No. 19-875

IN THE

Supreme Court of the United States

OTO, L.L.C.,

Petitioner,

v.

KEN KHO ET AL.,

Respondents.

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

BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION, CALIFORNIA EMPLOYMENT LAW COUNCIL, AND ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Amici respectfully submit this brief in support of petitioner OTO, L.L.C.[1]

INTEREST OF AMICI CURIAE

The California New Car Dealers Association (CNCDA) is the nation's largest state automobile dealer association, representing nearly 1,200 franchised new car and truck dealers throughout California. CNCDA seeks to create a business environment in which new car dealers can thrive, provide the best products and services to consumers, and maintain high employment rates. CNCDA also protects and promotes the interests of franchised new car dealers before government and regulatory agencies. To that end, it represents the views of its members on important issues that arise in public forums, including the courts.

The California Employment Law Council (CELC) is a voluntary, non-profit organization that promotes the common interests of employers and the general public in fostering the development in California of

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Amici notified the parties of their intention to file this brief more than ten days before the due date, and all parties provided consent to the filing of this brief.

reasonable, equitable, and progressive rules of employment law. CELC's membership includes about 70 private sector employers in the State of California who collectively employ well in excess of a half-million Californians. CELC prides itself on being a moderate employer organization, and seeks evenhanded employment laws in California, fair to employer and employee alike.

The Association of Southern California Defense Counsel (ASCDC) is the nation's largest regional organization of lawyers who specialize in defending civil actions. ASCDC counts as members over 1,000 attorneys in Southern and Central California, and is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous cases, including those that concern the scope and application of the Federal Arbitration Act (FAA).

Like many businesses throughout the United States, the members and clients of CNCDA, CELC, and ASCDC enter into contracts with their employees and consumers that adopt the time- and cost-saving options afforded by the FAA to resolve disputes promptly and efficiently. Judicial decisions that undermine the FAA thwart these efforts to achieve a swift, economical, and fair outcome when disagreements arise.

The California Supreme Court's ruling in this case frustrates the purposes of the FAA, singles out arbitration agreements for disfavored treatment, and puts employers seeking to use arbitration agreements in a bind. This Court should summarily reverse or grant review for reasons explained below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress passed the FAA nearly a hundred years ago "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The Act bars both explicitly disfavoring arbitration, and "covertly accomplish[ing] the same objective," *Kindred Nursing Ctrs. Ltd. Partnerships v. Clark*, 137 S. Ct. 1421, 1426 (2017), through the use of "more subtle methods" that "target arbitration," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018).

Yet judicial hostility to arbitration continues unabated in the nation's most populous state. As this Court has observed, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion,* 563 U.S. at 342-43. The California Supreme Court's method of choice for targeting arbitration has been the unconscionability doctrine, because the FAA allows states to apply generally applicable defenses to void arbitration agreements. 9 U.S.C. § 2.

In this case, the California Supreme Court held that a standard employment arbitration agreement that treats employees fairly—allowing broad discovery and requiring the employer to pay the costs of arbitration—is nevertheless both procedurally and substantively unconscionable.

That decision is flatly wrong. A state court may not, under the guise of applying the unconscionability doctrine, frustrate the fundamental purposes of arbitration. Nor may a state apply less favorable rules to evaluate arbitration agreements than other contracts.

Nor may a state void an arbitration agreement just because the state believes that a different forum would provide superior benefits to certain of its citizens. Yet the California Supreme Court did all three in the decision below.

The California courts' dismissive attitude toward arbitration impacts millions of employers and employees. This case involves a straightforward application of principles announced by this Court in *Concepcion* and other cases. Summary reversal is appropriate.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S FACT-INTENSIVE PROCEDURE IS INCONSISTENT WITH THE FAA.

This case concerns the validity of a standard employment arbitration agreement. Despite having agreed to arbitrate all disputes with his former employer, respondent Ken Kho sought to avoid arbitration and instead engage in an administrative process known as a Berman hearing.

The California Supreme Court struck down the arbitration agreement as both procedurally and substantively unconscionable, but stressed that its holding was limited and fact-intensive. The court repeatedly noted that it deemed this case to have a high degree of procedural unconscionability, and suggested its conclusion might be different otherwise. *E.g.*, Pet. App. 33a.

The fact-intensive nature of this holding is no impediment to this Court's review; indeed, the fact-

intensive test itself violates the FAA for at least two reasons. First, the procedure mandated by the California Supreme Court—conducting a minitrial on the benefits of arbitration compared to an alternate procedure—frustrates the aims of the FAA and is therefore preempted. Second, the inquiry prescribed by the court violates the rule that arbitration agreements must be placed on the same footing as other agreements.

