No. 15-750

IN THE

Supreme Court of the United States

WAN HAI LINES LTD., *ET AL.*,

Petitioners,

v.

ELITE LOGISTICS CORP. AND UNIMAX EXPRESS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an intermediate state court erred in holding the arbitration agreement in this case to be unconscionably one-sided, and thus unenforceable, because its extremely abbreviated limitations period and other provisions had the effect of blocking respondents from obtaining redress for their claims in any forum.

2. Whether the state court's judgment requiring vacatur of the arbitration award and remand to the trial court for litigation of respondents' statutory claims is correct for the alternative reason that the plain language of the arbitration agreement in this case (as well as the construction given that language by the organization that administers arbitrations under that agreement) provides that respondents' statutory claims are not subject to arbitration.

RULE 29.6 STATEMENT

Respondent Elite Logistics Corporation is not a publicly traded company. It has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent Unimax Express, Inc., is not a publicly traded company. It has no parent company and no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Rules:

INTRODUCTION

In its nonprecedential decision in this case, the California Court of Appeal held an arbitration agreement to be unconscionable under general principles of California contract law because its one-sided terms, including a minuscule 30-day limitations period, did not offer respondents a reasonable opportunity to present their claims for resolution. The court further held that the Federal Arbitration Act (FAA) does not preempt application of state unconscionability law to the contract at issue. That factbound decision by an intermediate state court does not conflict with the holding of any other appellate court. Indeed, federal and state courts have agreed that the arbitration agreement at issue is unconscionably one-sided and may be set aside consistently with the FAA.

The petitioners, Wan Hai Lines and Hyundai Merchant Marine, nonetheless argue that review is warranted to determine whether California unconscionability law as set forth in *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013) (*Sonic II*), is preempted by the FAA. Petitioners do not contend that this case presents the same unconscionability issue addressed in *Sonic II*, but instead argue broadly that *any* decision applying *Sonic II*'s unconscionability standard to set aside an arbitration agreement as unfairly one-sided conflicts with the FAA.

That sweeping claim does not merit review. Petitioners cite no division of appellate authority on the issue. Indeed, *no* court has held that California's general unconscionability doctrine is preempted as applied to arbitration agreements. Petitioners' claim is contradicted by this Court's repeated recognition that state contract-law principles of general applicability—

including unconscionability doctrines—are *not* preempted by the FAA unless their application would have the effect of requiring procedures incompatible with arbitration. *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–40, 343 (2011). As the California appellate court held in this case, the application of unconscionability law here, which requires no more than that procedures be available under which respondents have a reasonable opportunity to assert their claims, poses no "obstacle to the accomplishment of the FAA's objectives." *Id*. at 343.

Absent any disagreement among federal appeals courts or state supreme courts over the legal principles applied in this case, petitioners' argument for review boils down to a particularly unconvincing claim that an intermediate state court's unpublished opinion wrongly applied settled principles of FAA preemption in the specific factual context of this case. That claim does not warrant review by this Court.

STATEMENT

This case arises from a dispute between trucking companies and international shipping companies over "per diem" fees charged by the shipping companies for the trucking companies' use of containers owned by the shipping companies. The trucking companies, respondents here, claim that the shipping companies violated a California statute prohibiting shipping companies to charge fees for certain periods of time. The shipping companies successfully compelled arbitration of the claims under an agreement that required all claims to be initiated within 30 days of a disputed invoice, even though the arbitration agreement on its face did not permit the assertion of statutory claims and the arbitration provider itself viewed

the agreement as inapplicable to such claims. After the arbitrators dismissed the claim as time-barred by the 30-day contractual limitations period and a trial court confirmed the award, the California Court of Appeal set the award aside on the ground that the 30-day limitations period and other provisions of the arbitration agreement rendered it unconscionable and unenforceable.

1. The Contract Provisions at Issue.—The applicable contract is the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA), which establishes terms under which shipping companies that bring containerized goods to the United States provide those containers to motor carriers for transport to inland destinations. The UIIA is administered by the Intermodal Association of North America (IANA). As relevant here, the UIIA provides that the trucking companies may use the containers for specified periods of time without charge, after which the shipping companies may impose "per diem" charges based on the number of days the carriers retain the containers in excess of the "free time."

The UIIA provides for arbitration of certain disputes over invoices issued by the shipping companies for per diem charges. Under the agreement, a motor carrier must initiate the process by disputing an invoice within 30 days. The shipping company then may either verify its charges or issue a credit; once it does, the trucking company has only 15 days to file a notice of intent to arbitrate. *See* Pet. App. 6–9.

