No. S199119

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GIL SANCHEZ,

Plaintiff and Respondent,

vs.

VALENCIA HOLDING COMPANY, LLC,

Defendant and Appellant.

After a Decision by the Court of Appeal, Second Appellate District,
Division One, Case No. B228027
Superior Court, Los Angeles County, Case No. BC433634

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ASSOCIATION OF GLOBAL AUTOMAKERS, INC., AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT AND APPELLANT

To the Honorable Tani Cantil-Sakauye, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber"), the Association of Global Automakers, Inc., and the Alliance of Automobile Manufacturers respectfully move for leave to file a brief as *amici curiae* in this matter in support of the defendant and appellant.[1]

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community—including cases involving the enforceability of arbitration agreements with employees or consumers—in a wide variety of state and federal courts. Recent cases in which the Chamber has participated include *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758; *Preston v. Ferrer* (2008) 552 U.S. 346; *Sonic-Calabasas A,*

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[1] No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the *amici curiae*, their members, or their counsel.

Inc. v. Moreno, No. S174475 (pending); *Gentry v. Superior Court* (2007) 42 Cal.4th 443; and *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.[2]

The Association of Global Automakers, Inc., formerly known as the Association of International Automobile Manufacturers, is a nonprofit trade association whose members include the U.S. manufacturing and distribution subsidiaries of 13 international motor vehicle manufacturers, including American Honda Motor Co., Inc.; American Suzuki Motor Corp.; Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Hyundai Motor America; Isuzu Motors America, LLC; Kia Motors America, Inc.; Maserati North America, Inc.; McLaren Automotive, Ltd.; Nissan North America; Peugeot Motors of America; Subaru of America, Inc.; and Toyota Motor North America, Inc. Global Automakers has served as the voice of automobile manufacturers from around the world since 1961 under various names. Its members account for about 40 percent of the motor vehicles built and sold in America today. Global Automakers' mission is to foster an open and competitive automotive marketplace in the United States that works to improve vehicle safety, encourage technological innovation, and promote responsible environmental practices.

The Alliance of Automobile Manufacturers is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. The members of the Alliance are BMW of North America, LLC; Chrysler

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[2] A collection of the Chamber's most recent briefs in arbitration cases is available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

Group LLC; Ford Motor Company; General Motors Corporation; Jaguar Land Rover; Mazda North American Operations; Mercedes-Benz USA; Mitsubishi Motor Sales of America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc; Volkswagen of America, Inc.; and Volvo Cars North America, LLC.

The *amici* have a strong interest in the development of California law with respect to the enforceability of arbitration agreements. Many members of the *amici* have adopted agreements to arbitrate disputes. Arbitration agreements that are broadly similar to the agreement used by Valencia Holdings are widely used for automobile sales and financing.

These businesses use arbitration as a method of resolving disputes with their customers and employees because it is speedy, fair, inexpensive, and less adversarial than litigation in court. These advantages would be lost, however, if lower courts were allowed to employ anti-arbitration reasoning in order to impair the enforceability of arbitration agreements. As the U.S. Supreme Court reiterated in *Concepcion*, courts must place arbitration agreements on an equal footing with other contracts and *may not* target such agreements for invalidation on the basis of legal principles—such as unconscionability—that are "applied in a fashion that disfavors arbitration." 131 S.Ct. at 1747. Likewise, this Court has recently recognized that the Federal Arbitration Act (FAA) "preempt[s] state decisional law singling out" arbitration and therefore "precludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to other contractual clauses." *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC* (2012) 55 Cal.4th 223, 245-46.

Amici submit that the Court of Appeal did not evenhandedly apply generally applicable unconscionability principles, and reached a decision that is at odds with the FAA as construed in *Concepcion* and *Pinnacle*. The U.S. Supreme Court pointedly noted in *Concepcion* that "California's

courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." 131 S.Ct. at 1747. This case presents an ideal opportunity for this Court to make clear that anti-arbitration reasoning—*i.e.*, the "judicial hostility towards arbitration" which "had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration" provisions unenforceable (*ibid.*)—has no place in California law.

Because the Court of Appeal's decision—if upheld—would have a significant impact on the enforceability of arbitration agreements (including many used by the *amici*'s members), *amici* respectfully request leave to file the attached brief in support of the defendant and appellant.

CONCLUSION

The application should be granted and the accompanying *amicus curiae* brief filed.

Dated: October 1, 2012

Respectfully submitted.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community—including cases specifically involving the enforceability of arbitration agreements with employees or consumers—in a wide variety of state and federal courts. Recent cases in which the Chamber has participated include *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758; *Preston v. Ferrer* (2008) 552 U.S. 346; *Sonic-Calabasas A, Inc. v. Moreno*, No. S174475 (pending); *Gentry v. Superior Court* (2007) 42 Cal.4th 443; and *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.[1]

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[1] A collection of the Chamber's most recent briefs in arbitration cases is available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Hyundai Motor America; Isuzu Motors America, LLC; Kia Motors America, Inc.; Maserati North America, Inc.; McLaren Automotive, Ltd.; Nissan North America; Peugeot Motors of America; Subaru of America, Inc.; and Toyota Motor North America, Inc. Global Automakers has served as the voice of automobile manufacturers from around the world since 1961 under various names. Its members account for about 40 percent of the motor vehicles built and sold in America today. Global Automakers' mission is to foster an open and competitive automotive marketplace in the United States that works to improve vehicle safety, encourage technological innovation, and promote responsible environmental practices.

