No. 13-856

In the
Supreme Court of the United States

SONIC-CALABASAS A, INC.,

Petitioner,

v.

FRANK B. MORENO,

Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether the California Supreme Court can invent and apply a new unconscionability test ("unreasonably one-sided"), in lieu of the standard California unconscionability test ("shocks the conscience"), to deny the prompt enforcement of a binding arbitration agreement according to its terms, where the arbitration agreement is governed by the Federal Arbitration Act.

Whether the California Supreme Court can apply a new unconscionability test unique to arbitration contracts that requires an accessible, informal, and affordable mechanism for resolving statutory wage claims, which purports to contradict the U.S. Supreme Court's recent prior decisions in *AT&T Mobility LLC v. Concepcion*, No. 09-893, 563 U.S. ___, 131 S. Ct. 1740 (April 27, 2011) (precluding states from requiring arbitration procedures inconsistent with the FAA, even if based on public policy considerations) and *American Express Co. v. Italian Colors Restaurant*, No. 12-133, ___ U.S. ___, 133 S. Ct. 2304 (June 20, 2013) ("the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims").

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Federal Statutes

State Statutes

Rules

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases in this Court and the California Supreme Court involving the Federal Arbitration Act (FAA) and contractual arbitration in general. *See*, *e.g.*, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Sanchez v. Valencia Holding Co.*, docket no. S199119; *Iskanian v. CLS Transportation*, docket no. S204032; *Gentry v. Superior Court (Circuit City Stores, Inc.)*, 42 Cal. 4th 443 (2007).[1]

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

REASONS FOR GRANTING THE PETITION

The first time the California Supreme Court considered whether Frank Moreno's employment contract with Sonic-Calabasas A (an Acura car dealership) contained a valid arbitration clause, the court invalidated the contract on the categorical grounds that no arbitration provision could preclude an employee's ability to pursue wage claims in an "unwaivable" administrative hearing with the Labor Commissioner pursuant to Cal. Lab. Code § 98 et seq. (a so-called Berman hearing). *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011) (*Sonic I*). Basing its analysis on *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), the court held that the Berman waiver was unconscionable and did not discriminate against arbitration agreements because the Berman hearings furthered "important state interests." 51 Cal. 4th at 693.

Subsequently, this Court held that the *Discover Bank* rule is preempted by the Federal Arbitration Act (FAA) because the rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Concepcion*, 131 S. Ct. at 1753. This Court then granted certiorari in *Sonic I*, vacated that decision, and remanded for further consideration in light of *Concepcion*. On remand, the California Supreme Court acknowledged the obvious: a rule making the Berman hearing categorically unwaivable could not survive *Concepcion*. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1124 (2013) (*Sonic II*). Instead, cobbling together elements of unconscionability caselaw with Labor statutes, *Sonic II* replaced the categorical rule with a

requirement that "an adhesive arbitration agreement that compels the surrender of Berman protections as a condition of employment [must] provide for accessible, affordable resolution of wage disputes." *Id*. at 1150. This requirement reflects the court's extremely narrow construction of both *Concepcion*, interpreted to permit state regulation of arbitration so long as certain "fundamental attributes of arbitration" remain unaffected, and *Italian Colors*,[2] construed as addressing only the relationship of the FAA to other federal statutes.

As amply demonstrated in the Petition for Writ of Certiorari, *Sonic II* improperly singles out arbitration agreements in employment contracts for special, adverse, treatment. It essentially forces California employers to allow employees to file for Berman hearings instead of arbitration, or set up a dispute resolution process that mirrors the Berman hearings, upon penalty of having employment contracts invalidated as unconscionable. While the court below crafted its decision to avoid certiorari by remanding to the trial court for an evaluation of whether the arbitral remedy provides identical benefits to the employee as a Berman hearing, the rationale and holding are sufficiently clear to warrant this Court's review, and reversal.

