**S280256**

**SUPREME COURT OF THE STATE OF CALIFORNIA**

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EVANGELINA YANEZ FUENTES,
*Plaintiff and Respondent,*

v.

EMPIRE NISSAN, INC.; ROMERO MOTORS CORP.;
and OREMOR MANAGEMENT AND INVESTMENT CO.,
*Defendants and Appellants.*

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After a Decision by the Court of Appeal, Second Appellate
District Division Eight, B314490
Los Angeles Superior Court Case No. 20STCV35350
Judge Mel Recana

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# APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND APPELLANTS and BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND APPELLANTS

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## APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND APPELLANTS

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, including questions regarding arbitration agreements. (*E.g.*, *Zhang v. Superior Court*, review granted Feb. 15, 2023, S277736; *Ramirez v. Charter Communications, Inc.*, review granted June 1, 2022, S273802; *Bielski v. Coinbase, Inc.* (9th Cir. 2023) 87 F.4th 1003; *Caremark, LLC v. Chickasaw Nation* (9th Cir. 2022) 43 F.4th 1021; *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 586 U.S. 63; *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63.)

Many members of the Chamber and the broader business community have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation in court. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts. Based on the legislative

policy reflected in the Federal Arbitration Act ("FAA") and the United States Supreme Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements. Many members also routinely include delegation clauses in their arbitration agreements in order to avoid time-consuming litigation over the scope and enforceability of those agreements. The business community has a broad and overarching interest in ensuring that the FAA is appropriately applied and that businesses and those with whom they deal can rely upon stable arbitration precedent.

The Chamber thus has a strong interest in this case and in affirmance of the judgments below.

The accompanying brief may aid the Court in several ways relating to unconscionability issues presented in this case.

First, the brief explains that both substantive and procedural unconscionability remain necessary to prevent enforcement of a contract on grounds of unconscionability. While severe procedural unconscionability may reduce the amount of substantive unconscionability sufficient to bar enforcement, a meaningful degree of substantive unconscionability remains necessary. A validly formed, substantively fair contract must be enforced despite procedural unconscionability.

Second, the brief explains why the inclusion of a unilateral-amendment provision is not unconscionable so long as the right to change terms is exercised reasonably.

Third, the brief explains why reference in a severability provision to the possibility that a "court" might find a provision unlawful does not override the commitment of claims to arbitration.

Fourth, the brief explains why the ability of one party to seek injunctive relief for specific claims does not render an arbitration agreement nonmutual, much less to the point of unconscionability.

Fifth, the brief explains that, under general principles of severance, unconscionable provisions generally can and should be severed if the contract permits severance without requiring the court to add new terms to make the contract coherent and enforceable.

Arbitration provides an efficient means of dispute resolution that benefits employees, consumers, and businesses. The decision in this case should not impair access to those benefits.

No party or counsel for a party authored this brief in whole or in part. No person or entity other than the Chamber, its members, or its counsel in this matter has made any monetary contributions intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

## CONCLUSION

The Court should grant this application and permit the Chamber to file the attached amicus curiae brief.

Dated: April 25, 2024

Respectfully submitted.

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Other Authorities

**Statutes**



**Treatises**



**Other Authorities**

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents significant questions relating to the enforceability of arbitration agreements. The Court should carefully evaluate the agreement at issue here to avoid an inadvertently broad ruling that would deny the mutual benefits of arbitration to substantial numbers of employees, consumers, and businesses.

Although procedural unconscionability remains uncontested, the employee arbitration agreement in this case is substantively unremarkable. It calls for arbitration to be conducted under California Arbitration Act procedures, with a typical (and apparently unexercised) unilateral change-in-terms provision.

Having so little of substance to complain about, the employee, Fuentes, maintains that she should be excused from performing her agreement to arbitrate based on procedural unconscionability alone. The Court should decline that invitation to fundamentally change California law to make it even more difficult to enforce arbitration agreements. The Court instead should preserve the access of employees, businesses, and consumers to fair alternate dispute resolution.