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The *amici* have a strong interest in the development of California law with respect to the enforceability of arbitration agreements. Many members of the *amici* have adopted arbitration agreements because arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Indeed, arbitration agreements that are broadly similar to the agreement used by Valencia Holdings are widely used for automobile sales and financing. *Amici* and

other companies use arbitration as a method of resolving disputes because it is speedy, fair, inexpensive, and less adversarial than litigation in court. Arbitration also gives parties the freedom to design dispute resolution procedures that are tailored to the context of their contractual relationship.

These advantages would be lost, however, if lower courts were allowed to employ anti-arbitration reasoning in order to impair the enforceability of arbitration agreements. Based on the legislative policy reflected in the Federal Arbitration Act (FAA) and the U.S. Supreme Court's consistent endorsement of arbitration for the past half-century, members of *amici* have structured millions of contractual relationships around arbitration agreements. *Amici* accordingly have a strong interest in the correct resolution of this matter.

SUMMARY OF ARGUMENT

The Court of Appeal's decision is inconsistent with the FAA and should be reversed. That decision rests on arbitration-specific unconscionability rules that disfavor enforcement of arbitration agreements. It thus represents a clear violation of Section 2 of the FAA, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist … for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). At the very least, as the U.S. Supreme Court recently reiterated, Section 2 means that States may not discriminate against arbitration agreements or "'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1747 (quoting *Perry v. Thomas* (1987) 482 U.S. 483, 492 n.9). The arbitration provision here cannot be deemed unconscionable under California's standard unconscionability principles—that is, the doctrines that apply to *other* kinds of agreements *outside* the arbitration context—and so the decision below cannot stand.

Indeed, that conclusion is inescapable in light of this Court's recent decision in *Pinnacle Museum Tower Ass'n v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, which resolves many, if not most, of the issues presented here. As this Court explained, unconscionability "consists of both procedural and substantive elements," both of which must be established by the party resisting enforcement of the agreement. *Id.* at 246. The procedural unconscionability element addresses whether the circumstances of contract formation involved oppression or surprise. *Ibid.* "Oppression occurs where a contract involves lack of negotiation *and* meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." *Id.* at 247 (internal quotation marks omitted; emphasis added). The substantive unconscionability element addresses whether the contract's terms are "overly harsh or one-sided." *Id.* at 246. But that does not mean that unconscionability doctrine authorizes courts to ensure that the burdens and benefits of each contract—let alone each provision within a contract—are allocated equally between the parties. As this Court explained, "[a] contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to *shock the conscience*." *Ibid.* (internal quotation marks omitted; emphasis added).

Neither the substantive nor the procedural element of unconscionability is satisfied with respect to the contract at issue in this case, which involved the purchase of a used Mercedes luxury automobile. To begin with, the Court of Appeal failed to apply the "shock the conscience" standard for substantive unconscionability that this Court recognized as controlling in *Pinnacle*. Moreover, although California law does not require point-by-point mutuality in contracts, the Court of Appeal effectively imposed a precise mutuality requirement for the scope of claims to be arbitrated—again conflicting with *Pinnacle.* With respect to the

arguably asymmetrical allocation of appellate rights, moreover, the Court of Appeal took the remarkable step of condemning as unconscionable in the arbitration context something the Legislature has enacted (in a more "one-sided" form) in the small-claims context, where only defendants may appeal. For these and other reasons, the Court of Appeal's application of substantive unconscionability violated the FAA's equal-footing guarantee.

The Court of Appeal's procedural unconscionability analysis likewise deviated from generally applicable unconscionability doctrine. Sanchez could have gone elsewhere to buy a Mercedes from a dealer that did not require arbitration—or bought another type of car entirely. And the Court of Appeal's other stated bases for finding the arbitration agreement to be procedurally unconscionable depart from the unconscionability analysis that applies to contracts generally, and therefore are preempted.

Finally, even if one or more features of the arbitration provision were accurately identified as unconscionable, the Court of Appeal should have severed those features and enforced the parties' fundamental agreement to arbitrate. Instead, the court applied an *anti*-severance policy that is diametrically at odds with the "California cases tak[ing] a very liberal view of severability" outside the arbitration context. *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1230 (internal quotation marks omitted). This, too, is impermissible under the FAA.

ARGUMENT

Section 2 of the FAA provides that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, ... 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 492 n.9 (quoting 9 U.S.C. § 2; emphasis added by the Court). The FAA thus embodies an "'emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet Health Care Ctr., Inc. v. Brown* (2012) 132 S.Ct. 1201, 1203 (per curiam) (quoting *KPMG LLP v.*

Cocchi (2011) 132 S.Ct. 23, 25). Accordingly, unless Section 2's "savings clause" for generally applicable state-law contract defenses applies, state courts *must* enforce arbitration agreements according to their terms. *Concepcion*, 131 S.Ct. at 1746. And that savings clause extends only to defenses that do *not* "disfavor[] arbitration," "apply only to arbitration" or "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746-47. Only last Term, the U.S. Supreme Court unanimously reconfirmed that only "state common law principles that are *not* specific to arbitration" can avoid the FAA's preemptive force. *Marmet*, 132 S.Ct. at 1204 (summarily reversing decision of West Virginia Supreme Court of Appeals) (emphasis added).

In view of these controlling principles of federal law, the reasoning of the decision below is preempted by the FAA. The Court of Appeal's analyses of substantive unconscionability, procedural unconscionability, and severability all single out arbitration for suspect status in violation of the FAA.

I. The FAA Preempts State-Law Limitations On Enforceability Of Arbitration Agreements That Apply Only To Those Agreements Or That Discriminate Against Arbitration In Practice.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the *same footing* as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 24 (emphasis added). As the U.S. Supreme Court recently observed, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *Concepcion*, 131 S.Ct. at 1747 (citations omitted). The FAA swept aside all such "devices and formulas" by "preclud[ing] States from singling out arbitration provisions for suspect status." *Doctor's Assocs. v. Casarotto* (1996) 517 U.S. 681, 687. To that end, Section 2 of the FAA

requires enforcement of arbitration provisions subject only to a narrow exception for generally applicable state-law "grounds ... for the revocation of *any* contract. 9 U.S.C. § 2 (emphasis added).

