No. 25-1008

IN THE

# Supreme Court of the United States

AVIAGAMES, INC.,

*Petitioner*,

v.

ANDREW PANDOLFI AND MANDI SHAWCROFT,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION


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## INTRODUCTION

The Ninth Circuit has once again refused to enforce the Federal Arbitration Act (FAA), this time through two distinct mechanisms that are specifically designed to convert the facially neutral doctrine of unconscionability into an anti-arbitration doctrine: (1) a rule deeming arbitration agreements procedurally unconscionable because they incorporate an arbitration provider's "then-current" rules; and (2) California's severability doctrine, which authorizes courts to deny severance when purportedly unconscionable terms indicate a "systematic effort to impose arbitration on the weaker party." Together, these mechanisms single out and disfavor arbitration agreements. Certiorari is warranted to end this thinly veiled hostility to arbitration.

On the first issue, Respondents all but concede that incorporating "then-current" AAA rules cannot render an arbitration agreement procedurally unconscionable. They do not dispute that such clauses follow the same model as countless non-arbitration contracts that incorporate then-current rules from external sources. Instead, Respondents offer only the thin defense that the Ninth Circuit was applying generally applicable unconscionability standards. As *AT&T Mobility LLC v. Concepcion* makes clear, that defense is not viable: the FAA preempts even facially neutral doctrines when they "derive their meaning from the fact that an agreement to arbitrate is at issue" or "have a disproportionate impact on arbitration agreements." 563 U.S. 333, 339, 342 (2011).

On the second question, Respondents have no answer to the fact that California's "interests-of-

justice" severability inquiry facially targets arbitration by name, directing courts to ask whether "the stronger party engaged in a systematic effort to impose arbitration on the weaker party." *Ramirez v. Charter Commc'ns, Inc.*, 551 P.3d 520, 547 (Cal. 2024). Instead, Respondents argue only that California has applied a *different* prong of its "interests-of-justice" standard in one other context: choice-of-law clauses under the Song-Beverly Act. That solitary data point does not alter the facial discrimination, nor does it cure the doctrine's vastly disproportionate impact on arbitration agreements.

Respondents cannot dislodge the reality that the Ninth Circuit and California stand alone in their understanding of the FAA's compatibility with these arbitration-specific doctrines. The consequences will continue to destabilize arbitration agreements throughout the nation's largest circuit until this Court intervenes—as it has done repeatedly when the Ninth Circuit has defied the FAA. This case is an ideal vehicle to do so.

## ARGUMENT

### I. Respondents' Defense of the Ninth Circuit's "Then-Current Rules" Holding is Meritless.

**1.** Respondents' lead argument attempts to recast the Ninth Circuit's holding as a mere observation about one "factor" in a totality-of-the-circumstances analysis for unconscionability. BIO.9-11. That characterization is wrong on multiple levels.

To start, it is contradicted by the decision itself. While the Ninth Circuit did cite multiple factors when assessing the *delegation clause's* procedural unconscionability, it identified only one basis for

extending that conclusion to the arbitration agreement as a whole: "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. Because California requires both procedural and substantive unconscionability to invalidate a contractual provision, *see Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000), that holding was dispositive on the validity of the arbitration agreement here.

The panel underscored this reasoning by reiterating 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 v. Live Nation Ent'mt, Inc.*, 120 F.4th 670, 682 (9th Cir. 2024)). This was no passing observation about one variable in a multi-factor test. It was a categorical pronouncement that incorporating an arbitral provider's current rules is itself a ground for procedural unconscionability. That holding reaches virtually every arbitration agreement in the Ninth Circuit.

This holding structurally disadvantages arbitration agreements under California's "sliding scale" approach to unconscionability. *Armendariz*, 6 P.3d at 690. Under that framework, slight evidence of substantive unconscionability suffices when procedural unconscionability is strong enough to "tip the scale and render the arbitration provision unconscionable." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006) (en banc); Pet.App.4a. By treating incorporation of changeable rules as

inherently contributing to procedural unconscionability, the Ninth Circuit has tipped the scales against any agreement incorporating AAA or JAMS rules—encompassing the vast majority of consumer and commercial arbitration agreements.