The Court's consideration of the unconscionability arguments in this case should embrace the following principles:

First, the Court should make clear that a contract, including an arbitration agreement, cannot be denied enforcement on unconscionability grounds unless the agreement

is *both* procedurally and substantively unconscionable. A fair contract should be enforced even if procedurally flawed.

Second, if the Court addresses the unilateral change-in-terms provision, it should hold that such a provision is not facially unconscionable. Unilateral-amendment provisions must be exercised consistent with the obligation of good faith and fair dealing that inheres in every contract. As a result, such a provision is not unconscionable unless it is exercised unconscionably. There is no contention that the employer here amended the agreement unconscionably (or at all).

Third, the Court of Appeal correctly concluded that a later confidentiality agreement did not override the employer's duty to arbitrate relief for threats to its intellectual property. The only reference to a "court" in the later agreement came in the context of a severance provision that acknowledged that a court might find one or more provisions of the agreement invalid—as courts often do. A reference of that kind does not defeat an agreement to arbitrate, or even render the agreement ambiguous, whether in the arbitration agreement itself or (as here) in a subsequent agreement.

Fourth, if it exists, even a narrow carve-out for trade secret relief would not be unconscionable or even remarkable. Pure point-by-point mutuality is not required in other contracts. Rather, agreements routinely provide reasonable advantages to one party as part of the bargained-for exchange. And because precise, mirror-image mutuality is not required for other contracts, it cannot be required for an arbitration agreement.

Fifth, were the Court to find that any of the provisions in the arbitration agreement here were unconscionable, those provisions could be severed and the agreement enforced. The Court should not impose the strict rule adopted by some panels of the Court of Appeal that deny severance whenever more than one provision of an arbitration agreement—but only an arbitration agreement—is unconscionable. The Civil Code and this Court's precedents express a policy strongly favoring enforcement of any contract with a legal object, so long as any unlawful collateral terms can be stripped away without fundamentally altering the bargain by requiring the court to supply new terms rather than merely deleting flawed provisions. The same rule can and must apply to arbitration agreements.

## ARGUMENT

### A. The Court Should Continue To Require Both Procedural And Substantive Unconscionability Before Denying Enforcement To A Contract

Fuentes contends that the font size and print clarity in her arbitration agreement are sufficient in isolation to invalidate the agreement as unconscionable. Whatever role those characteristics may play in determining whether a contract was validly formed, font size and clarity cannot by themselves support a finding of unconscionability because they do not render the substantive contents of the agreement unfair.

As this Court has held, a contract can be sufficiently unconscionable to bar enforcement only if the contract is both procedurally and substantively unconscionable. (*E.g.*, *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24

Cal.4th 83, 114.) Although the analysis employs a sliding scale, under which modest substantive unconscionability may suffice if extreme procedural unconscionability is present, or vice versa, both must be present. (*Ibid.*)

The Court should adhere to the two-part test for unconscionability. That two-part test is deeply rooted in this Court's jurisprudence and in the jurisprudence of other courts since the modern doctrine of unconscionability emerged in *Williams v. Walker-Thomas Furniture Co.* (D.C. Cir. 1965) 350 F.2d 445, 449. (See, *e.g.*, *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145 [citing *Williams*].)

Procedural unconscionability addresses issues relevant to contract formation. Yet so long as procedural unconscionability does not prevent the mutual assent needed to form an agreement, even severe procedural unconscionability should not by itself prevent enforcement of a substantively fair agreement.

Nor should the Court permit double-counting of the kind Fuentes seeks in her alternative argument here (OBM, pp. 43–44). Fuentes asks the Court to allow the legibility of the agreement to render the agreement both procedurally and substantively unconscionable. But that makes no sense. Only the substance of a contract's terms can be substantively unconscionable. If it were otherwise, the two-factor test for unconscionability would be a mirage. Substantive "unconscionability requires a substantial degree of unfairness beyond a simple old-fashioned bad bargain." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911 [cleaned

up].) Unless the small font obscured a term that is substantively unfair to the point of being "unreasonably one-sided" (*Sonic-Calabasas*, *supra*, 57 Cal.4th at p. 1159)—a standard that in practice means the same thing as "shock[s] the conscience" (*Sanchez*, *supra*, 61 Cal.4th at p. 911 [quoting *Sonic-Calabasas*])—the agreement should be enforced.