Section 2 therefore "embodies the national policy favoring arbitration and places arbitration agreements on *equal footing* with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443 (emphasis added). It categorically bars courts from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston v. Ferrer* (2008) 552 U.S. 346, 356. These overriding principles of federal law mean that the FAA, at the very least, precludes States from imposing obstacles to the enforcement of arbitration agreements that either are inapplicable to other kinds of contracts or that apply with particular rigor in the arbitration context. In other words, a state-law impediment to arbitration that "conditions the enforceability of arbitration agreements on compliance with a special ... requirement not applicable to contracts generally" (*Doctor's Assocs.* 517 U.S. at 687), is preempted by the express terms of the FAA and "must give way" (*Perry*, 482 U.S. at 490-91).

The U.S. Supreme Court has consistently and rigorously enforced the FAA's equal-footing guarantee. In *Perry*, for example, the Court held that the FAA preempted a statute declaring nonarbitrable certain claims under the California Labor Code. 482 U.S. at 492-93. The Court emphasized that "state law, whether of legislative or judicial origin," may justify a refusal to enforce an arbitration agreement *only* if "that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 492 n.9. "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" thus is preempted by the FAA. *Ibid.*

Similarly, in *Doctor's Associates*, the U.S. Supreme Court held that a Montana law imposing a special disclosure requirement with respect to arbitration provisions likewise was preempted by the FAA "because the State's law condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement *not applicable to contracts generally*." 517 U.S. at 687 (emphasis added). As the Court explained, an "arbitration specific limitation" on enforceability, which "sing[les] out arbitration provisions for suspect status," cannot stand. *Id.* at 687 & n.3.

And in *Preston*, the U.S. Supreme Court reiterated that the FAA preempts any state law—there a provision of the California Talent Agency Act—that "imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." 552 U.S. at 356.

More recently, the Supreme Court in *Concepcion* confirmed that "courts must place arbitration agreements on an equal footing with other contracts." 131 S.Ct. at 1745. That principle prevents courts from invalidating arbitration agreements on the basis of "defenses that apply only to arbitration," or "that derive their meaning from the fact that an agreement to arbitrate is at issue," or that are premised on the "uniqueness of an agreement to arbitrate." *Id.* at 1746-47. And the protective principle reaches beyond explicit and obvious discrimination: courts may not apply even a "doctrine normally thought to be generally applicable" in "a fashion that disfavors arbitration." *Id.* at 1747. The doctrine at issue in *Concepcion*, as in this case, was this State's law of unconscionability. See *ibid.*

This Court faithfully applied the equal-footing principle in its recent *Pinnacle* decision, explaining:

> [S]tate laws that discriminate against arbitration are preempted where, as here, the FAA applies. That is, the FAA precludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to

> other contractual clauses, such as proof of actual notice, meaningful reflection, signature by all parties, and/or a unilateral modification clause favoring the nondrafting party.

55 Cal.4th at 245. The FAA not only "preempt[s] any *statutory* provision that specifically discriminates against arbitration." *Id.* at 243 n.8 (emphasis added). It also preempts "state *decisional* law singling out an arbitration clause" (*id.* at 246 (emphasis added)), because allowing "'court[s] [to] rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable ... would enable the court to effect what ... the state legislature cannot'" (*id.* at 235 (quoting *Perry*, 482 U.S. at 492 n.9)).

II. The Court Of Appeal's Grounds For Finding The Arbitration Agreement To Be Unconscionable And Unenforceable In Its Entirety Contravene The FAA's Equal-Footing Guarantee And Therefore Are Preempted By Federal Law.

The Court of Appeal did precisely what Section 2 of the FAA forbids. It subjected Valencia's arbitration provision to more stringent unconscionability and severability standards than California law applies to other contract terms.[2] This Court should correct that unjustifiable refusal to implement the FAA's equal-footing mandate.

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[2] Courts cannot insulate their decisions from the FAA's preemptive effect by *purporting* to invoke generally applicable legal principles, yet *in fact* applying them with particular harshness in the arbitration setting. See, *e.g.*, *Concepcion*, 131 S.Ct. at 1747; *Perry*, 482 U.S. at 492 n.9; *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC* (5th Cir. 2004) 379 F.3d 159, 167 ("state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny"). The FAA preempts the application of "the general principle of unconscionability" in a fashion that disfavors arbitration or obstructs the purposes of the FAA. *Concepcion*, 131 S.Ct. at 1747.

A. The Court Of Appeal Did Not Apply Generally Applicable Substantive Unconscionability Principles.

The Court of Appeal not only failed to acknowledge the "shocks the conscience" standard for substantive unconscionability that this Court articulated in *Pinnacle*—under which the arbitration clause undoubtedly would pass muster—but also used a series of arbitration-specific rules to justify refusing enforcement of Sanchez's agreement to arbitrate. In particular, the court (1) effectively required *each* feature in an arbitration provision to be *equally* beneficial to both sides not only facially, but in practice; (2) criticized aspects of the arbitration provision even though the Legislature has enacted similar features in analogous contexts; and (3) premised much of its substantive unconscionability holding on this Court's *Broughton/Cruz* rule—which declared nonarbitrable certain "public" injunctive relief claims under the CLRA—even though the FAA preempts that arbitration-specific rule, as this Court should recognize and hold.