Under the arbitration agreement, disputes are "confined to charges arising from" invoices, and they must be resolved "solely on the rules in the UIIA and the rules and charges in the Equipment Provider's

Addendum." Pet. App. 8, 9. Arbitrations are limited to disputes over particular invoices, only five of which may be consolidated in a single arbitration. The process does not permit arbitrators to issue injunctive relief against practices of shipping companies that transcend particular invoices. *See* Pet. App. 8, 29–30.

2. Respondents' Statutory Claims.—In 2005, California adopted Business and Professions Code Section 22928, which imposes limitations on a shipping company's ability to impose per diem charges on intermodal motor carriers. The statute prohibits the imposition of such charges for any period of time when a marine terminal's truck gate is closed during normal working hours; for any weekend day or holiday; during a labor disruption; or when the truck gate is closed for any other reason (such as an "act of God").

Respondents brought this action in a California trial court in 2011 after discovering that petitioners had been systematically violating section 22928 by imposing per diem charges for weekends and holidays. The action alleged that the statutory violations gave rise to a right of action under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*. Because such an action is subject to a four-year statute of limitations, *see* Cal. Bus. & Prof. Code § 17208, the suit sought recovery for all charges imposed in violation of the statute over the preceding four years, as well as injunctive relief against further violations.

3. The Arbitration Proceedings.—Petitioners moved to compel arbitration under the UIIA. Respondents opposed the motion, arguing that the UIIA's arbitration provision, which expressly limits

the arbitrators to deciding cases on the basis of the rules set forth in the UIIA itself, is limited to contract disputes and does not encompass statutory claims. Respondents also argued that, if the agreement did apply to the dispute, it was unconscionable because of (among other reasons) the severely abbreviated limit on the time for initiating proceedings as well as the limitations on the claims the arbitrators could hear and the relief they could provide. The trial court nonetheless compelled arbitration.

When respondents sought to initiate arbitration, however, IANA, which administers arbitrations under the UIIA, rejected their claim on the ground that the agreement does not apply to statutory claims. IANA's general counsel informed the parties that the claims were "not within the purview of the matters which are the proper subjects for resolution under the Binding Arbitration Process of the [UIIA]." Pet. App. 13. He explained the organization's view of the applicability of the arbitration clause as follows:

> The apparent determination of the merits of the disputed claims rests on the determination of whether [charges] were assessed in violation of Cal. Bus. & Prof. Code Section 22928.... That is a legal determination which is not within the purview of the operational matters the UIIA arbitration process is intended and designed to resolve. [¶] This can be seen from the qualifications of the arbitrators as described in Section 4 of the Binding Arbitration Process Guidelines. To be qualified to act as an arbitrator, the individual must have five years' operating experience involving such matters as gate interchanges, the yard procedures associated with vessels and trains, load-

> ing and unloading operations, the operations of marine and rail container yards, the receiving and delivery of containers, and/or with road equipment. It is within such operational and commercial contexts that the arbitrators address the disputed invoices relating to maintenance and repair or per diem matters. The panels are not qualified to address legal matters and no lawyers serve on the panels. Therefore, the UIIA arbitration process is not able to address the disputed claims which you have presented for arbitration under the UIIA's process.

Pet. App. 13–14.

Shortly thereafter, however, after reviewing the trial court's order compelling arbitration, IANA decided to accept the claims for arbitration—but not because it had changed its view that its arbitrators were not empowered or qualified to decide them. Indeed, IANA reiterated that its precedents established "that claims disputes have been confined exclusively to the validity or correctness of the challenged invoices according to operational or commercial practices." Pet. App. 14. However, in light of its review of the order compelling arbitration, IANA agreed to initiate arbitration "so that the Parties are not left without recourse in this dispute." Pet. App. 14.

IANA then convened a panel of arbitrators, which dismissed respondents' claims because respondents had not disputed the shipping companies' invoices in writing within 30 days of receiving the invoices. The trial court confirmed the award, adhering to its previous views that the arbitration agreement was applicable to the dispute and was not unconscionable.

4. The Decision on Appeal.—Respondents appealed the order confirming the award, arguing that the arbitration agreement was unconscionable because of its 30-day limitations period and other provisions that severely interfered with their ability to present their claims; that the dispute was not properly arbitrable under the UIIA because the UIIA's dispute resolution provisions on their face authorize only adjudication of contractual disputes over the propriety of invoices; and that, for the same reasons, the arbitrators exceeded their powers in purporting to decide respondents' statutory claims.