### B. A Unilateral-Amendment Provision Is Not Unconscionable So Long As It Is Exercised Reasonably And In Good Faith.

Although Fuentes does not renew the argument here, the dissenting opinion below maintained that the provision in Fuentes' agreement allowing the employer to unilaterally change its terms was unconscionable on its face. (C.A. dis. opn., p. 6; but see C.A. slip opn., pp. 19–20 [disagreeing and finding the argument forfeited in any event].)[1]

Should this Court exercise its discretion to reach the issue, it should hold squarely that a unilateral-amendment provision does not automatically render an agreement illusory or unconscionable. A provision of that kind is unconscionable only if

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[1] The modification provision states:

> Consequently, all terms and conditions of my employment, with the exception of the arbitration agreement, may be changed or withdrawn at Company's unrestricted option at any time, with or without good cause. No implied, oral or written agreements contrary to the express language of this agreement are valid unless they are in writing and signed by the President of the Company (or majority owner or owners if Company is not a corporation).

(C.A. slip opn.. appen. B, p. 7.)

it is exercised unconscionably by changing material terms to the disadvantage of the employee or consumer.

Many, if not most, businesses have some form of unilateral-amendment provision in their arbitration agreements or in their broader purchase, warranty, or employment agreements. Businesses rely on the flexibility afforded by unilateral-amendment clauses to keep their employment and consumer agreements up to date. Businesses need to revise their agreements for many legitimate reasons, ranging from trivial address or procedural changes, to changes made to comply with new laws or regulations, to changes made to increase efficiency or reflect new best practices.

As the Court of Appeal recognized, most California decisions hold that unilateral-amendment provisions are generally permissible. (See C.A. slip opn. 19–20 [collecting cases].) The decisions generally hold that a unilateral change-in-terms provision is not unconscionable as long as it is exercised in accord with the obligation of good faith and fair dealing. (*E.g.*, *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1473; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214; see 1 Witkin, Summary of Cal. Law (11th ed. 2023) Contracts, § 230.) That obligation requires notice once a unilateral change takes effect so that the other party "is aware of his or her rights under the agreement" (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 61), and precludes a change that would "frustrate the purpose of the

contract." (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 706; see *id.* at pp. 707–08.)

This view reflects the national consensus in favor of flexibility limited by fairness. "Most courts hold that companies can unilaterally amend any procedural term if the underlying contract includes a change-of-terms clause." (David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments* (2010) 57 UCLA L.Rev. 605, 649.) Like the California courts, courts elsewhere generally require that the power be exercised "subject to limitations, such as fairness and reasonable notice," (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 16), or compliance with the obligation of good faith and fair dealing.[2] As the Ninth Circuit put it, "the implied covenant of good faith and fair dealing prevents a party from *exercising* its rights under a unilateral modification clause in a way that would make it unconscionable." (*Tompkins v. 23andMe, Inc.* (9th Cir. 2016) 840 F.3d 1016, 1033 [emphasis added].)