A. The procedure frustrates fundamental attributes of arbitration.

The California Supreme Court's use of a fact-specific test is not in any way a sign of deference to the FAA. In an earlier case, the California Supreme Court tried to impose a categorical rule that all arbitration agreements in the employment context are per se unconscionable because of the lack of Berman process. *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011), *cert. granted, judgment vacated,* 565 U.S. 973 (2011) (*Sonic I*).

But that rule was short-lived. Just a few months after *Sonic I*, this Court decided *Concepcion*, overturning an earlier California Supreme Court decision rejecting an arbitration agreement on unconscionability and public policy grounds. *Concepcion*, 563 U.S. at 341-42 (overturning *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005)). This Court vacated and remanded *Sonic I*, and based on the clear analysis of *Concepcion*, even the California Supreme Court had to grudgingly concede that its "categorical rule" prohibiting a waiver of Berman procedures was

preempted. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1124, 1139-41 (2013) (*Sonic II*).[2]

Since a categorical approach was not an option after *Concepcion*, the court pivoted to a fact-intensive approach, explaining "[a]rbitration agreements could not be deemed categorically unconscionable simply because they entail a waiver of the Berman proceedings. However, . . . an employee's Berman waiver, while not dispositive, remains a significant factor in considering unconscionability." Pet. App. 11a (citation omitted).[3]

While the FAA allows states to apply generally applicable contract defenses, 9 U.S.C. § 2, states may not apply "rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343; *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). Nor may states use the unconscionability analysis to achieve ends that "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 347 n.6.

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[2] This Court denied the petition for certiorari in *Sonic II*, 573 U.S. 904 (2014), but that petition was from an interlocutory decision—the California Supreme Court had remanded for the trial court "to examine additional evidence regarding the particulars of the arbitration process set out in the agreement." Pet. App. 12a (citing *Sonic II*). The case was resolved in the trial court on remand (Los Angeles Super. Ct. No. BS107161, Sept. 4, 2014 Minute Order), so this Court had no other chance to review the final decision.

[3] Using the lack of Berman process as a "significant factor" is just as preempted as using it as the sole factor for the reasons explained in Section II.

Yet the California Supreme Court has prescribed a complex process to assess arbitration agreements in employment cases: The trial court must sit in judgment of the arbitration procedure and ensure arbitration is as beneficial for employees as an administrative proceeding. *See, e.g.*, Pet. App. 12a. As the court explained here, "in exchange" for the employee's decision to give up Berman rights, the "arbitral scheme must offer employees an effective means to pursue claims for unpaid wages, and not impose unfair costs or risks on them or erect other barriers to the vindication of their statutory rights." Pet. App. 26-27a.

To evaluate whether the arbitration agreement meets this test the California Supreme Court instructed lower courts to "closely scrutinize" the terms of the arbitration agreement, being "sensitive to 'the context of the rights and remedies that otherwise would have been available to the parties.' " Pet. App. 20-21a (quoting *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 922 (2015)). The courts must compare arbitration to the administrative Berman process, "examin[ing] both the features of dispute resolution adopted" in the arbitration agreement "as well as the features eliminated." *Id*. at 21a.

The FAA bars this procedure. As this Court put it in *Italian Colors*, "[s]uch 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." *Italian Colors Rest.*, 570 U.S. at 239. Requiring a minitrial on the comparative benefits of arbitration interferes with the FAA's goal of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*,

563 U.S. at 344; *see also, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 357 (2008). The "FAA does not sanction such a judicially created superstructure." *Italian Colors Rest.*, 570 U.S. at 239.

This case is a good illustration. The proceedings have taken more than four years—and counting—just to determine whether the arbitration agreement is enforceable. Pet. App. 25a n.15. The trial court ruled that the employee's loss of Berman procedures was substantively unconscionable, Pet. App. 5-6a, the court of appeal ruled it was not and reversed, *id.* at 109a-116a, and the California Supreme Court reversed again, *id.* at 39a.

Indeed, even though the state court of last resort reviewed this case, that court went to great lengths to make clear it was not even resolving the enforceability of other *identical* arbitration agreements, let alone different agreements. Pet. App. 30-31a (suggesting that the same arbitration provision "might pass muster under less coercive circumstances").

Under the California Supreme Court's framework, every future California wage-dispute case in which an employee makes a claim of unconscionability will require a full-blown evidentiary analysis to judge the arbitration process and scrutinize whether that process provides employees as many rights as a state administrative proceeding. "Arbitration, if it ever occurred . . . would likely be long delayed, in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.' " *Preston*, 552 U.S. at 357 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). But this

Court has made clear that state law is preempted when it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' " of the FAA. *Concepcion*, 563 U.S. at 352.

The fact-intensive procedure set out by the California Supreme Court for judging the comparative benefits of arbitration agreements stands as an obstacle to the FAA's goal of streamlining arbitration procedures and enforcing parties' agreements according to their terms. It is thus preempted.