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[2] *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

I

THE CALIFORNIA SUPREME COURT'S PERSISTENT REFUSAL TO UPHOLD ARBITRATION CONTRACTS FLAGRANTLY CONFLICTS WITH THIS COURT'S DECISIONS

Since 1984, this Court has been reversing California court decisions based on distrust and disapproval of arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 5, 7 (1984) (reversing the California Supreme Court's holding that the state Franchise Investment Law required judicial resolution rather than arbitral resolution because "[p]lainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration."); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (reversing California Court of Appeal decision that the FAA preempts a state labor law authorizing wage collection actions regardless of an agreement to arbitrate: "[U]nder the Supremacy Clause, the state statute must give way."); *Preston*, 552 U.S. at 359 (reversing California Court of Appeal and holding that the FAA's protection of an arbitration agreement vesting jurisdiction over all disputes in an arbitral tribunal supersedes state laws lodging dispute resolution jurisdiction in a different judicial or administrative forum); *Concepcion*, 131 S. Ct. at 1748 (reversing Ninth Circuit application of California *Discover Bank* rule because "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for other reasons."). This most recent example is an earlier petition in this case: *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011)

(vacating *Sonic I*, which categorically forbade waiver of a Berman wage hearing prior to arbitration, for reconsideration in light of *Concepcion*).

Yet each time this Court upholds an arbitration contract because the federal law requires it, the California Supreme Court doubles down on its unrelieved hostility to arbitration. *See Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1095 (2003) (Brown, J., concurring and dissenting) ("this court appears to be 'chip[ping] away at' United States Supreme Court precedents broadly construing the scope of the FAA 'by indirection,' despite the high court's admonition against doing so.") (citation omitted); *Gentry*, 42 Cal. 4th at 473 (Baxter, J., dissenting) (noting the California Supreme Court's "continuing effort to limit and restrict the terms of private arbitration agreements, which enjoy special protection under both state and federal law."). *See also James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1036-37 (S.D. Tex. 2012) (applying California law; noting that some California courts, even post-*Concepcion*, continue to find arbitration forum-selection clauses unenforceable as unconscionable, while applying a far less stringent analysis to forum-selection clauses applicable to litigation).

As a result of this intransigence, this Court continues to receive petitions for writs of certiorari to the California courts by parties seeking validation of arbitration contracts. *See e.g.*, *CarMax Auto Superstores California, LLC v. Fowler*, No. 13-439 at 3, 2013 WL 5553442 (U.S. Oct. 8, 2013) (Pet. for Writ of Cert.) (seeking review and summary reversal of California Court of Appeal decision invalidating an arbitration contract on the "vindication of rights"

theory, in conflict with *Italian Colors*); *Bingham McCutchen LLP v. Harris*, No. 13-351, 2013 WL 5276021, *10 (U.S. Sept. 17, 2013) (Pet. for Writ of Cert.) (seeking review of a California Court of Appeal decision that invalidated an arbitration contract in an employment discrimination case, noting, "The California courts' hostility to arbitration is hiding in plain sight. So determined was the court of appeal to defeat arbitration in this case that the decision it issued conflicts with decisions of this Court and lower courts on almost every core principle of Section 2 jurisprudence."); *Ralphs Grocery Co. v. Brown*, No. 11-880, 2012 WL 151754, *28, (U.S. Jan. 13, 2012) (seeking review of California's "unwaivable statutory rights theory" that operates as an "end-run around the FAA" to invalidate arbitration contracts in conflict with this Court's decisions), *cert. denied* 132 S. Ct. 1910 (2012).

The lower courts in California are obliged to follow the anti-arbitration rulings of the California Supreme Court, even though that court has proven a poor interpreter of how the FAA governs arbitration contracts. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962). *See, e.g.*, *Baker v. Tognazzini Family, Inc.*, No. B247137, 2013 WL 6159167, *5 (Cal. Ct. App. Nov. 25, 2013) (noting that *Concepcion* implicitly disapproved the reasoning of *Gentry v. Circuit City*, but "[u]ntil our Supreme Court holds otherwise, we . . . are obliged to follow *Gentry*"); *Arroyo v. Riverside Auto Holdings, Inc.*, No. E056256, 2013 WL 4997488, *9 (Cal. Ct. App. Sept. 13, 2013) ("*Gentry* remains good law until our Supreme Court decides otherwise."). Federal courts, in conflict with the state courts, show greater deference to this Court's rulings.