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[2] See, *e.g.*, *Larsen v. Citibank FSB* (11th Cir. 2017) 871 F.3d 1295, 1317–18; *Sevier County Schools Fed. Credit Union v. Branch Banking & Trust Co.* (6th Cir. 2021) 990 F.3d 470, 478, cert. den. (2022) 142 S. Ct. 2770; *Hutcherson v. Sears Roebuck & Co.* (Ill. App. Ct. 2003) 793 N.E.2d 886, 899–900; *Bank One, N.A. v. Coates* (S.D. Miss. 2001) 125 F. Supp. 2d 819, 831, aff'd, (5th Cir. 2002) 34 Fed. Appx. 964; *Fleming v. Borden, Inc.* (S.C. 1994) 450 S.E.2d 589, 595–96 [employee handbook]; *Sears Roebuck & Co. v. Avery* (N.C. Ct. App. 2004) 593 S.E.2d 424, 427–28. Cf. *Cornell v. Desert Fin. Credit Union* (Ariz. 2023) 524 P.3d 1133 [adopting Rest., Consumer Contracts (Tent. Draft No. 2, 2022) § 3].

Although this Court has held that the reservation of a unilateral right to terminate or modify a contract does not render the contract *illusory* (see *Asmus*, *supra*, 23 Cal.4th at pp. 15–16), the issue is frequently relitigated in the arbitration context, generally on a contention that the arbitration agreement is unconscionable because it is illusory. (*E.g.*, C.A. dis. opn. p. 6; *Peng*, *supra*, 219 Cal.App.4th at p. 1473; *Serpa*, *supra*, 215 Cal.App.4th at pp. 706–08.) And this Court has not yet squarely addressed whether or when a unilateral amendment or modification provision renders a contract *unconscionable*. As the dissenting opinion below indicates, some judicial officers in the lower courts continue to treat unilateral-modification provisions as inherently suspect in the absence of any showing that the provisions were abused.

If it reaches the issue, this Court should clearly state its agreement with the better reasoned approach. Unilateral-amendment provisions are not unconscionable unless exercised unconscionably. California decisions have properly declined to hold a contract term unconscionable based on a wholly "hypothetical situation" in which the term might be exercised unfairly. (*West v. Henderson* (1991) 227 Cal.App.3d 1578, 1588, disapproved in part on unrelated grounds, *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n* (2013) 55 Cal.4th 1169, 1178 fn. 7; accord *Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 622.) Because Fuentes does not assert that the employer has made any unilateral modification, there is no basis

to find that modification authority is unconscionable in this case. (See *Peng*, *supra*, 219 Cal.App.4th at p. 1474.)

### C. The Confidentiality Agreements Do Not Render The Arbitration Agreement Unconscionable.

#### 1. A Reference to a "Court" in a Severance Provision Does Not Override the Commitment of Claims to Arbitration.

Of broad concern to the business community is the argument—properly rejected by the Court of Appeal (C.A. slip opn., pp. 15–16)—that a reference to a "court" and "judicial modification" in a severability provision could be taken to nullify the commitment of claims to arbitration. The answer brief on the merits points out (at p. 43) that the confidentiality agreements' sole reference to a court is in its severance clause:

> Each provision of this Agreement is intended to be severable. If any *court* of competent jurisdiction determines that one or more of the provisions of this Agreement, or any part thereof, is or are invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect or impair any other provision of this Agreement, and this Agreement shall be given full force and effect while being construed as if such invalid, illegal or unenforceable provision had not been contained within it. If the scope of any provision of this Agreement is found to be too broad to permit enforcement of such provision to its full extent, you consent to judicial modification of such provision and enforcement to the maximum extent permitted by law.

(C.A. slip opn., pp. 15–16.)

That reference would not undercut the arbitration agreement even if it were in the arbitration agreement itself. The reference to a court, in context, pertains only to preliminary

proceedings to enforce the arbitration agreement, which generally involve judicial proceedings even though an arbitrator will decide the substance of the dispute.

Indeed, that is the setting of this case and most, if not all, judicial decisions addressing arbitration provisions. Enforcement proceedings are brought in court, and it is almost always courts, rather than arbitrators, that invalidate provisions in arbitration agreements while considering whether to invalidate the entire agreement. Acknowledging this fact in an arbitration agreement's severance clause does not undercut the allocation of claims to the arbitrator.[3]

### 2. Variations in the Scope of Claims Subject to Arbitration Does Not Render an Arbitration Agreement Unconscionably Nonmutual.