In an unpublished opinion that is not citable as precedent under California law, a panel of the California Court of Appeal reversed. The court held that "[b]ecause the[] [UIIA] provisions do not provide plaintiffs with sufficient time or an adequate mechanism to address and remedy the kinds of legal and statutory disputes at issue in this case, they effect 'a practical abrogation of the right of action' … and therefore are unconscionable and unenforceable under California law." Pet. App. 4. The court did not reach respondents' alternative arguments that the agreement did not apply to statutory claims and that the arbitrators exceeded their authority in deciding those claims.

The court's ruling applied principles of California law, under which unconscionability has both procedural and substantive dimensions—the former focusing on inequality of bargaining power and the adhesive nature of a contract, *see* Pet. App. 17–19, and the latter on whether its terms are "overly harsh," "unduly oppressive," "so one-sided as to 'shock the conscience,'" or "unfairly one-sided." Pet. App. 21. Both

procedural and substantive unconscionability must be present to find a contract unenforceable, but if there is a particularly strong showing of one element, a lesser showing of the other is needed. Pet. App. 17–18.

On the procedural side, the court found that the UIIA was a contract of adhesion because the trucking companies had no say in its terms, while the shipping companies could decide unilaterally to amend it and to include addenda addressing various matters. The court also relied on uncontradicted evidence that the contract was presented to the trucking companies on a "take it or leave it basis." Pet. App. 19–20.

As to the substantive terms of the arbitration agreement, the court found that they were unduly harsh, oppressive and one-sided because they "effectively block[ed] [respondents] from obtaining redress of disputes in *any* forum." Pet. App. 22. The court noted that California precedents involving both arbitration agreements and non-arbitration agreements had found that limitations periods that fail to provide a sufficient time to effectively pursue a remedy are unconscionable. *See* Pet. App. 23–26. It held that the 30-day limitations period applicable to respondents' claims was similarly unreasonable "as applied to the present dispute" because it amounted to "a practical abrogation of the right of action." Pet. App. 26 (citation omitted).

The court reasoned that although such a limitations period was designed for and might suffice for garden-variety "operational challenges to per-diem charges," it was insufficient as applied to a legal challenge based on "the interpretation and enforceability of a California statute, as well as the application of

that statute to the contracts between the parties." Pet. App. 27. As the court explained:

> This is not an issue on which motor carriers are likely to have expertise, and thus a reasonable statute of limitations must allow them time to consult with legal counsel. It is likely to take a motor carrier more than 30 days to retain counsel and determine whether weekend or holiday per diem charges violated its statutory rights. Thus, as in the cases discussed above, the 30-day notice provision is unreasonable because it requires motor carriers to dispute per diem charges before they fairly can do so.

Pet. App. 27. The court made clear that it was not holding that the provision could not be applied to other disputes, nor that an enforceable agreement must allow the full four years to bring a claim that is otherwise provided in the applicable statute. Pet. App. 28 n.5, 38.

In addition to the 30-day limitations period, the court also found that a number of other features of the arbitration agreement together denied respondents a reasonable opportunity to present their claims. These features included the agreement's 15-day limits on the time to initiate arbitration after the shippers responded to a claim and to submit briefs to the arbitration panel, which the court found "is not reasonable as applied to a legal/statutory dispute like the present one." Pet. App. 27. The court also pointed to the agreement's provision that arbitrators must base decisions "solely on the rules in the UIIA and the rules and charges in the Equipment Provider's Addendum," which "prohibits arbitrators from considering the very authority on which plaintiffs' claims depend."

Pet. App. 29. In addition, the court noted that by limiting arbitrators to ruling on the charges in particular invoices, the agreement prevented them from issuing injunctive relief and required respondents to initiate arbitration separately each time petitioners imposed an improper charge—a procedure that "does not provide plaintiffs with a reasonable avenue for redress of defendants' alleged unlawful conduct, and thus is unconscionable as applied to plaintiffs' claims." Pet. App. 30. The court also found that the arbitration clause "uniquely handicap[s] motor carriers," because the only disputes subject to arbitration are motor carriers' challenges to invoices. Pet. App. 30. Moreover, the court found that the agreement's tight required time-frames were also one-sided, because shipping companies were not actually required to respond to complaints about their invoices within similar periods of time, only to "undertake" to do so. Pet. App. 30. The court pointed out that its conclusion that all these features together rendered the agreement unconscionable was consistent with the only other appellate authority on the issue, the Ninth Circuit's decision in *Elite Logistics Corp. v. Hanjin Shipping Co.*, 589 Fed. Appx. 817 (9th Cir. 2014). *See* Pet. App. 31.

