”); *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 230 (3d Cir. 2018) (stating that under New Jersey law a clause within an arbitration agreement was not appropriate for severance because it was “an integral, not ancillary, part of the parties’ agreement”). Far from adopting a unique severability approach that disproportionately affects arbitration, California’s generally applicable severability law is consistent with the practices of other states.

Because Avia did not present the issue, the Ninth Circuit had no occasion to consider whether the FAA preempts application of California’s severability doctrine in this case. Had the Ninth Circuit addressed the issue and concluded that FAA preemption does not apply, however, that conclusion would not conflict with the holdings of other circuits.

Oblix Inc. v. Winiacki, from the Seventh Circuit, which Avia cites, has nothing to do with severability. The case instead is about the specific application of an arbitration agreement to disputes about compensation or discrimination. It therefore has no bearing on whether the FAA would preempt the refusal to sever the unconscionable provisions of an arbitration agreement when such provisions pervade the agreement. *See generally* 374 F.3d 488 (7th Cir. 2004). *Oblix* offers Avia no basis for asserting that the Seventh Circuit would have found California severability doctrine to be a “special hurdle” subject to preemption. Pet. 22.

Although Avia cites a number of cases that have declined to sever unconscionable aspects of arbitration agreements, those cases do not imply that the Ninth Circuit’s affirmance of the district court’s decision not to sever reflects antipathy toward arbitration. Rather, it reflects the Ninth Circuit’s recognition that the District Court acted within its discretion in applying California’s flexible severability doctrine to the specific facts of this case. As the District of Columbia Circuit explains, in a case cited by Avia and referencing other cases that Avia cites:

“The differing results [on severability] may well reflect not so much a split among the circuits as variety among different arbitration agreements. Decisions striking an arbitration clause entirely often involved agreements without a severability clause, *see, e.g., Perez*, 253 F.3d at 1286, *or agreements that did not contain merely one readily severable illegal provision, but were instead pervasively infected with illegality, see, e.g., Graham Oil*, 43 F.3d at 1248–49; *Hooters*

v. Phillips, 173 F.3d 933, 938–39 (4th Cir. 1999). Decisions severing an illegal provision and compelling arbitration, on the other hand, typically considered agreements with a severability clause and *discrete unenforceable provisions*, see, e.g., *Morrison*, 317 F.3d at 675; *Gannon*, 262 F.3d at 680.”

Booker v. Robert Half Int’l, Inc., 413 F.3d 77, 84 (D.C. Cir. 2005) (emphasis added). In *Booker* itself, the D.C. Circuit affirmed the district court’s severance of the arbitration agreement rather than strike it in its entirety because “[t]he district court did not unravel “a highly integrated” complex of interlocking illegal provisions.” *Id.* at 85 (internal citation omitted). The Ninth Circuit undertook a similar analysis in *Ronderos*, focusing on the district court’s discretion to decide severability under California law where “the procedural unconscionability is at least moderate, and the agreement contains at least two substantively unconscionable provisions.” 114 F.4th at 1102–03 (decisions severing unconscionable provisions “do not mean that the district court abused its discretion by deciding *not* to sever multiple unconscionable provisions”). Here, there were multiple forms of procedural and substantive unconscionability, stemming from distinct unenforceable provisions as well as the interactions between them. A similar distinction exists between this case and *Hadnot v. Bay, Ltd.*, where one provision of an arbitration agreement was unlawful under Title VII, and the court severed. 344 F.3d 474, 478 (5th Cir. 2003). Yet again, at issue in that case was only a single unlawful provision, versus here there are multiple unlawful provisions and multiple forms of procedural and substantive unconscionability.

The District Court here would have had similar discretion not to sever the unconscionable provisions in any other circuit or in any of the many states whose severability law resembles California's. While the District Court did not sever the agreement, there is no evidence that it did so "lightly" or summarily. *Cf. Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003). Although Avia disagrees with how the District Court exercised that discretion in this case after engaging in careful, reasoned analysis that disagreement does not present an issue that merits this Court's review. It is perhaps for that reason that this Court has consistently denied petitions seeking review of whether the FAA preempts particular applications of state severability law. *See* Pet. for Writ of Cert., *Ritz-Carlton Dev. Co. v. Narayan*, 583 U.S. 1115 (2018) (No. 17-694), 2017 WL 5256231, at *i; Pet. for Writ of Cert., *Winston & Strawn LLP v. Ramos*, 589 U.S. 921 (2019) (No. 18-1437), 2019 WL 2140500, at *i; Pet. for Writ of Cert., *Live Nation Entm't, Inc. v. Heckman*, 146 S. Ct. 96 (2025) (No. 24-1145), 2025 WL 1349073, at *i.

III. This case is a poor vehicle for review of the questions presented.

This case is a poor vehicle for review as it is an unpublished decision and the questions presented were not addressed by the parties or the courts below.

A. The memorandum is neither binding nor comprehensive.

The petition's challenge to the memorandum decision raises two problems for this Court's review.

First, under the Ninth Circuit’s own rules, the decision below is nonprecedential and therefore could not have announced a new rule with the “sweeping consequences” Avia decries. Pet. 29. Ninth Circuit Rule 36–3 dictates that “unpublished dispositions and orders of the Court are not precedent,” though they may have some preclusive effect in the same or related litigation. The reason for this is simple enough. As the Seventh Circuit explained concerning its own identical rule, “[s]ince almost all unpublished decisions are affirmances, the effect would be to create an immense body of precedents consisting of all district court decisions that had ever been appealed and affirmed without a published opinion.” *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995). So even if the panel’s memorandum decision conflicted with in- or out-of-circuit precedent—which it does not—it still could not create a split in authority deserving of this Court’s review.

Second, and relatedly, the Ninth Circuit and the district courts therein treat unpublished memorandum dispositions differently than full opinions of the court. Avia repeatedly errs in even referring to the decision as an “opinion,” because Ninth Circuit rules distinguish between “opinions” and unpublished “memoranda” or “orders.” In this case specifically, the Ninth Circuit’s decision was not required to engage with, or restate, all of the bases for procedural unconscionability identified by the District Court. *See* 9th Cir. General Order 4.3.a. So, the concise wording that Avia paints as propounding novel rules for procedural unconscionability is in fact just the bare minimum explanation for why the District Court did not err.

B. The questions presented are tangential to the lower courts' holdings.

This case is also a poor vehicle because the challenged decision rests on ample alternative grounds. The District Court's finding that the delegation clause and agreement were unconscionable rested on a wide set of factors, only some of which were expressly reiterated by the Ninth Circuit in its order affirming the District Court's opinion in full. So, there are adequate other grounds for finding the agreement unenforceable according to the sliding scale of procedural and substantive unconscionability. Those grounds, which Avia's petition does not challenge, include hiding major modifications behind in-app pop-ups, the use of hard-to-read text, the lack of mutuality, illegal shortening of the limitations period, and the very batching provision that provided the main basis for unconscionability both in the District Court and on appeal. Thus, even if this Court agrees with Avia about the narrow questions presented, a remand would not change the outcome. There is no reason for this Court to grant review of ancillary, case-specific conclusions of state law reached by lower courts in memorandum decisions.

CONCLUSION

For all the reasons stated above, the Court should deny the petition.

Respectfully submitted,

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