**2.** Respondents are equally wrong to suggest that the Ninth Circuit is aligned with other courts. They rely on a sleight of hand, highlighting cases in which the Ninth Circuit has generally approved incorporation of AAA rules. That is not the issue. The decision below held that any contract incorporating the "*then-current rules*" of an arbitration entity is procedurally unconscionable. Pet.App.5a. And because major arbitration providers—such as AAA and JAMS—specify by default that then-current rules apply, *see* Pet.16-17, the practical effect is that parties must affirmatively override those defaults and freeze existing rules at the time of contracting. No other circuit has imposed such a requirement.

The very line of cases Respondents cite—holding that parties may incorporate third-party rules generally, *see, e.g.*, *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1262 (9th Cir. 2017)—only underscores the incoherence of the Ninth Circuit's more recent position. Under prior Ninth Circuit law, failure to attach a copy of the AAA rules "does not affect the finding of procedural unconscionability," *id.*, but, now, a mutual agreement to use then-current rules does. That contradiction is untenable.

Respondents also defend the decision below by invoking the unremarkable principle that a contract is procedurally unconscionable if it results in unfair surprise. BIO.13-14. Petitioner does not take issue with that principle. The Ninth Circuit wrongly

targeted arbitration agreements in conflict with other circuits when it held that assenting to "then-current" AAA rules *does* result in unfair surprise. Other courts have found unfair surprise only where the arbitration agreement was never furnished to the consumer or provided only after enrollment, such that the party literally "c[ould] not assent to something he does not know exists." BIO.14 (quoting *Bacon v. Avis Budget Grp., Inc.*, 959 F.3d 590, 601 (3d Cir. 2020)). Here, the full text of the arbitration agreement was presented to Respondents, including the incorporation of the AAA's then-current rules, which are publicly available and easily accessed. *See* Pet.App.112a. The Ninth Circuit thus stands alone in condemning the AAA's default rules as a source of unconscionability. *See, e.g.*, Pet.12-15.

**3.** On the merits, Respondents can muster only the assertion that the panel was applying California's general unconscionability doctrine. *See* BIO.18-21. This is not a serious response. Lower courts cannot specifically target and invalidate arbitration agreements with impunity merely by invoking unconscionability. Again, even "when a doctrine thought to be generally applicable, such as … unconscionability," is at issue, the FAA prohibits applications that "derive their meaning from the fact that an agreement to arbitrate is at issue" or that "have a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 341-42. To conclude otherwise "would enable the court to effect what … the state legislature cannot." *Id.* at 341 (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)). Likewise, the FAA "displaces any rule that covertly accomplishes the same objective by

disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251-52 (2017).

These principles apply squarely here. Respondents offer no response to Petitioner's demonstration that the rule applied below disfavors arbitration agreements uniquely. California courts routinely allow parties to incorporate rules subject to change. As applied to arbitration, such clauses are functionally identical to forum-selection or choice-of-law clauses or clauses that require compliance with the Federal Rules of Evidence, which likewise subject parties to procedural rules that evolve over time. *See, e.g.*, *EpicentRX, Inc. v. Superior Ct.*, 572 P.3d 1, 10-11 (Cal. 2025) (reiterating presumption in favor of forum-selection clauses). It is thus no accident that the decision below spoke in arbitration-specific terms, holding that "'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) (emphasis added). That language targets arbitration by name and has no analog in California's treatment of any other type of contract.

**4.** Respondents offer no meaningful response to the far-reaching consequences flowing from the rule confirmed below. Nearly all arbitration agreements incorporate procedural rules. And the major arbitration providers specify by default that the rules in effect at the time of arbitration apply, rather than those in effect at the time of contracting. *See* Pet.16-17. The Ninth Circuit's rule thus renders a common attribute of arbitration a basis for invalidation.

Respondents suggest that the unpublished status of the decision below limits its impact. BIO.18. That argument fails for multiple reasons, *see infra* Section III, but most importantly because the decision below applies *Heckman*—a published, precedential decision. *See* 120 F.4th at 687. Going forward, nearly every arbitration agreement in the Ninth Circuit will carry a built-in "modest degree" of procedural unconscionability—inherently reducing the quantum of substantive unconscionability needed to invalidate an arbitration agreement under California's sliding scale approach.