The court further rejected petitioners' argument that its application of unconscionability law was preempted by the FAA under this Court's decision in *Concepcion*. Reviewing both *Concepcion* and the California Supreme Court's decision in *Sonic II*, the court concluded that the application of neutral principles of contract law, such as the unconscionability doctrine, are not preempted as long as they do not have the effect of "interfer[ing] with fundamental attributes of arbitration." Pet. App. 36 (quoting *Concepcion*, 563 U.S. at 344). The court held that the contract princi-

ples it relied on "applie[d] equally to arbitration and litigation," Pet. App. 38, and did not require any procedures that would interfere with fundamental attributes of arbitration. Pet. App. 37–38. The court emphasized that in holding that the agreement was unconscionable because it "did not give plaintiffs a reasonable opportunity to investigate and pursue their claims," it was not preventing the use of arbitration agreements that promote low cost, efficiency and speed—even, possibly, by providing for limitations periods shorter than those established by statute—nor was it "exempt[ing] a whole class of claims from arbitration." Pet. App. 38.

Finally, the court concluded that the pervasive unconscionability of the arbitration agreement required that it be set aside in its entirety, as severing individual provisions would not be practical and would require the court to "reform the contract by augmenting it with additional terms." Pet. App. 40. Accordingly, the court remitted the case to the trial court with directions to reinstate the civil actions.

Petitioners sought review of the court's unconscionability and preemption rulings—but not its ruling on severability—in the California Supreme Court. That court denied review.

REASONS FOR DENYING THE WRIT

I. Petitioners offer no compelling reason why this Court should grant review in the absence of conflict among the state and federal courts.

The decision below reflects the application of general principles of California contract law and FAA preemption doctrine to the specific features of a particular contract, the UIIA. That contract presents an

idiosyncratic constellation of features, including extremely abbreviated limitations periods applicable only to one side of a commercial relationship, and strict limits on the issues arbitrators can consider and the relief they can grant. A nonprecedential, intermediate state court opinion addressing such a factbound matter does not merit review by this Court.

Petitioners do not contend that the state court's decision with respect to the enforceability of the UIIA conflicts with the decision of any state court of last resort or federal court of appeals. Indeed, petitioners acknowledge that the decision below is fully consistent with the one other appellate decision addressing the application of unconscionability and preemption principles to the contract at issue, the Ninth Circuit's decision (also unpublished) in *Elite Logistics Corp. v. Hanjin Shipping Co.*, 589 Fed. Appx. 817. An issue that has so far generated only consistent, nonprecedential appellate opinions is a particularly unimpressive candidate for review by this Court.

In light of the factbound nature of the particular issue posed by this case, and the unanimity of opinion on it, petitioners seek to broaden the issue to whether California's general standard of unconscionability as summarized in *Sonic II* is, on its face, preempted as applied to arbitration agreements. Again, petitioners can muster *no* appellate authorities in support: Despite the frequency with which general principles of unconscionability under California law are applied by federal and state courts, petitioners cite not a single decision supporting their view that those principles are broadly preempted regardless of the particulars of the arbitration agreements to which they are applied. In the more than two years since *Sonic II* was decid-

ed, not one state or federal appellate court has held that the California unconscionability standard that *Sonic II* reiterated is broadly preempted. Nor, indeed, do petitioners cite any decision of any court holding any state's general unconscionability standard to be preempted on its face as applied to any and all arbitration agreements.

Petitioners' failure to point to any disagreement among the lower courts on the broad issue they present is not surprising, because whether the FAA preempts application of general state contract law principles is by nature a fact-specific inquiry. As one federal court recently explained, "California's generally applicable rule against unconscionable contracts is not necessarily preempted by the FAA, but it could be if the specific application of the rule disproportionately impacts arbitration." *Galen v. Redfin Corp.*, 2015 WL 7734137, at *7 (N.D. Cal. Dec. 1, 2015); *accord*, *e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013). In the absence of either any disagreement among the state and federal appellate courts with the proposition that California unconscionability law is not preempted on its face, or any divergent holdings with respect to the application of unconscionability doctrine to the specific provisions at issue here, petitioners can point to no conflict among the lower courts meriting resolution by this Court.

Unable to make any credible claim of a conflict among the lower courts, petitioners contend that the California courts have disregarded this Court's preemption precedents. But both *Sonic II*, on which petitioners train their fire, and the decision below cited this Court's controlling decision, *Concepcion*, and applied what petitioners themselves concede is the

correct standard: A state contract law principle is preempted if it "interferes with fundamental attributes of arbitration." Pet. 4 (quoting *Concepcion*, 563 U.S. at 344); *see Sonic II*, 311 P.3d at 201 (recognizing that states may not apply unconscionability doctrine in ways that "interfere[] with fundamental attributes of arbitration"); Pet. App. 37 (same).

Thus, petitioners assert only that the California courts have misapplied settled legal principles. Such a claim of error does not ordinarily justify a grant of certiorari. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). There is no reason to depart from that principle to address the factbound decision here.