The Court of Appeal held that the later confidentiality agreement allowing the employer to seek injunctive relief for trade secret theft did not render the arbitration agreement nonmutual in any sense, because any injunctive relief would have to be sought in arbitration. To the extent the Court of Appeal's interpretation of the agreements is correct, there is no asymmetry in access to the courts. The Court of Appeal construed the arbitration agreement in a way that rendered it unquestionably enforceable, in accord with general principles of

[3] Similarly, the reference to "judicial modification" in the severance clause's last sentence refers both to this preliminary stage and to the possibility that an arbitrator will modify the agreement while performing "'judicial' work in an arbitration setting." (C.A. slip opn., p. 16.)

contract law that must apply here under the equal footing doctrine.

But even if the Court of Appeal was incorrect, and the employer has access to the courts for a limited subset of claims, the contract was still mutual under the general principles applied to other contract provisions—principles that the Federal Arbitration Act requires to be applied here.

In no other contract setting is 100% mirror-image mutuality required. Such a requirement would be absurd because contract is fundamentally a matter of exchange, and no one exchanges identical goods or services with someone else.

It is true that this Court held in *Armendariz*, *supra*, that some imbalances in which claims are excepted from arbitration may be unconscionable. But only the narrowest aspect of that holding could possibly be squared with the FAA. Because 100% mutuality is not the rule applicable to other contract provisions, that rule cannot be applied to the arbitration agreements under the FAA. Especially given the employee's position here, where access to confidential information is unlikely, it is not unconscionable for the agreement to provide a limited safety valve allowing the employer to respond more swiftly to a small class of unlikely events.

This Court in *Armendariz* recognized the governing general principle that "a contract can provide a margin of safety that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." (24 Cal.4th at p. 117 [cleaned

up].) Yet the Court called that principle into question in suggesting that 100% mutuality was necessary in arbitration agreements. Courts have taken *Armendariz* to justify a term-by-term analysis of arbitration agreements to determine whether each term not only applies equally to each party, but benefits each party equally. That exaggerated point-by-point mutuality requirement does not apply to contracts generally.

On the contrary, this Court follows a different rule for other contractual obligations: "If 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 fn. 14 [cleaned up]. See also Rest.2d, Contracts (1981) § 79 [using identical language].) Indeed, "the so-called requirement of mutuality of obligation is now widely discredited." (2 Corbin on Contracts (rev. ed. 1995) § 6.1.) And "[m]ost federal courts" apply the *Foley* standard and reject "challenges on the grounds that an arbitration clause does not require mutuality of obligation, so long as the underlying contract is supported by adequate consideration." (*In re First Merit Bank, N.A.* (Tex. 2001) 52 S.W.3d 749, 757 & fn. 35 [collecting cases].)

Any effort to enforce strict mutuality in the scope of claims committed to arbitration suffers from another invalidating flaw. *Armendariz* and similar decisions assume that the requirement to resolve claims in arbitration is some kind of penalty—and "inferior forum" (*Armendariz*, *supra*, 24 Cal.4th at p. 124)—reflecting the very "judicial hostility to arbitration agreements"

that the FAA was enacted to override. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.) The FAA preempts contract defenses "that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Kindred Nursing Centers Ltd. P'ship v. Clark* (2017) 581 U.S. 246, 251 [quoting *Concepcion*, *supra*, 563 U.S. at p. 339]).

In short, a limited variation between the parties in the scope of claims subject to arbitration is not unconscionable.

### D. Any Unconscionable Terms Should Be Severed And The Arbitration Agreement Enforced So Long As he Remaining Agreement Is Lawful And Coherent.

Were this Court to find substantively unconscionable any of the challenged provisions of the arbitration agreement, those provisions should be severed and the agreement to arbitrate enforced. The severability provisions in both the arbitration agreement (C.A. slip opn., appen. B, p. 7) and the confidentiality agreement (C.A. slip opn., pp. 15–16) make clear the parties' intent that invalid provisions be severed.