Only by applying a version of unconscionability law that is "not applicable to contracts generally" (*Preston*, 552 U.S. at 356) could a court deem the arbitration provision here to shock the conscience. Because the decision below subjected arbitration clauses to special scrutiny, it failed to comply with the FAA's equal-footing guarantee.

1. *California contract law does not generally require term-by-term mutuality.*

The Court of Appeal held that the contract's provision restricting to extreme cases the right to appeal to a panel of arbitrators—specifically, when the award is either zero or more than $100,000—is unconscionable because it is not strictly "bilateral." Slip op. 22. In the court's view, "[a] truly bilateral clause would allow a *buyer* to appeal an award *below $100,000*" (*ibid.*) even though the seller has no such right. The court also faulted the arbitration provision for allowing appeals of any award

containing an injunctive-relief component, which the court felt tends to favor car dealers. *Ibid.* ("This type of appeal unduly burdens the buyer because the buyer, not the car dealer, would be the party obtaining an injunction."). Finally, the court held that the arbitration provision is unconscionable because it "expressly exempts self-help remedies including repossession, which is perhaps the most significant remedy from the car dealer's perspective." *Id.* at 27. This, the court reasoned, creates an "unduly oppressive distinction in remedies." *Id.* at 28.

As Valencia has explained, these features of the provision are, in fact, even-handed and fully bilateral, both on their face and in practical effect. Opening Br. 42-44. So even on its own terms, the Court of Appeal's finding of nonmutuality is flawed.

But even if this were not so, the FAA precludes courts from fashioning an arbitration-specific test for substantive unconscionability that requires term-by-term mutuality and denies enforcement based on any feature that the court considers more practically beneficial to the drafter of the arbitration provision. There is no generally applicable principle of California contract law that requires every provision of every contract to be facially mutual, let alone one that requires terms also to be mutual in the practical distribution of benefits. To the contrary, it is black-letter law that point-by-point mutuality is not ordinarily required. The "standard contract principle" holds that, "'[i]f the requirement of consideration is met, there is no additional requirement of … equivalence in the values exchanged, or mutuality of obligation.'" *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 672 n.14 (quoting Restatement (Second) of Contracts (Tent. Draft No. 2, 1965) § 81) (other citations and internal quotation marks omitted); see also, *e.g.*, Restatement (Second) of Contracts § 79 ("If the requirement of consideration is met, there is no additional requirement of … 'mutuality of obligation.'"). Indeed, a leading treatise describes the "so-called

requirement of mutuality of obligation" as "widely discredited." 2 Perillo, *Corbin on Contracts* (1995) § 6.1. Like any other provision in a contract, an arbitration provision—and its various terms—may affect the overall attractiveness of that contract, considered as a whole by the parties; it is part of the *bundle* of obligations that constitutes the consideration for one or both of the parties.

The Court of Appeal's imposition of a precise mutuality requirement has no parallel outside the context of arbitration clauses (the only place in recent memory where (before *Concepcion*) other courts have applied it), and thus violates the FAA's requirement that state law may not single out arbitration for suspect status. *Concepcion*, 131 S.Ct. at 1746; *Perry*, 482 U.S. at 492 n.9. Indeed, the U.S. Court of Appeals for the First Circuit recently recognized that, like California, "[m]ost jurisdictions do not require that both parties to a contract have identical remedies to satisfy the general requirement of mutuality of obligation" and held that "the FAA preempts [a state] from imposing such a requirement applicable only to arbitration provisions." *Soto v. State Indus. Prods., Inc.* (1st Cir. 2011) 642 F.3d 67, 76-77. Similarly, the Illinois Supreme Court recently held, in accord with the FAA, that because "mutuality of obligation is not essential" as a general rule so long as "there is any other consideration for the contract," the same principle must "apply equally to arbitration agreements as they do to other types of contract." *Carter v. SSC Odin Operating Co., LLC* (Ill. 2012) 2012 IL 113204 ¶¶ 21-22, 2012 WL 4127299, at *4.[3]

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[3] See also *Enderlin v. XM Satellite Radio Holdings, Inc.* (E.D. Ark. Mar. 25, 2008) 2008 WL 830262, at *9-*10 (holding that a state "law requiring mutuality within the arbitration paragraph itself [is] preempted" by the FAA because it places the arbitration clause on "unequal footing with other contract terms that do not each have to be mutual"); *Gray v. Conseco, Inc.* (C.D. Cal. Sept. 29, 2000) 2000 WL 1480273, at *4 ("under general principles of contract law, a non-mutual contract is valid and not

(footnote continued)

The FAA therefore preempts any California "decisional law singling out an arbitration clause as the only term" in a contract that requires point-by-point mutuality. *Pinnacle*, 55 Cal.4th at 246.

2. *Contractual provisions that reflect allocations of procedural rights approved by the Legislature cannot "shock the conscience."*

The Court of Appeal's analysis deviated from traditional unconscionability principles in yet another respect. The court condemned as substantively unconscionable—*i.e.*, as shocking to the conscience—aspects of the arbitration provision that are not meaningfully distinguishable from procedures already in place by legislative enactment. Cf. *Pinnacle*, 55 Cal.4th at 250 ("Far from evidencing substantive unconscionability, the ... provision reflects a restrictive term that the Legislature, for policy reasons, has determined is reasonably and properly included ... .").

For example, as noted above, the Court of Appeal required strictly mutual arbitral appeal rights. It faulted the arbitration provision because, in the court's view, defendants were more likely to take advantage of such appeals. (That premise seems doubtful given the high threshold for a defendant to appeal an award—which would have barred an appeal in this case even of an award that refunded Sanchez's $53,000 purchase price in full—as opposed to the availability of an appeal to any plaintiff who receives a take-nothing award.)