Moreover, a lower-level court's noncitable application of unconscionability doctrine to circumstances far different from those in *Sonic II* provides little occasion for addressing the correctness of *Sonic II*. This Court's decision to deny certiorari in *Sonic II* itself, *see Sonic-Calabasas A, Inc. v. Moreno*, 134 S. Ct. 2724 (2014), underscores that petitioners' claim that *Sonic II* misapplied this Court's precedents does not warrant plenary consideration by this Court. If *Sonic II* itself did not merit review, there is still less reason to review its application to a particular contract by an intermediate state court in a nonprecedential decision that agrees with the only other appellate authority addressing these contract terms.[1]

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[1] Petitioners point out that the Court granted certiorari in *MHN Government Services v. Zaborowski*, 136 S. Ct. 27 (2015) (No. 14-1458), which was recently removed from the Court's ar-

(*Footnote continued*)

II. The state court correctly applied FAA preemption doctrine to the circumstances of this case.

Petitioners' claim of error in the application of this Court's FAA preemption jurisprudence not only fails to present an issue that has caused disarray in the lower courts necessitating review here, but also fails on the merits. California unconscionability doctrine is not preempted by the FAA because it is a generally applicable contract-law defense to the enforcement of an agreement, and its application in the circumstances of this case does not interfere with fundamental attributes of arbitration.

A. The FAA does not preempt application of state unconscionability standards that do not interfere with fundamental attributes of arbitration.

Section 2 of the FAA limits the enforceability of arbitration agreements by stating explicitly that they may be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9

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gument calendar because of a settlement. *See* Pet. 27. Petitioners do not, however, contend that this case presents the same issue that was deemed worthy of review in *MHN*, and for good reason: That case involved a claim that California *severability* principles were preempted, not a claim that California *unconscionability* law was preempted. Although the court of appeal decided a severability question in this case, petitioners do not seek review of that aspect of the decision, nor do they raise a severability issue of any kind in their petition for certiorari. *See* Pet. ii (presenting only the question whether the FAA preempts California's rule of unconscionability). In any event, petitioners did not raise severability in their petition for review in the California Supreme Court, and thus waived any chance to raise it in this Court.

U.S.C. § 2. This Court has long recognized that, as a result, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). In *Concepcion*, the Court repeated the point, and again specifically included unconscionability among the generally applicable contract defenses that states may enforce under the FAA. 563 U.S. at 339.

Concepcion also reiterated the Court's previous statements that the generally applicable contract defenses that may be maintained consistently with the FAA do not include "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id*. at 339. *Concepcion* added that "a doctrine normally thought to be generally applicable" may not be "applied in a fashion that disfavors arbitration" by "interfer[ing] with fundamental attributes of arbitration and thus creat[ing] a scheme inconsistent with the FAA." *Id*. at 341, 344.

B. Unconscionability principles applied by California courts since *Concepcion* are not preempted by the FAA.

In *Sonic II*, the California Supreme Court thoroughly addressed the holding of *Concepcion* and concluded that it required the court to overturn a previous holding that state law could categorically prohibit enforcement of an arbitration agreement that waived a party's right to present certain claims in an administrative hearing before arbitration. *See* 311 P.3d at 198–200. At the same time, the court concluded, *Con-*

cepcion did not preempt the application of California unconscionability law to arbitration agreements, so long as its application did not have the effect of requiring the adoption of procedures incompatible with the nature of arbitration. *Id*. at 201–03.

Pointing out that *Concepcion* itself listed unconscionability among the generally applicable contract defenses permitted by the FAA, the court reasoned that "unconscionability remains a valid defense to a petition to compel arbitration." *Id*. at 201. The court further recognized that, after *Concepcion*, it was "clear" that to avoid preemption, unconscionability rules not only "must not facially discriminate against arbitration and must be enforced evenhandedly," but also "must not disfavor arbitration as applied by imposing procedural requirements that 'interfere[] with fundamental attributes of arbitration,' especially its '"lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."'" *Id*. (quoting *Concepcion*, 563 U.S. at 344, 348).

California unconscionability principles, both generally and as applied in this case, satisfy these standards. *Sonic II* did not, as petitioners suggest, invent a new unconscionability standard; it applied settled principles of California contract law defining the general circumstances under which a contract, regardless of its subject-matter, is unenforceable on grounds of unconscionability. *See* 311 P.3d at 201–03. As *Sonic II* explained, unconscionability doctrine incorporates both procedural concerns about the absence of choice in contracts of adhesion between parties of unequal bargaining power, and substantive concerns about the resulting unfairness of contractual terms:

> [T]he core concern of the unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party.