See, *e.g.*, *Andrade v. P.F. Chang's China Bistro, Inc.*, No. 12-cv-2724-JLS-JMA, 2013 WL 5472589, (S.D. Cal. Aug. 9, 2013) ("the Court acknowledges the policy considerations underlying *Gentry*, but must hold that *Gentry* cannot preclude enforcement of the [arbitration contract] in light of *Concepcion*."); *Velazquez v. Sears, Roebuck and Co.*, No. 13-cv-680-WQH-DHB, 2013 WL 4525581, *7-*8 (S.D. Cal. Aug. 26, 2013) (holding that plaintiff's claims under the Private Attorney General Act and *Gentry* are foreclosed in light of *Concepcion*).[3]

While the preceding cases focus on *Gentry*, the California Supreme Court's key employment arbitration case, other federal courts have noted that *Concepcion* similarly undermines the rationale of *Armendariz v. Foundation Health Psychcare Svcs., Inc.*, 24 Cal. 4th 83, 115-21 (2000) (establishing a multi-step process for determining unconscionability). In *James v.*

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[3] A federal district court applying California law also noted that California courts generally allow contracts to incorporate documents by reference, but that they hold arbitration contracts to a stricter standard, finding it unconscionable that arbitration contracts would incorporate the American Arbitration Association Rules by reference. *Wallace v. Red Bull Distributing Co*, No. 5:12-CV-02431, __ F. Supp. 2d ___, 2013 WL 3823130, at *9 (N.D. Ohio July 23, 2013). The *Wallace* court found this distinction untenable in light of *Concepcion*, as have other federal courts applying California law. *Id.*, *see also Collins v. Diamond Pet Food Processors of California, LLC*, No. 2:13-cv-00113-MCE-KJN, 2013 WL 1791926, at *5 (E.D. Cal. 2013) (in light of *Concepcion*, arbitration agreements cannot be treated differently from other types of contracts with respect to incorporation by reference); *McFarland v. Almond Bd. of Cal.*, No. 2:12-cv-02778-JAM-CKD, 2013 WL 1786418, at *5 (E.D. Cal. Apr. 25, 2013) (a bright-line rule requiring that a copy of relevant arbitration rules be provided with the arbitration agreement is preempted by the FAA under *Concepcion*); *Ulbrich v. Overstock.com, Inc.*, 887 F. Supp. 2d 924, 933 (N.D. Cal. 2012) (same).

Conceptus, Inc., 851 F. Supp. 2d 1020, the district court applied California law to an employee's challenge to his employment contract's arbitration clause and considered whether *Armendariz* remained viable after *Concepcion*. The court described *Armendariz* as "couching its requirements in terms of unconscionability," but this posture could not mask the policy reasons for the holding in that case, which derived solely from the fact that an arbitration agreement was at issue. *Id.* at 1033. For this reason, the *James* court held that "[t]o the extent *Armendariz* precludes arbitration in any employment dispute if the employee is required to bear any type of expense not present in litigation, it appears preempted" by the FAA. *Id.*

Additionally, in *Hendricks v. AT&T Mobility, LLC*, 823 F. Supp. 2d 1015, 1021 (N.D. Cal. 2011), District Court Judge Breyer acknowledged that *Concepcion* does not discuss *Armendariz* by name, but found that the Supreme Court was not "indifferent" to the issues presented by *Armendariz*. Judge Breyer noted that the dissent in *Concepcion* particularly called out the majority for the potential effect of the decision on plaintiffs with small monetary claims, *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting), to which the majority explicitly responded that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.[4] *Hendricks*, 823 F. Supp. 2d at 1021. Ultimately,

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[4] *See also Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048-49 (N.D. Cal. 2011) ("If the *Concepcion* majority had intended to allow for the plaintiffs to avoid class-action waivers by offering evidence about particular costs of proof they would (continued...)

the court found the arbitration agreement enforceable because it was neither unconscionable nor violated public policy under what remains of *Armendariz*. *Id.* at 1022-23.

While *Concepcion* did not eliminate every possible application of the unconscionability doctrine, it narrows the doctrine considerably. "*Concepcion* outlaws discrimination in state policy that is unfavorable to arbitration by further limiting the savings clause." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013). *See also Litman v. Cellco P'ship*, 655 F.3d 225, 231 (3d Cir. 2011) ("the holding of *Concepcion* [is] both broad and clear"). The function of the courts, as exemplified by *Concepcion*, is to preserve the public's interest in a reliable system for contracting, not protecting parties from their own later-perceived missteps and misjudgments. *See* Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 Clev. St. L. Rev. 187, 206 (2005).