But the allocation of appeal rights in the arbitration provision is *less* one-sided than the allocation of appeal rights in the small-claims court provisions of the Code of Civil Procedure. Under the statutory scheme enacted by the Legislature, *only* a defendant or cross-defendant may appeal

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unconscionable so long as there [is] some consideration on both sides[;] ... a contrary rule would impose a special burden on agreements to arbitrate and therefore conflict with the federal policy favoring arbitration").

a decision of the small-claims court. See Code Civ. Proc. § 116.710. As the Legislature designed the system, plaintiffs who receive nothing on their claims have no appellate rights at all. *Ibid.* According to the Court of Appeal, then, an allocation of appellate rights that is more generous than the one the Legislature provided for small claims litigants nonetheless "shocks the conscience" if found in an arbitration clause. That cannot be right.

Similarly, the Court of Appeal found the arbitration provision unconscionable because it "expressly exempts self-help remedies including repossession" from its scope. Slip op. 27. But that objection makes little sense. By definition, *self*-help remedies are already outside the reach of the courts in the first instance because they do not require prior judicial approval. That is, it is the *Legislature* that has "exempt[ed] self-help remedies including repossession" from the need for judicial preapproval. Repossession is a contractual and statutory right that does not involve a decision by a judicial officer: "After default" on a secured loan, "a secured party may … [t]ake possession of the collateral." Com. Code § 9609(a)(1). And it may do so "[w]ithout judicial process, if it proceeds without breach of the peace." *Id.* § 9609(b)(2).[4]

No provision of law requires any prior determination of the merits of the secured lender's right to repossession—by a judge, an arbitrator, or any other third party. The decision below thus discriminates against arbitration by refusing to enforce an agreement to arbitrate because the agreement simply states a background principle of law, rather than placing *additional*

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[4] When an automobile loan is at issue, Civil Code sections 2983.2 and 2983.3 set out requirements as to *post*-repossession notice and opportunity to cure the default. Such requirements would be enforceable in arbitration. And the buyer can sue for conversion, restitution, and the like, all of which would be fully arbitrable.

limitations on the self-help repossession remedy created by the Legislature that do not exist in the absence of an arbitration agreement. Stated otherwise, the Court of Appeal's decision effectively requires a secured lender to forfeit its statutory, self-help repossession remedy as a condition of enforcing an agreement to arbitrate disputes.

3. *The Court of Appeal's unconscionability analysis relies on the preempted* Broughton/Cruz *rule*

Finally, in assessing the "unconscionability of the arbitration provision," the Court of Appeal relied on this Court's decisions in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, which held that requests for so-called "public injunctions" under the CLRA and the UCL are not arbitrable. Slip op. 23 n.5. The Court of Appeal stated that the requirement in the arbitration provision "that the buyer seek injunctive relief from the arbitrator is inconsistent with the CLRA," and thus provided another basis for the finding of substantive unconscionability. *Id.* at 28.

In the first place, *Broughton* and *Cruz* are not about substantive unconscionability; they instead represent this Court's understanding of the intent of the Legislature to make certain claims categorically nonarbitrable. The decisions themselves make clear that other kinds of claims remain arbitrable (and hence that an agreement requiring arbitration of all claims is not unconscionable merely because some claims are nonarbitrable).

In any event, there should be no question at this point that the FAA preempts the rule announced in *Broughton* and *Cruz*. As the Supreme Court reiterated in *Concepcion*, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 131 S.Ct. at 1747 (citing *Preston*, 552 U.S. at 356, which held that the FAA preempts a California statute "grant[ing] the Labor Commissioner exclusive jurisdiction to decide an

issue that the parties agreed to arbitrate"); accord *Marmet*, 132 S.Ct. at 1203-04. *Cruz* and *Broughton* "prohibit[] outright" the arbitration of certain claims—namely, claims brought by private parties seeking injunctions against conduct that allegedly violates either the CLRA or the UCL.

Accordingly, under *Concepcion* and *Marmet*, the restrictions announced in *Cruz* and *Broughton* must give way to the FAA. The premise of *Broughton* was that—notwithstanding the U.S. Supreme Court precedent holding that "the capacity to withdraw statutory rights from the scope of arbitration agreements is the prerogative solely of *Congress*"—state courts and legislatures *also* "may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests." 21 Cal.4th at 1083 (emphasis added). But Congress and state legislators do not have equal ability to create exceptions to federal law; otherwise the Supremacy Clause in Article VI of the U.S. Constitution would have no practical effect. See *Marmet*, 132 S.Ct. at 1201 ("When [the U.S. Supreme Court] has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."); *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 272 ("[S]tate courts cannot apply state statutes that invalidate arbitration agreements.").

The misunderstanding of the Supremacy Clause that underlies *Broughton* and *Cruz* should not persist after *Concepcion*. Indeed, the Court in *Concepcion* took account of California's public policy favoring class actions, but flatly held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S.Ct. at 1753; accord *Marmet*, 132 S.Ct. at 1204 (state-law "rule[s] prohibiting arbitration of a particular type of claim … [are] contrary to the terms and coverage of the FAA"). Unsurprisingly, in the wake of *Concepcion*, another panel of the Court of Appeal has recognized that

"*Broughton-Cruz* has ... been abrogated in the wake of *Concepcion*." *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1135, pet. for review pending, No. S204953. This Court should take the opportunity presented by this case to recognize that the *Broughton/Cruz* rule is preempted.