Id. at 202 (internal quotation marks and citations omitted).

Under this standard, both procedural and substantive unfairness must be present to render a contract unconscionable, but "they need not be present in the same degree"; rather, California courts use a "sliding scale" under which "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 748 (Cal. 2015) (citations omitted). Moreover, the varying terms used to describe the substantive element of unconscionability "all mean the same thing": "Not all one-sided contractual provisions are unconscionable; hence the various intensifiers in our formulations: '*overly* harsh,' '*unduly* oppressive,' '*unreasonably* favorable.'" *Id*. at 749.

Both in its procedural and substantive aspects, California unconscionability law satisfies the FAA's basic requirement that arbitration agreements not be singled out for different treatment: The doctrine neither "appl[ies] only to arbitration" nor "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Rather, the doctrine's procedural focus on the adhesive nature of the contract and its substantive attention to whether the terms are overly harsh, oppressive and one-sided employ standards that apply whether a contract involves arbitration or not. Thus, the "standard is, as it must be, the same for arbitration and nonarbitration agreements." *Sanchez*, 353 P.3d at 750.

Of course, any evaluation of whether a particular contract is unduly harsh and one-sided "is highly dependent on context." *Id*. at 749. The particular features that render a contract excessively harsh will vary depending on its subject matter. The specific terms that make a contract for the lease of furniture excessively one-sided, for example, will differ from those that make an arbitration agreement unduly oppressive. In other words, "unconscionability can manifest itself in different ways, depending on the contract term at issue." *Id*.

In the case of an arbitration agreement, one of the hallmarks of an unreasonably harsh agreement is that its terms are so one-sided that they do not allow a claimant a reasonable opportunity to present his claims, and thus the agreement "blocks every forum for the redress of disputes, including arbitration itself." *Sonic II*, 311 P.3d at 204 (citation omitted). A finding that an arbitration agreement is unconscionable on that basis, however, remains an application to

the arbitration context of the same general rule of unconscionability applicable to all other contracts. As the California Supreme Court has emphasized:

> [T]he application of unconscionability doctrine to an arbitration clause … proceed[s] from general principles that apply to any contract clause. In particular, the standard for substantive unconscionability—the requisite degree of unfairness beyond merely a bad bargain—must be as rigorous and demanding for arbitration clauses as for any contract clause.

Sanchez, 353 P.3d at 749. California's even-handed application of this standard to arbitration and non-arbitration agreements alike is fully consistent with *Concepcion*.

C. The state court conscientiously followed FAA preemption principles.

The decision of the court of appeal in this case adheres to the principles articulated in *Concepcion*. The court held that multiple provisions of the arbitration agreement at issue, including not only the extremely limited period for bringing claims, but also the limits on the arbitrators' authority and the one-sided nature of the obligation to arbitrate, had the effect of denying respondents the ability to pursue their claims in any forum. Pet. App. 22-30. That determination provided ample support for the court's conclusion that the agreement was unduly harsh, oppressive and one-sided and hence unconscionable under California's generally applicable contract-law principles.

Moreover, the court's application of those principles did not require procedures incompatible with arbitration or otherwise interfere with fundamental attributes of arbitration. As noted above, the California

Supreme Court made clear in *Sonic II* that it recognized that even the application of generally applicable unconscionability principles is preempted under *Concepcion*'s analysis if applying those principles would "mandate procedural rules that are inconsistent with fundamental attributes of arbitration." 311 P.3d at 203; *accord*, *Sanchez*, 353 P.2d at 750. The lower court in this case correctly applied that teaching of *Concepcion* to the circumstances and concluded that ensuring that parties have sufficient time to identify their claims and advance them in arbitration, and that arbitrators have the authority to apply governing law and supply the remedies it provides, is not incompatible with fundamental attributes of arbitration.

Petitioners take issue with that conclusion, relying on this Court's observations that arbitration's benefits include its "efficiency and speed" and its use of "streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 348, 344. Ensuring that the process actually allows claimants an opportunity to assert their claims, however, is not inconsistent with those attributes of arbitration. After all, a proceeding so "streamlined" that it *prevents* the parties from advancing particular claims is hardly "tailored" to that "type of dispute." Ensuring that arbitration is accessible to the parties and conducted under terms minimally necessary to allow it to serve its functions as a prompt and effective dispute resolution mechanism *promotes* the FAA's objectives. *See Sonic II*, 311 P.3d at 207.

Moreover, the court of appeal's decision in this case did not prevent parties from adopting provisions to require speedy assertion of claims, even provisions that might allow less time than otherwise applicable

statutes of limitations. The court specifically stated: "[W]e do not suggest that, to be enforceable, an arbitration agreement must allow plaintiffs the full four-year statute of limitations provided" by California law; all the court required was a period that was not so abbreviated that it failed to allow a "reasonable opportunity to investigate and pursue the[] claims" at issue. Pet. App. 38.