## II. Respondents' Defense of California's Anti-Arbitration Severability Doctrine Fails.

Respondents fare no better in defending the Ninth Circuit's refusal to sever. Each of their arguments collapses on examination.

**1.** Respondents first argue that Avia "never previously raised the argument that the FAA preempts California's severability law," and that the issue is therefore not properly before this Court. BIO.22. Not so. Petitioner argued below that the district court's reliance on the "chill" to hypothetical consumers—the central rationale for declining to sever, *see* Pet.App.29a-30a, 40a—violated the FAA under *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). More broadly, Petitioner argued that the FAA's pro-arbitration policy and the agreement's severability clause required severance of any unconscionable provisions. *See* Appellant's Opening Brief, ECF No. 13.1, at 82-84; Appellant's Reply Brief, ECF No. 43.1, at 34.

In any event, the severance issue presents a question of law that this Court may address regardless of how it was articulated below. *See, e.g.*, *Lebron v. Nat'l R.R. Pass. Corp.*, 513 U.S. 374, 379 (1995) (this Court will consider a new legal theory where the question is one of law and the relevant facts are fully developed); *see also Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (defining distinct legal theories as "separate *arguments* in support of a single claim").

Respondents' cramped view of preservation is particularly inappropriate here, where both the Ninth Circuit and the California Supreme Court have squarely and recently rejected the claim that California's severability doctrine violates the FAA. *See, e.g.*, *Heckman*, 120 F.4th at 689; *Ronderos v. USF Reddaway, Inc.*, 114 F.4th 1080, 1103 (9th Cir. 2024); *Ramirez*, 551 P.3d at 548. Given those holdings, it is unclear what further analysis Respondents expected the lower court to provide. Only this Court can bring California's severability doctrine into conformity with the FAA.

**2.** Respondents' principal merits argument—that California's severability doctrine "applies with equal force to both arbitration agreements and non-arbitration contracts" (BIO.2)—ignores both the standard itself and its operation in practice.

California severance law permits courts to decline to sever offending terms, where they are otherwise severable, "because the interests of justice would be furthered." *Ramirez*, 551 P.3d at 547. Specifically, severance may be refused in two circumstances: (1) where severance would "condone an illegal scheme," or (2) where "the defects in the agreement

indicate that the stronger party engaged in a systematic effort *to impose arbitration* on the weaker party ... to secure a forum that works to the stronger party's advantage." *Id.* (emphasis added). Courts may decline to sever "[i]f the answer to either question is yes." *Id.*

This standard expressly *singles out* arbitration as one of two situations in which courts apply the interests-of-justice inquiry to override severability. *See* 551 P.3d at 547. It thus "discriminat[es] on its face against arbitration." *Kindred Nursing Ctrs.*, 581 U.S. at 251.

That conclusion is not altered by Respondents' three cited decisions involving the sole other context where California courts have applied the interests of justice standard to deny severance: where choice-of-law and forum-selection clauses violate unwaivable consumer rights under the Song-Beverly Act. In that lone context, some courts have found that severance "would function to condone an illegal practice." *Hardy v. Forest River, Inc.*, 108 Cal. App. 5th 450, 460 (2025) (collecting divided authority). But that is a *separate* prong of the *Ramirez* framework—it says nothing about the arbitration-specific prong at issue here.

Setting aside Respondents' inability to cite any decision outside that narrow context, the existence of a single additional circumstance where one prong of the standard has applied does not alter the fact that *Ramirez*'s second prong targets arbitration on its face. And, even if the standard were not facially discriminatory, it would still "have a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342.

This case illustrates the doctrine's arbitration-specific operation with precision. The challenged provisions—a bellwether batching procedure and a shortened limitations period—are "collateral to the agreement's main purpose." *Ramirez*, 551 P.3d at 547. Removing them would leave the parties' bilateral commitment to arbitrate wholly intact. In any non-arbitration context, severance would be routine. Yet the Ninth Circuit refused to sever because this is an arbitration agreement, invoking California's "interests-of-justice" standard to punish Avia for "'engag[ing] in a systematic effort to impose arbitration on the weaker party....'" Pet.App.6a (quoting *Ramirez*, 551 P.3d at 547). That singles out arbitration for disfavored treatment.