Although the Court of Appeal in the present case insisted that its reasoning and conclusions would "remain accurate" even if the "FAA preempts *Broughton*'s holding" (slip op. 30 n.6), it provided no explanation for that conclusion. And in any event, the decision by its terms does rely on the *Broughton* analysis, which exempts particular claims from the scope of arbitration. For this reason as well, the FAA preempts the Court of Appeal's substantive-unconscionability holding. See *Marmet*, 132 S.Ct. at 1204 (vacating state court's "alternative" unconscionability holding because it possibly was "influenced by [that court's] invalid, categorical rule" of public policy prohibiting pre-dispute agreements to arbitrate certain types of claims).

B. The Court Of Appeal Did Not Apply Generally Applicable Procedural Unconscionability Principles.

In holding that the arbitration agreement here was procedurally unconscionable, the Court of Appeal reasoned that (1) the presence of meaningful alternatives is irrelevant to the question whether the contract was "oppressive;" (2) a customer may establish "actual surprise" and avoid a contract by denying that he read it; and (3) a boxed contractual provision preceded by a bold-faced, capitalized heading and averted to in a bold-faced, capitalized notice that is immediately above the signature line is inconspicuous merely because it is on the reverse side of a *two*-page contract. Slip op. 14-18. Each of these propositions represents a marked deviation from generally applicable legal principles.

1. *In accord with the general rule outside the arbitration context, this Court recognized in* Pinnacle *that the "oppression" element of procedural unconscionability requires an absence of meaningful alternatives.*

This Court should adhere to its formulation in *Pinnacle* and make clear that, whether or not an arbitration provision is involved, "oppression" for purposes of procedural unconscionability "'occurs where a contract involves lack of negotiation *and* meaningful choice.'" 55 Cal.4th at 247 (quoting *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317). That articulation (and this Court's explicit reliance on *Morris*) should resolve what had been a conflict among decisions of the Court of Appeal.

Several decisions of the Court of Appeal—almost all of which address the enforceability of arbitration agreements—have held that a contract may be procedurally unconscionable even if the consumer had the option of obtaining the underlying good or service from other sources on different terms. According to these decisions, the fact that the consumer had no choice as to the terms on which *one* supplier would sell its goods or services constitutes sufficient "oppression" to clear the procedural unconscionability threshold and proceed to an examination of the contract's substantive terms. See, *e.g.*, *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 583; *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1099-1100; *Villa Milano Homeowners Ass'n v. Il Davorge* (2000) 84 Cal.App.4th 819, 828.[5]

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[5] The Court of Appeal in this case further stated that "use of a contract of adhesion" ordinarily establishes a certain "degree of procedural unconscionability." Slip op. 16. This blanket hostility to form contracts is neither warranted by generally applicable unconscionability principles nor consistent with modern commercial realities. See *Concepcion*, 131 S.Ct. at 1750 ("the times in which consumer contracts were anything other than adhesive are long past"). Procedural unconscionability is a term that

(footnote continued)

By contrast, decisions addressing *other* types of contractual provisions have generally held that the presence of meaningful alternatives precludes—or very nearly precludes—any possibility that a contract is so "oppressive" as to be procedurally unconscionable. In addition to the *Morris* decision cited in *Pinnacle*, these decisions include *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1245 (requirement that cable music subscribers receive basic cable television); *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 482 (declared-value insurance for package shipping); *Aron v. U-Haul Co.* (2006) 143 Cal.App.4th 796, 808 (rental truck refueling policy); *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 768 (termination and annual fee); and *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606, 614 (release of liability for motorcycle park).

That makes perfect sense: a person with a *choice* of suppliers cannot be oppressed by the terms of *one supplier's* form contract. As the Court of Appeal explained in *Wayne*:

> There can be no oppression establishing procedural unconscionability, *even assuming unequal bargaining power and an adhesion contract*, when the customer has *meaningful choices*: "[A]ny claim of 'oppression' may be defeated if the complaining party has

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connotes *atypical* unfairness. It is implausible that this doctrine would condemn such a routine manner of contract formation as the use of form contracts. *Crippen v. Cent. Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1165 ("there is no general rule that a form contract used by a party for many transactions is procedurally unconscionable"); *see* John J.A. Burke, *Contracts as Commodity: A Nonfiction Approach*, 24 Seton Hall Legis. J. 285, 290 (2000) (standard forms account for more than 99% of all contracts). Indeed, form contracts can "benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices[.]" *Carbajal v. H&R Block Tax Servs., Inc.* (7th Cir. 2004) 372 F.3d 903, 906.

> reasonably available sources of supply from which to obtain desired goods or services free of the terms claimed to be unconscionable."

135 Cal.App.4th at 482 (emphasis added). For oppression to exist, the weaker party must lack "any realistic opportunity to look elsewhere for a more favorable contract; he must either adhere to the standardized agreement or for[]go the needed service." *Morris*, 128 Cal.App.4th at 1320 (emphasis and quotation marks omitted).

Thus, this Court's resolution of the conflict in *Pinnacle*—choosing to apply in the arbitration context the standard of oppression generally applied in other contracting situations—was effectively dictated by the FAA's equal-footing principle. Under generally applicable legal principles, Sanchez's failure to present evidence that he was unable to purchase a car from a dealer on terms that did not require arbitration should have precluded a finding of oppression, eliminating one of the main premises of the finding of procedural unconscionability.[6] The application below of an arbitration-specific variant of unconscionability doctrine that all but disregards the presence of meaningful alternatives cannot survive either *Pinnacle* or scrutiny under the FAA.