Petitioners suggest that any unconscionability ruling that involves consideration by a court of whether an arbitration agreement offers a fair opportunity to present a state-law claim is preempted because, under the FAA, the doctrine that arbitration agreements must allow "effective vindication" of a claim is limited to federal-law claims. *See* Pet. 4 (citing *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013)). That argument is inapplicable and unavailing here.

To be sure, if a plaintiff sought to assert that another law implicitly *overrides* the FAA based on an "effective vindication" argument, the argument would necessarily have to be based on another federal statute. *See Compucredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (recognizing possibility that the "FAA's mandate" may be "overridden by a contrary congressional command"). An unconscionability claim, however, rests on a different basis: a state contract-law principle of general applicability, which the FAA expressly provides may serve as a reason for a court to refuse enforcement to an arbitration agreement. 9 U.S.C. § 2. No decision of this Court has held that, in applying state-law contract principles that require assessing whether a contract is unduly harsh or oppressive, a court is disabled from considering an ar-

bitration agreement's effects on the parties' ability to assert state-law claims to which the agreement may otherwise apply. Nor is there any reason why the FAA should preempt such consideration of state-law claims. The FAA's purposes do not include the *suppression* of claims, but their *resolution* through arbitration. *See* 9 U.S.C. § 2. A state contract-law decision finding an agreement unenforceable because it *prevents* the resolution of claims through arbitration does not run afoul of that policy as long it does not require procedures incompatible with arbitration.

Thus, the California Supreme Court has correctly held that "[n]either *Concepcion* nor *Italian Colors* precludes states from ensuring, through rules that do *not* interfere with arbitration's fundamental attributes, that the arbitral scheme set forth in a contract is in practice 'an accessible, affordable process for resolving … disputes.'" *Sanchez*, 353 P.3d at 756. Petitioners concede that this Court has never held to the contrary, *see* Pet. 4, and they cite no decisions of any court holding that courts applying state-law unconscionability doctrines may not consider whether arbitration agreements provide reasonable means for pursuing state-law claims as part of the determination of whether those agreements are unduly harsh or oppressive. Absent any decisional authority supporting petitioners' argument, there is no reason for this Court to consider it.

D. The decision below reflects no hostility toward arbitration.

Finally, petitioners argue that California unconscionability doctrines reflect "hostility" toward arbitration. But they concede that in *Sonic II*, the California Supreme Court *reversed* a previous uncon-

scionability holding in light of *Concepcion* and correctly "acknowledged the FAA's 'fundamental attributes of arbitration' principle." Pet. 5. And in the only California Supreme Court decision since *Sonic II* that directly addresses unconscionability, the Court likewise rejected unconscionability arguments. *See Sanchez*, 353 P.3d at 751–57 (rejecting multiple arguments that arbitration agreement was unconscionable). The California Supreme Court's few unconscionability decisions since *Concepcion* thus hardly support a broad charge of hostility.

Nor does the court of appeal's ruling in this case indicate hostility to arbitration. It reflects only the court's determination that the uniquely restrictive features of the arbitration agreement at issue here, as applied to the type of statutory dispute in this case, were unconscionably one-sided. The court's analysis, moreover, would have applied equally to a non-arbitration agreement that purported to impose similarly unreasonable limitations periods. The court also made clear that its ruling did not preclude the application of the clause in a conventional dispute over an invoice under the UIIA, and, contrary to petitioners' assertion, it explicitly disclaimed any intention to "negate all arbitration agreements that shorten the time for presentation of state statutory claims in arbitration." Pet. 5. The court's fact-specific ruling, correctly applying unconscionability and preemption doctrines, presents no threat to arbitration justifying review by this Court.

III. This case is a poor vehicle for resolving the issue petitioners claim it presents.

A. The case comes from a state court, and there is continued disagreement on this Court over whether the FAA applies in state courts.

Petitioners' claim that the FAA preempts the application of California unconscionability principles to the arbitration agreement at issue presupposes that the FAA applies to state-court actions. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), a majority of this Court concluded that section 2 of the FAA applies to state-court actions, and thus preempts state courts from applying inconsistent standards, over the dissent of Justice O'Connor, joined by Justice Rehnquist. *See id*. at 21. Justice O'Connor eventually accepted the stare decisis effect of *Keating* in *Allied-Bruce*, 513 U.S. at 282 (O'Connor, J., concurring), even while "continu[ing] to believe that that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass." *Id*. at 283. But in *Allied-Bruce*, two more Justices took up the view "that *Southland* clearly misconstrued the Federal Arbitration Act," *id*. at 284 (Scalia, J., dissenting), and that the FAA is "wholly inapplicable in [state] courts." *Id*. at 297 (Thomas, J., dissenting).