Some California courts have held that a severability provision in an arbitration agreement can have effect only for a single substantively unconscionable provision. For example, in a decision now under review by this Court, one panel of the Court of Appeal held that "[s]everance may be properly denied when the agreement contains more than one unconscionable provision, and there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." (*Ramirez v. Charter Communications, Inc.* (2022) 75 Cal.App.5th 365, 386–87 [cleaned up], review granted June 1, 2022, S273802.)

Other panels of the Court of Appeal have likewise invalidated arbitration agreements on the ground that "[a]n agreement to arbitrate is considered 'permeated' by unconscionability where it contains more than one unconscionable provision." (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 292.)

But courts do not limit severance to a single unconscionable provision when dealing with other types of contracts.[4] The supposedly unconscionable provisions here are far from the contract's core objective to provide for a fair and efficient resolution of disputes outside the judicial system. Severing all or some of the supposed limit on arbitrable claims, the supposed PAGA waiver (see C.A. dis. opn., pp. 6–7), or the right to amend unilaterally would do no violence to the agreement to arbitrate under the provisions of the California Arbitration Act. The remaining provisions of the arbitration agreement would be sufficiently coherent to represent an enforceable contract to pursue the lawful object of resolving disputes in a more efficient arbitral forum.

The Civil Code expresses California's strong preference for severance rather than invalidation: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part . . . the contract is void as to the latter and valid as to the rest." (Civ. Code, § 1599.) A court

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[4] *E.g.*, *MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 802, 805 [remanding for severance analysis where several terms of contract provided for compensation unlawful under real estate licensing statutes]; accord *GreenLake Capital, LLC v. Bingo Investments, LLC* (2010) 185 Cal.App.4th 731, 737–40.

should thus hold an "entire contract" to be "void" only where the contract "has but a single object, and such object is unlawful." (*Id*. § 1598.)

In accord with the Code, this Court has interpreted these statutory provisions as a prohibition against voiding an entire contract unless its "central purpose . . . is tainted with illegality." (*Marathon Entertainment, Inc. v. Blasi (*2008) 42 Cal.4th 974, 996 [quoting *Armendariz*, *supra*, 24 Cal.4th at p. 124].) That is because the express terms of Civil Code section 1599 "preserve[] and enforce[] *any* lawful portion of a parties' contract that feasibly may be severed." (*Id*. at p. 991 [emphasis added].) Courts must sever illegal provisions that are "collateral to the main purpose of the contract" and enforce the remainder of the contract. (*Id*. at p. 996 [quoting *Armendariz*, *supra*, 24 Cal.4th at p. 124].)

Especially when the parties have explicitly intended to sever any invalid terms of their agreement, California courts "take a very liberal view of severability." (*Adair v. Stockton Unified School Dist.* (2008) 162 Cal.App.4th 1436, 1450.) Severance accords with the intentions and expectations of the parties by preserving the lawful benefit of the bargain and stripping out any unlawful elements. (See *Keene v. Harling* (1964) 61 Cal.2d 318, 320–21.) Thus, outside the arbitration context, the general "rule relating to severability of partially illegal contracts" long has been "that a contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or

determinable portion of the consideration on the other side." (*Id.* at p. 321.) As this Court has instructed, California courts decline to sever and instead invalidate the entire contract only when they are "unable to distinguish between the lawful and unlawful parts of the agreement." (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 138–40.)

Under the FAA's equal-footing doctrine, the same process must govern severance of provisions in arbitration agreements. (See *Armendariz*, 24 Cal.4th at p. 127; accord *Concepcion*, 563 U.S. at p. 339.) The core and lawful object of most arbitration agreements is the relatively speedy and inexpensive resolution of disputes. (*Lamps Plus, Inc. v. Varela* (2019) 587 U.S. 176, 184–85 [cleaned up].) In most cases, any unlawful objects relating to specific procedures are "collateral to the main purpose of the contract" (*Marathon*, *supra*, 42 Cal.4th at p. 996 [quoting *Armendariz*, *supra*, 24 Cal.4th at p. 124]) can be severed while leaving a coherent and enforceable arbitration agreement. An arbitration agreement should be invalidated in full only when the unlawful aspects, once removed, do not leave an enforceable agreement, but would require the court to affirmatively "augment[]" the contract "with additional terms." (*Armendariz*, *supra*, 24 Cal.4th at p. 125.)