In this case, the California Supreme Court acknowledged that "the FAA preempts *Sonic I*'s rule requiring arbitration of wage disputes to be preceded by a Berman hearing . . . ." *Sonic II*, 57 Cal. 4th at 1149, but still refused to compel arbitration. It remanded to the trial court to determine whether,

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[4] (...continued)
face—essentially applying the underlying rationale of *Discover Bank* without relying on *Discover Bank* as a 'rule'—one would expect it to have drawn attention to such a significant point in response to the dissent."). This Court rejected the "costs of proof" argument in *Italian Colors*, "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." 133 S. Ct. at 2311.

given "the totality of the agreement's substantive terms as well as the circumstances of its formation," the contract is unconscionable because it impedes an employee's right to a Berman hearing, which, it suggested, may be more "speedy" and "affordable" than arbitration. *Id*. at 1146, 1150. As Associate Justice Chin pointed out in a separate opinion, *Concepcion* does not allow courts to invalidate arbitration agreements as unconscionable based on a policy judgment that the arbitration procedure is not adequately "accessible, informal, and affordable." In enacting the FAA, Congress "intended to foreclose [such] legislative attempts to undercut the enforceability of arbitration agreements." *Id*. at 1189 (Chin, J., concurring in part and dissenting in part) (citations omitted). The decision below demonstrates the California courts' creativity in generating new reasons to invalidate employment contracts providing for arbitration of disputes. It conflicts with a clear line of this Court's precedent demanding that lower courts abide by the FAA's explicit command to enforce arbitration agreements.

II

CERTIORARI IS NECESSARY TO ENSURE THAT COURTS REVIEW ARBITRATION CONTRACTS ON AN EQUAL FOOTING WITH OTHER CONTRACTS, FURTHERING THE PUBLIC POLICY IN FAVOR OF CONTRACTUAL FREEDOM

The freedom to make and enforce contracts reflects a fundamental element of free choice and must be protected for that reason. *See, e.g., Stolt-Nielsen*, 559 U.S. at 683 ("Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit.") (citation and quotation marks omitted); *Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) ("[F]reedom of contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ("The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."). Consistent with these principles, the FAA reflects both a "liberal federal policy favoring arbitration agreements" and the "fundamental principle that arbitration is a matter of contract."[5] *Concepcion*, 131

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[5] There is no statute in California, or any other state, that *requires* parties to a transaction to arbitrate disputes. Nonetheless, arbitration frequently is described as "mandatory," by which those who oppose arbitration contracts generally mean (continued...)

S. Ct. at 1745, 1749; *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." (internal quotation omitted)); *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1057 (9th Cir. *en banc* 2013) ("[T]he FAA was intended to 'overcome an anachronistic judicial hostility to agreements to arbitrate'") (citation omitted). This includes arbitral resolution of statutory claims. *Italian Colors*, 133 S. Ct. at 2309; *Feeney v. Dell*, 466 Mass. 1001, 1003 (2013) ("the analysis the Court set forth in *Concepcion* (and reinforced in [*Italian Colors*]) applies without regard to whether the claim sought to be vindicated arises under Federal or State law.").

For these reasons, courts must "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 131 S. Ct. at 1745 (citations omitted); 9 U.S.C. § 2. ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). The "savings clause" permits courts to void arbitration agreements only on state-law grounds that are generally applicable to all contracts. The FAA's preemptive effect extends to grounds that generally

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[5] (...continued)
either that (1) individuals must agree to arbitration if they wish to buy the product or continue being employed; or (2) by agreeing to arbitrate, the contract "mandates" individuals to resolve disputes by arbitration even if they later would prefer to go to court. Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 706 (2001).

exist "at law or in equity for the revocation of any contract[]" when those grounds "have been applied in a fashion *that disfavors arbitration*." *Concepcion*, 131 S. Ct. at 1747 (emphasis added). Thus, it does not allow courts to fashion contract law principles that "stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748. That is, a court may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