Although Justice Scalia has accepted the majority holdings that the FAA applies to state courts, Justice Thomas has not. In *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), Justice Thomas made clear that he "remain[s] of the view that the Federal Arbitration Act … does not apply to proceedings in state courts" and "does not require state courts to order arbitra-

tion." *Id*. at 471 (Thomas, J., dissenting). As *Imburgia* illustrates, that view continues to determine the disposition that will command Justice Thomas's vote in a case where the issue is whether the FAA preempts a state court's refusal to compel arbitration.

The continuing disagreement on the Court over this question makes a case coming from a state court a very poor candidate for resolving any significant FAA issue (even assuming that the case, unlike this one, actually presents a significant issue). Such issues have often closely divided the Court. *See*, *e.g.*, *Am. Express*, 133 S. Ct. 2304; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). For example, *Concepcion* was decided by a bare 5-4 majority. Had the case arisen from a state court, this Court would likely have divided 4-4 on the merits of the FAA preemption question, with the deciding vote resting on another basis entirely. Such a decision would have contributed nothing to the definitive resolution of any question of federal law.

Even if petitioners' preemption arguments here were strong enough to command any votes at all, there would be a strong likelihood of a similarly indecisive outcome. In such a case, the parties' investment of resources in briefing the question of federal law petitioners seek to present, and the Court's efforts to consider and resolve it, would be so much wasted effort. The case's origin in the state-court system thus makes it a very poor candidate for review.

B. Resolution of petitioners' preemption claim in their favor would not result in confirmation of the arbitration award because the arbitrators exceeded their power in exercising jurisdiction over statutory claims.

This case is also an unsuitable vehicle for consideration of petitioners' preemption claims because, even in the unlikely event that those claims were resolved in petitioners' favor, the arbitration award would have to be vacated for another reason, not reached by the state appellate court: Respondents' statutory claims were not properly subject to arbitration under the plain language of the arbitration agreement, and the arbitrators accordingly exceeded their powers in purporting to adjudicate those claims.

The arbitration agreement provides that it covers only "charges arising from Maintenance and Repair (M&R), Per diem or Lost/Stolen Equipment invoices," and that all disputes are to be resolved "based solely on the rules in the UIIA and the rules and charges in the Equipment Provider's Addendum." Pet. App. 8, 9. In other words, the agreement by its terms empowers the arbitrators to consider only contract claims, not statutory claims. Thus, when respondents initially attempted to pursue their statutory claims in arbitration, the arbitration provider's general counsel rejected the claims on the ground that they were "not within the purview of the matters which are the proper subjects for resolution under the Binding Arbitration Process of the [UIIA]." Pet. App. 13. He explained that legal determinations about whether charges were prohibited by statute were outside "the operational matters the UIIA arbitration process is intended and

designed to resolve," and that the arbitrators, who were not lawyers, were "not qualified to address legal matters." Pet. App. 13, 14.

The arbitration provider's ultimate decision to accept the claims rested not on reconsideration of its view that they were outside the scope of the arbitration agreement, but solely on the trial court's erroneous decision to compel arbitration, which the arbitration provider believed left respondents with no other recourse for their claims. Following the arbitrators' decision and the return of the matter to court for confirmation or vacatur of the award, respondents again urged that the dispute was outside the scope of the agreement.

On appeal from the trial court's ruling confirming the award, respondents argued, as another ground for reversal, that the trial court erred not only in compelling arbitration but also in confirming the award because the arbitrators exceeded their powers in adjudicating a matter outside the scope of the arbitration agreement. The court of appeal found it unnecessary to address this argument because of its holding that the agreement was unconscionable as applied to this dispute. As a result, if this Court were to consider petitioners' preemption claims, it would either have to consider respondents' arguments that the agreement is outside the scope of arbitration as an alternative ground for affirming the judgment below, or remand for consideration of those arguments if it were to conclude that the lower court erred in rejecting petitioners' preemption argument.

The necessity of either considering another fact-bound ground for affirmance, or remanding to the court of appeal for an almost certain decision that the

clear language of the agreement, as construed by the arbitration provider itself, rendered the dispute nonarbitrable, underscores the unsuitability of this case for review by this Court. The Court should not expend its finite resources (nor require the parties to pour their own resources into merits briefing of the case) when the issue on which the petitioners seek review will likely not be outcome-determinative. Under these circumstances, review by this Court will only further delay the litigation of respondents' claims in the trial court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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