This Court's decision in *Armendariz* does not support the rigid approach of some courts in invalidating any arbitration agreement with more than one unconscionable provision. Under the proper analysis, "the presence of multiple unconscionable clauses is merely *one factor* in the trial court's inquiry; it is *not*

dispositive." (*Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 454.) "That an agreement *can* be considered permeated by unconscionability if it contains more than one unlawful provision does not compel the conclusion that it *must* be so." (*Ibid.*; see also *Poublon v. C.H. Robinson Co.* (9th Cir. 2017) 846 F.3d 1251, 1272–74.)

The setting of *Armendariz* is instructive. The Court found that severance would not work, not merely because "the arbitration agreement contain[ed] more than one unlawful provision," but because the Court did not believe severance could "remove the unconscionable taint from the agreement." (*Armendariz, supra*, 24 Cal.4th at pp. 124–25.) The agreement did not embody mutual intent to resolve the parties' disputes (or the bulk of their disputes) quickly and efficiently, but rather reflected an intent to channel only the employees' claims through a dispute resolution mechanism that additionally restricted the employees' recoverable damages—a hamstrung and thus "inferior forum that works to the employer's advantage." (*Id.* at p. 124.)

As noted above, the Court could not lawfully have meant that arbitration in general is an "inferior forum"; that would reflect the judicial hostility that the FAA forbids. (See, *e.g.*, *Concepcion*, *supra,* 563 U.S. at p. 339; *Vaden* v. *Discover Bank* (2009) 556 U.S. 49, 58–59.) The Court instead seemingly referred to arbitration under the agreement at issue as "inferior" because it encompassed only one side's claims and placed one-sided limits on remedies.

In short, "the doctrine of severance attempts to conserve a contractual relationship" so long as the relationship does not further an "illegal scheme." (*Armendariz*, 24 Cal.4th at pp. 123–24.) The "scheme" here is to move disputes to arbitration without one-sided limits on claims or remedies. There is nothing illegal about that.

### E. Enforcing Arbitration Agreements Benefits Employees and Consumers As Well As Businesses.

The Court should ensure that its jurisprudence related to arbitration agreements does not impair access to arbitration for the employees, consumers, and businesses who mutually benefit from the "lower costs, greater efficiency and speed," as well as "the ability to choose expert adjudicators to resolve specialized disputes," that distinguish arbitration from litigation in court. (*Lamps Plus*, *supra*, 587 U.S. at p. 185 [cleaned up].)

Millions of employees agree to arbitrate disputes with their employers because "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." (*Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 123.) For many employees whose claims would not make litigation in court economical, "it looks like arbitration—or nothing." (Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks* (2008) 41 U. Mich. J.L. Reform 783, 792.)

"[T]he informality of arbitral proceedings" not only "reduc[es] the cost" but also "increas[es] the speed of dispute

resolution." (*Concepcion*, *supra*, 563 U.S. at p. 345.) Although some courts seem to suspect that arbitration agreements are one-sided contracts that routinely disadvantage employees, data do not support that apprehension. To the contrary, "the speed, informality, and lower costs of arbitration provide real advantages" for both sides "over litigating in court." (*Johnmohammadi v. Bloomingdale's, Inc.* (9th Cir. 2014) 755 F.3d 1072, 1076.) These "advantages of the arbitration process" do not "disappear when transferred to the employment context." (*Circuit City*, *supra*, 532 U.S. at p. 123.)