This is "a principle of rigorous equality." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119-20 (1st Cir. 1989) ("[N]o state may simply subject arbitration to individuated regulation in the same manner as it might subject some other unprotected contractual device (say, a prescriptive period or exculpatory clause contained within a private contract)."). *See also Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (overturning a state's "public policy" exception to enforcement of arbitration agreements if the matter involved personal injury or wrongful death causes of action); *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (reversing a state court decision which struck down a noncompete agreement that contained an arbitration provision, this Court reminded the state court that "once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."). *Concepcion* specifically invalidated California's *Discover Bank* rule because, as a practical matter, the state's courts applied the unconscionability doctrine in a way that

disproportionately undermined arbitration agreements. *Id*. at 1747-48.

California law acknowledges the public's interest in freedom of contract outside the context of arbitration agreements, and relies on that principle in assessing the validity of plaintiffs' claims to back out of their agreements. "Freedom of contract is an important principle, and courts should not blithely apply public policy reasons to void contract provisions." *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708, 713 (2007); *Aydin Corp. v First State Ins. Co.*, 18 Cal. 4th 1183, 1193 (1998) ("our obligation is to give effect to the language the parties chose, not the language they might have chosen."). Parties are free not to enter into a contract, but if they do they are obligated to perform the contractual obligations. *See Baltimore & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) ("the right of private contract is no small part of the liberty of the citizen, and . . . the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation."); Randy E. Barnett, *Contract Scholarship and Reemergence of Legal Philosophy*, 97 Harv. L. Rev. 1223, 1241-42 (1984) (discussing the consensual transfer of present or future rights as the basis of contract obligations). When the subject is anything other than arbitration, California courts "recognize[] the concept of *freedom of contract* and allows the parties to contract substantial latitude in fixing their rights and responsibilities even in a manner contrary to statute." *Lewis Operating Corp. v. Superior Court*, 200 Cal. App. 4th 940, 946 (2011) (upholding waiver for use of exercise equipment provided by residential landlord), citing *Tunkl v.*

Regents of University of California, 60 Cal. 2d 92, 96-98 (1962)). *See also Hambrecht & Quist Venture Partners v. American Medical Int'l., Inc.*, 38 Cal. App. 4th 1532, 1548 (1995) (upholding contract with modified statute of limitations); *Regional Steel Corp. v. Superior Court*, 25 Cal. App. 4th 525, 528-29 (1994) (upholding indemnification agreement).

Instead of treating arbitration contracts like other types of contracts, California courts use the unconscionability doctrine, "a particularly vague and fuzzy standard," as a cudgel wielded particularly to strike down arbitration contracts. Anthony Niblett, *Tracking Inconsistent Judicial Behavior*, 34 Int'l Rev. L. & Econ. 9, 18 (2013); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 San Diego L. Rev. 609, 622 (2009) ("Not only did the volume of unconscionability cases [in California] increase over the last two decades, the relative success of unconscionability claims increased as well . . . [T]he increase in successful claims was attributable to arbitration clause cases."). In this way, the doctrine is "a fertile source of inconsistent decisions" because California courts disagree as to how to apply *Armendariz*'s sliding scale balancing test. Niblett, 34 Int'l Rev. L. & Econ. at 18. Under the "guise of objectivity," California courts use the "abstract formula" of the sliding scale "to cultivate the appearance of objectivity, while actually enhancing its discretion over subjective analyses of unconscionability." Anthony Rallo, Comment, *Weighing (In) Discretion on a Sliding Scale: California Appellate Court Hands down an Exposé of Modern Approaches to Jurisdiction and Unconscionability*, 5 Y.B. on Arb. & Mediation 315, 323

(2013). Moreover, "these abstract quantifications are so intangible they cannot be articulated (much less recorded) in a manner that fosters future predictability." *Id*. The California Supreme Court in this case took full advantage of the intangible, shifting nature of the unconscionability doctrine to put Moreno's employment contract in limbo, pending yet another judicial review of its provisions under vague standards of "affordability" and "fairness."

CONCLUSION

The petition for a writ of certiorari to the California Supreme Court should be granted.

DATED: February, 2014.

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER contains 3,928 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 13, 2014.

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