B. The procedure discriminates against arbitration agreements.

The California Supreme Court's decision also violates the rule that a court may not apply the unconscionability doctrine "in a fashion that disfavors arbitration," *Concepcion*, 563 U.S. at 341, nor may it construe an arbitration "agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

California law generally focuses the analysis of unconscionability on whether the agreement is unfairly one-sided. Pet. App. 20a. The party attacking the agreement must prove the contract contains a "substantial degree of unfairness beyond 'a simple old-fashioned bad bargain.' " *Sonic II*, 57 Cal. 4th at 1160; Pet. App. 20a.

As explained above, though, when employees attack arbitration agreements, that standard is inverted. The court must hold a minitrial on the costs and benefits of arbitration compared to alternate employee-friendly administrative procedures. *E.g.*, *Sonic II*, 57 Cal. 4th at 1146. Rather than placing the

burden on the party attacking the agreement to show "a substantial degree of unfairness," the court must police the agreement to ensure the party attacking that agreement did not lose any rights and got a good bargain. *E.g.*, Pet. App. 26-27a.

This is simply not how contract law usually works, in California or elsewhere. Courts don't usually scrutinize every aspect of a bargain to be sure that each party got the same rights under the agreement as they gave up. New and separate consideration is not required for every individual item that a party gives up in agreeing to the contract—and analyzing contract claims would be hopelessly complicated if it were. *See* Pet. App. 58-60a (Chin, J. dissenting) (explaining how test set out by majority is far more elaborate than usually required under California law); *see also Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491-92 (7th Cir. 2004) (Easterbrook, J.) (applying California law).

Indeed, the California Supreme Court itself candidly admitted that it was applying an arbitration-specific test, noting that "the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 119 (2000).

This Court has made clear that the FAA incorporates "an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' " *Kindred Nursing*, 137 S. Ct. at 1426. When "a state treats

arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted by § 2 of the Federal Arbitration Act." *Oblix, Inc.*, 374 F.3d at 492. California's use of a special just-for-wage-arbitration test violates federal law.

II. CALIFORNIA MAY NOT REFUSE TO ENFORCE AN ARBITRATION AGREEMENT BECAUSE THE STATE BELIEVES A DIFFERENT FORUM WOULD OFFER MORE BENEFITS.

The California Supreme Court held that the parties' decision to resolve their disputes before a neutral arbitrator, rather than in an administrative Berman proceeding, made the agreement substantively unconscionable. But that conclusion flouts the FAA. A state court may not invalidate an arbitration agreement based on its own "judgment concerning the forum for enforcement of [a] state-law cause of action." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006).

As the court of appeal decision bluntly acknowledged and the California Supreme Court never questioned, the arbitration procedure here treated the parties *equally*. Pet. App. 6-7a. There was no unfair fee-shifting, one-sided discovery rules, or other features that favored the employer. Instead, the agreement provided for arbitration "before a retired superior court judge, pursuant to the California Arbitration Act, with full discovery permitted." *Id.* at 4a (citations omitted). The employer must "pay both the costs of arbitration and a successful claimant's reasonable attorney fees." *Id.* at 6a (citations omitted);

see also id. at 111a ("One Toyota acknowledges that it must pay all costs of arbitration under the Agreement").

The California Supreme Court declared the arbitration agreement substantively unconscionable because it was *insufficiently one-sided*—that is, because it did not put a thumb on the scale for the employee as a Berman hearing would but treated both sides equally like court litigation. The court enumerated various ways in which the alternative Berman procedure slants in favor of the employee: hand-holding by the administrative agency in initiating a complaint, counseling of the employee at hearing, and judgments collection by the Labor Commissioner. *Id.* at 20-22a, 30-31a. In contrast, the court observed, the arbitration agreement "closely resembled civil litigation." *Id.* at 31a.

The court acknowledged that "litigation-like procedures, on their own, are not necessarily so one-sided as to make an arbitration agreement unconscionable." *Id.* at 25a. Civil litigation has been "carefully crafted to ensure fairness to both sides" and is not "per se unfair." *Id.* at 25-26a. This was a necessary concession, as otherwise the court would be maintaining that litigation in California's own system of civil courts is one-sided.

Still, the court found the arbitration agreement substantively unconscionable because it mandated arbitration on an even footing rather than the pro-employee Berman procedure. Or, as the court put it, "[b]y signing the agreement, [the employee] surrendered the full panoply of Berman procedures and assistance we have described. What he got in return

was access to a formal and highly structured arbitration process that closely resembled civil litigation *if* he could figure out how to avail himself of its benefits and avoid its pitfalls." *Id.* at 31a (emphasis in original).[4]

The court tried to obscure its holding by stressing that a low level of substantive unconscionability would suffice in this context to void the agreement. But the court still acknowledged that *some* substantive unconscionability was required under California law to declare an agreement unenforceable. *Id.* at 14a ("Both procedural and substantive unconscionability must be shown" to find unconscionability under California law); *id.* at 20a ("procedural unconscionability alone does not invalidate a contract"); *see also Armendariz*, 24 Cal. 4th at 114.