A recent study based on data collected from the federal PACER system and the two largest arbitration service providers in the country—the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Services ("JAMS")—highlights the benefits of arbitration for all parties. (Nam D. Pham & Mary Donovan for U.S. Chamber of Commerce Inst. for Legal Reform, *Fairer, Faster, Better III: An Empirical Assessment of Consumer & Employment Arbitration* (Mar. 2022) pp. 5, 15, available at https://tinyurl.com/m9wfhhsz. The authors found that employees and consumers who pursued claims in arbitration won more often, more quickly, with higher monetary awards.

Between 2014 and 2021, employees that initiated arbitration won nearly 38% of their cases, while employees prevailed in fewer than 11% of cases initiated in court during the same period. (*Id.* at p. 12.) Employees and consumers also received more money in arbitration than in litigation. On average, employees who pursued arbitration obtained $444,134,

while those who pursued litigation obtained an average of $407,678. (*Id*. at p. 14.) The gap between median awards was more pronounced: $142,334 in arbitration as against only $68,956 in litigation. (*Ibid*.)[5]

And these favorable results came more quickly in arbitration than in court. Employees prevailed after an average of 659 days in arbitration compared to 715 days in federal litigation, while consumers obtained their awards after an average of 321 days in arbitration as opposed to 439 days in federal court. (See *id*. at p. 15.) Another study found that arbitrations take, on average, less than 11 months to decide, versus an average of 26.6 months to reach a verdict in state-court jury-trial cases. (Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers* (2019) 107 Cal. L. Rev. 1, 51.) If protracted proceedings tend to benefit defendants, the relative speed of the arbitration process benefits employees.

The efficiency of arbitration is even more pronounced when compared to the pace of litigation in the California court system, which moves more slowly than the national average. The most recent data available indicates that it can take more than two years to resolve a civil case in the Superior Courts, and nearly 1,000 additional days to complete an appeal. (See Jud. Council of

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[5] Earlier studies showed similar results. (See, *e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights* (1998) 30 Colum. Human Rts. L. Rev. 29, 46; Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?* (Nov. 2003–Jan. 2004) 58 Disp. Res. J. 56, 58).

Cal., Court Statistics Report (2024), Statewide Caseload Trends 2013–2014 Through 2022–2023, pp. 36, 50, available at https://tinyurl.com/bdzyduu8.)

And arbitration has broader, tangible benefits. Arbitration lowers businesses' dispute-resolution costs by, among other things, reducing the time and expense of discovery, and limiting appellate review. (Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements* (2001) 2001 J. Disp. Res. 89, 90–91.) Lowering businesses' "dispute-resolution costs" results in "wage increase[s]" for employees. (Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees* (2006) 5 J. Am. Arb. 251, 254–56.) And "whatever lowers costs to businesses tends over time to lower prices to consumers." (*Id.* at p. 255; accord *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l* (7th Cir. 2002) 294 F.3d 924, 927.)

These mutual benefits provide ample public-policy reasons to uphold substantively fair arbitration agreements whenever possible, including by severing unconscionable provisions when necessary. The same benefits weigh heavily against distorting precedent in a way that would thwart agreements to arbitrate.

## CONCLUSION

The order of the Court of Appeal should be affirmed.

Dated: April 25, 2024

Respectfully submitted,

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## CERTIFICATION OF COMPLIANCE

In compliance with California Rules of Court, Rule 8.520(c), I hereby certify that this Brief of Amicus Curiae contains 5,110 words, including footnotes but excluding the items referenced in California Rules of Court, Rule 8.520(c)(3), as calculated by the word processing software used to prepare this Brief of Amicus Curiae.

Dated: April 25, 2024

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## CERTIFICATE OF ELECTRONIC SERVICE

I am over the age of 18 and not a party to this action. My business address is Four Embarcadero Center, Suite 1400, San Francisco, CA 94111. On April 25, 2024, I electronically served the above Application of the Chamber of Commerce of the United States of America for Leave to File Brief As Amicus Curiae In Support of Defendants and Appellants and Brief as Amicus Curiae In Support of Defendants and Appellants on the following via TrueFiling:

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

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