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[6] The Court of Appeal noted that "there is no evidence Sanchez could have purchased a Mercedes-Benz from a dealer who did not mandate arbitration." Slip op. 16-17. But that reverses the proper analysis: The party resisting enforcement of a contract "bears the burden of proving unconscionability." *Pinnacle*, 55 Cal.4th at 247. As part of that burden, Sanchez had to establish each of the factual predicates for a finding of procedural unconscionability, including the absence of meaningful choice through market alternatives—*i.e.*, that Sanchez could not have bought a Mercedes from a dealer that did not require arbitration (or bought another type of car entirely). The Court can take judicial notice of the common sense fact that people routinely sell used vehicles through the newspaper or Craigslist without requiring arbitration as a condition of the sale.

2. *As a matter of general contract-law principles, the absence of actual notice of a contractual provision is irrelevant to its enforceability.*

The Court of Appeal also held irrelevant Sanchez's signed attestation that he was given the contract; that he was "free to take it and review it"; and that he "read both sides of this contract, including the arbitration clause on the reverse side, before signing below." Slip op. 17. Instead, the court held that Sanchez had established "'actual surprise'" based on his representation that he "did not know the contract contained an arbitration provision by way of either the two-word reference on the front side or the full arbitration provision on the reverse side." *Id.* at 17-18 (quoting *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1291).

This holding conflicts with the long-standing "general rule ... that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding." *Palmquist v. Mercer* (1954) 43 Cal.2d 92, 98. Put simply, "one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms." Restatement (Second) of Contracts § 157, cmt. b. Because, as this Court recognized, "proof of actual notice" is *not* a requirement that is "generally applicable to other contractual clauses," *Pinnacle*, 55 Cal.4th at 245, the FAA preempts application of that requirement here.

Outside the arbitration context, California courts rigorously enforce this principle, refusing to allow a party to avoid the terms of a contract that he had an *opportunity* to read by claiming that he did not *actually* read it. See, *e.g.*, *Intershop Commc'ns AG v. Superior Court* (2002) 104 Cal.App.4th 191, 202 ("the forum selection clause plainly says that

Hamburg, Germany is the selected forum. Plaintiff had full notice [of] that ... even though he may have chosen not to read the four-page contract"); *Robison v. City of Manteca* (2000) 78 Cal.App.4th 452, 459 (substance-abuse employment agreement; no surprise where "there is no allegation he was prevented from reading the agreement on the day of execution"); *Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 622 & n.4 ("even assuming an inequality of bargaining power" and testimony that "skiers rarely read releases before signing them," "there is no credible evidence [that] release agreements are a surprise to skiers"); *West v. Henderson* (1991) 227 Cal.App.3d 1578, 1587 (limitation-of-actions provision in lease).

But as illustrated by the decision below, many courts have relaxed this requirement in the arbitration context and jettisoned the general rule that consumers are presumed to know the contents of the contracts that they have signed. See, *e.g.*, *Bruni,* 160 Cal.App.4th at 1290-91 ("[P]laintiffs are claiming that they never knowingly agreed to the arbitration provisions ... . [F]ailure to read the contract helps 'establish actual surprise.'"); *Baker v. Osborne Dev. Corp.* (2008) 159 Cal.App.4th 884, 863 (same); *Patterson v. ITT Consumer Fin. Corp.* (1993) 14 Cal.App.4th 1659, 1666 (same).

Not all California courts take this approach, however. As one court correctly held in applying the general rule, "'[r]easonable diligence requires the reading of a contract before signing it. A party cannot use his own lack of diligence to avoid an arbitration agreement.'" *Brookwood v. Bank of Am.* (1996) 45 Cal.App.4th 1667, 1674) (quoting *Rowland v. PaineWebber Inc.* (1992) 4 Cal.App.4th 279, 286). Indeed, if a party could avoid an arbitration provision in a contract by claiming failure to read it, every other provision in the contract could be held equally nonbinding on the same grounds. Such an absurd rule of law would threaten the validity of nearly all form contracts, which make up the vast majority of contracts in existence today. See *supra* note 5; cf. *Pinnacle*, 55 Cal.4th at 248 n.13

(rejecting as "untenable" the argument that procedural unconscionability resulted from the inability to negotiate an arbitration provision in development's covenants and restrictions, as the same rationale would undercut all the other covenants as well). This Court should hold (as the FAA requires) that, as with other contracts, a consumer cannot claim surprise from a contract he signed but later claims not to have read.

3. *Under generally applicable contract-law principles, a contractual provision set out in bold typeface and capital letters is regarded as conspicuous.*

In another departure from the general law of contracts, the Court of Appeal held that the bold-faced, all-capitalized notice of the arbitration clause was insufficient to bring the clause to the consumer's attention because the arbitration clause—which was enclosed in a box and preceded by a bold-faced, capitalized heading—was near the end of a two-page contract. Slip op. 18. The decision below does not cite a single statute or decision in support of this extraordinary conclusion, and it is wrong for at least three reasons.

First, California has no generally applicable rule of contract law specifying that all material terms must be located on the front of a double-sided contract or must somehow be made to stand out from surrounding terms.[7] Indeed, any such rule would be absurd because many and varied contractual terms might be material to any particular signatory of a form agreement. They can't all be on the first page in bold, all-capitalized typeface. So far as *amici* are aware, no California decision has held that a comparably prominent notice about any kind of contractual provision—apart from arbitration clauses—was not conspicuous enough to be

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[7] It bears noting that, as Valencia has pointed out, the arbitration provision in Sanchez's agreement is significantly more prominent than most other provisions in the agreement. See Opening Br. 7-8, 52-53.

enforceable. On the contrary, decision after decision has concluded that notice of this type—or less conspicuous notice—is adequate for a variety of contract provisions, including arbitration clauses. See, *e.g.*, *Frittelli, Inc. v. 350 N. Canon Drive, LP* (2011) 202 Cal.App.4th 35, 50-51 & n.6 (provision was "found in the middle of the lease [and] printed in the same size type as the other provisions," but was also "captioned in bold print"); *Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 759 (provision was conspicuous since it was preceded by a "bold-faced heading"); *TIG Ins. Co. v. Homestore, Inc.* (2006) 137 Cal.App.4th 749, 759 & n.11 ("exclusion was conspicuous when located ... under boldface heading ... notwithstanding print was of same size and density as rest of policy"); *Rodriguez v. Am. Techs., Inc.* (2006) 136 Cal.App.4th 1110, 1124 (arbitration clause was not inconspicuous since contract noted above the signature lines that "The Terms and conditions on the reverse side of this Proposal are incorporated herein by reference" and the "arbitration clause on the reverse side is labeled with the heading, 'ARBITRATION,' in bold capital letters").