The court also acknowledged that the *only* argument for substantive unconscionability was the choice

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[4] The court's ruling also puts California employers seeking to use arbitration agreements in a Catch-22. Under decades-old precedent, California courts refuse to enforce arbitration agreements if they *do not have enough* neutral litigation-like procedures. In *Armendariz*, 24 Cal. 4th at 91, that court held that an employment arbitration agreement "must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration." California courts have struck down many agreements for containing insufficient litigation-like procedures. *E.g.*, *Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242, 1248-49 (2011). Yet here the court found the agreement substantively unconscionable because it contained *too many* neutral litigation-like procedures. Congress passed the FAA to prevent precisely this sort of state hostility to arbitration.

of arbitration rather than a Berman hearing. Pet. App. 21a ("[The employee] and the Labor Commissioner do not focus on the fairness of specific, isolated terms in the agreement. Rather, they contend One Toyota's arbitral process is so inaccessible and unaffordable, considered as a whole, that it does not offer an effective means for resolving wage disputes.").

Yet the court still held that the arbitration agreement met the threshold for substantive unconscionability. Under the court's analysis, choosing arbitration rather than a Berman hearing *by itself* renders an agreement so "unfairly one-sided" that it qualifies as substantively unconscionable. Pet. App. 11a.

But a state court may not rule that arbitration is substantively unconscionable because the court believes a different, non-arbitration procedure would be better. As explained in Section I.B and in the petition, this violates the rule that states may not disfavor arbitration agreements or scrutinize them differently than other contracts. And, as this Court made clear in *Concepcion*, 563 U.S. at 351, "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." For this reason, too, the California Supreme Court's decision conflicts with the FAA.

III. THIS COURT SHOULD SUMMARILY REVERSE.

Summary reversal is unusual, but warranted here. This Court has repeatedly instructed the California courts that they must enforce to the FAA, but California continues to ignore that instruction. To correct California's persistent refusal to apply the FAA, this Court need not "decide any new or

unanswered question of law, but simply correct[] a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999).

The stakes are high. There are over 17 million people employed in California, millions of whom work in sales or other occupations likely to have arbitration agreements. *See* U.S. Bureau of Labor Statistics, *State Occupational Employment and Wage Estimates: California* (May 2018), https://www.bls.gov/oes/current/oes_ca.htm#00-0000 (last modified Apr. 2, 2019). As Justice Chin warned, "the majority's new rule will significantly impact the enforceability of virtually all mandatory, predispute arbitration agreements in the employment context" in California. Pet. App. 46a (Chin, J., dissenting).[5]

As this Court has noted, "State courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17-18 (2012). When state courts have refused to follow these directives, this Court has not hesitated to step in.

California has been perhaps the most frequent offender, and this Court has had to reverse opinions of California's courts that were hostile to arbitration agreements many times. *See, e.g.*, *Preston*, 552 U.S. 346 (reversing California opinion that refused to

[5] Justice Chin, the lone dissenting voice on the California Supreme Court for many arbitration cases, has announced his retirement from that court.

enforce the terms of an arbitration agreement); *Perry*, 482 U.S. 483 (same); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (same); *see also Concepcion*, 563 U.S. at 352 (reversing Ninth Circuit decision that applied California Supreme Court ruling holding class arbitration waivers unconscionable); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015) (reversing California court of appeal decision finding class arbitration waiver unconscionable even after *Concepcion*); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415-17 (2019) (reversing Ninth Circuit arbitration decision applying California law).

This Court has not hesitated to summarily reverse state court decisions giving short shrift to arbitration agreements. *See, e.g.*, *Nitro-Lift Techs.*, 568 U.S. at 21 (summarily reversing); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (summarily reversing); *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (summarily reversing).

As in other arbitration cases that this Court has summarily reversed, the California Supreme Court's "interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court." *Marmet*, 565 U.S. at 532. As this Court explained in *DIRECTV, Inc.*, "Lower court judges are certainly free to note their disagreement with a decision of this Court. But the 'Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.' The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *DIRECTV*, 136 S. Ct. at 468 (citations

omitted). " 'It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.' " *Nitro-Lift Techs.*, 568 U.S. at 21.

This is not the first time California has thumbed its nose at this Court's arbitration decisions. Nor the second. While a grant of certiorari would be appropriate here, this Court has already spent a great deal of its valuable time correcting California's errant ways. The Court should summarily reverse.

CONCLUSION

For all these reasons and those set out in the petition, the Court should summarily reverse the decision of the California Supreme Court, or grant certiorari and require California to follow the dictates of the FAA.

Respectfully submitted,

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