**3.** Respondents next assert that California's doctrine is consistent with other state and federal courts, but once again they engage in a sleight of hand. They point to the unremarkable proposition that other States decline to sever when unconscionability pervades an entire agreement. BIO.25-26. That is hornbook contract law. What is decidedly *not* hornbook law is California's "interests of justice" standard, which targets arbitration by name and invites lower courts to invalidate entire arbitration agreements as a "deterrent." *Ramirez*, 551 P.3d at 547. Here, there is no dispute that the core arbitration commitment could survive without the purportedly unconscionable provisions. It was solely because of the interests-of-justice standard that the Ninth Circuit invalidated the arbitration agreement here. *See* Pet.App.5a.

As for federal courts, Respondents resist the clear import of *Oblix Inc. v. Winiecki*, which recognized—in

the specific context of evaluating California's severability doctrine—that imposing any "special hurdles for arbitration agreements" or "novel rule" would violate the FAA. 374 F.3d 488, 492 (7th Cir. 2004) (interpreting *Armendariz*, 6 P.3d 669). That is precisely what California has since clarified its law does and what the Ninth Circuit has since endorsed: arbitration agreements must undergo special review to determine whether a "stronger party" is seeking to "impose arbitration" on others. *Ramirez*, 551 P.3d at 547. Nor can Respondents distinguish the multiple circuit courts holding that the FAA requires enforcement of severability clauses as written—something the Ninth Circuit refused to do despite Petitioner's urging. *See* Pet.22-24.

## III. This Case Is an Excellent Vehicle.

**1.** Respondents close by arguing that this case is a poor vehicle because the Ninth Circuit did not publish its decision. This Court has long rejected that objection. *See Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) ("[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case."). The Court regularly grants certiorari to review unpublished decisions. *See, e.g.*, *Clark v. Sweeney*, 607 U.S. 7, 10 (2025) (per curiam); *Lora v. United States*, 599 U.S. 453 (2023); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); R. Brown *et al.*, *Is Unpublished Unequal?*, 107 Cornell L. Rev. 1, 139-45 (2021) (cataloging 75 additional examples). Indeed, if the unpublished nature of a decision were sufficient to foreclose this Court's review, there may never be an appropriate vehicle to correct the Ninth Circuit's defiance of the FAA—as that court routinely resolves arbitration

disputes through unpublished memorandum dispositions.

More fundamentally, the decision below is not an isolated aberration. It reflects and applies established precedent—namely, *Ramirez* and *Heckman*—that is fully binding and precedential. Its errors are the predictable and recurring product of a body of law that systematically disfavors arbitration.

**2.** Respondents also contend that the questions presented are "tangential" because the unconscionability finding rested on a "wide set of factors." BIO.31. This argument is flawed several times over.

As demonstrated above, the Ninth Circuit cited the fact that the agreement "incorporates AAA rules that are subject to change" as its sole ground for finding the arbitration agreement procedurally unconscionable. *See supra* Section I. But even accepting Respondents' characterization that it was one factor among three, vacatur would still be warranted. This Court has vacated rulings when it was "unclear … to what degree" the holding "was influenced by the invalid" discrimination under the FAA. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533-34 (2012). More broadly, this Court routinely evaluates the permissibility of individual factors in multi-factor balancing tests, understanding that the appropriate remedy is to vacate and remand for analysis free from error. *See, e.g.*, *Esteras v. United States*, 606 U.S. 185, 203-04 (2025); *Sochor v. Florida*, 504 U.S. 527, 540 (1992).

The second question is independently dispositive. Even if some provisions of the arbitration agreement

were unconscionable, the sole basis for invalidating the entire arbitration agreement was California's facially discriminatory interests-of-justice standard. Without that standard, the unconscionable provisions must be severed and the arbitration agreement enforced.

In recent years, this Court has repeatedly intervened to correct the Ninth Circuit's and California's persistent refusal to enforce the FAA. *See* Pet.26-28. This case is no different. The errors are clear. The conflicts are real. And the consequences are severe. Certiorari is warranted.

## CONCLUSION

The petition should be granted.

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Respectfully submitted,

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