Second, this Court in *Pinnacle* flatly declined "to read additional unwritten procedural requirements, such as actual notice and meaningful reflection, into the [California] arbitration statute." 55 Cal.4th at 245. That by itself precludes the Court of Appeal's creation of enhanced notice requirements out of whole cloth.

Third, even if there were a rule of California law demanding that arbitration provisions be given special prominence, that rule would be preempted because "the FAA precludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to other contractual clauses." *Pinnacle*, 55 Cal.4th at 245. In particular, the U.S. Supreme Court has held that, under Section 2 of the FAA, states may not apply conspicuousness requirements to arbitration

provisions that do not apply to other contractual provisions. *Doctor's Assocs.*, 517 U.S. at 686-88. As this Court recently observed, *Doctor's Associates* stands for the proposition that the "FAA preempts [a] state's first-page notice requirement for arbitration agreements." *Pinnacle*, 55 Cal.4th at 246. That proposition leaves no doubt that the FAA preempts the holding below that "first-page notice" is not sufficient unless the entire arbitration clause also appears on the first page of a two-page contract. See also *Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, 585 ("font and point size, notification, and warning requirements ... cannot be judicially construed to invalidate the arbitration clause at issue without violating the [FAA]").

Nor does it make any difference that the court's special-prominence requirement was imposed by judicial decision rather than statute. Just as the "FAA prohibits states from passing *statutes* that require arbitration clauses to be displayed with special prominence, ... *courts* cannot use unconscionability doctrines to achieve the same result." *Iberia Credit Bureau*, 379 F.3d at 172 (emphasis added); see also *Concepcion*, 131 S.Ct. at 1747; *Pinnacle*, 55 Cal.4th at 235, 246.

In short, the Court of Appeal's procedural unconscionability finding in the instant case is preempted by the FAA because it rests on an arbitration-specific conspicuousness requirement that has no counterpart in generally applicable contract law.

C. The Court Of Appeal Did Not Apply Generally Applicable Severability Principles.

As we have explained above, and as Valencia has explained in detail, the arbitration provision before this Court is not unconscionable under generally applicable principles. But if this Court were to decide that one or another aspect of the provision is unconscionable on grounds that the FAA does not preempt, the offending portion should be severed and the

arbitration agreement enforced. The Court of Appeal independently erred in failing to sever the portions of the arbitration agreement it found unconscionable and enforce the remainder of the agreement.

The arbitration provision at issue here expressly contemplates severance so as to preserve the parties' core agreement to arbitrate on an individual basis. It provides that "[i]f any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable." Invoking this express provision to sever unenforceable terms and enforce the remainder of the agreement to arbitrate is consistent with the "very liberal view of severability" that California courts have endorsed outside the arbitration context. *Baeza*, 201 Cal.App.4th at 1230 (internal quotation marks omitted). Thus, the courts generally "enforce[e] valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *Ibid.* (internal quotation marks omitted).

The Court of Appeal relied on decisions that declined to use severance in order to enforce arbitration clauses. See *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 124-25; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826. This Court in *Armendariz* held that "there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." 24 Cal.4th at 124-25. But that is not the case here, where at most one or two relatively peripheral provisions could even arguably be found objectionable after *Pinnacle* and *Concepcion*.

Relying on other decisions of the Court of Appeal, the court below applied a highly restrictive standard for invoking severance. *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, for example, states that even a "single unconscionable term could justify a refusal to enforce an arbitration agreement." *Id.* at 93. Another decision adopted a virtually per se rule that

the presence of more than one substantively unconscionable feature in an arbitration provision precludes severance. See *Murphy v. Check 'N Go of Cal., Inc.* (2007) 156 Cal.App.4th 138, 149.

These decisions are sharply inconsistent with the "liberal policy" favoring severance that applies to contracts other than arbitration. See, *e.g.*, *Baeza*, 201 Cal.App.4th at 1230; *Adair v. Stockton Unified Sch. Dist.* (2008) 162 Cal.App.4th 1436, 1451. A stricter severance standard that applies only to arbitration clauses is preempted by the FAA. See *Concepcion*, 131 S.Ct. at 1746-47; *Perry*, 482 U.S. at 492 n.9. If this Court determines that any part of the Sanchez-Valencia agreement is unenforceable, therefore, that provision should be severed and the arbitration agreement enforced.

CONCLUSION

The judgment of the Court of Appeal should be reversed and remanded with directions to compel the parties to arbitrate their disputes.

Dated: October 1, 2012

Respectfully submitted.

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CERTIFICATE OF SERVICE
S199119

I, Kristine Neale, declare:

I am over the age of eighteen and not a party to the within-entitled action. My business address is Two Palo Alto Square, Suite 300, Palo Alto, California 94306-2112.

On October 1, 2012, I served a copy of the within documents:

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT

by placing the document listed above in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the United States and of the State of California that the above is true and correct.

Executed on October 1, 2012, at Palo Alto, California.

Kristine Neale

Kristine Neale