Filed 11/13/26

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TRACIE BENNETT, Plaintiff and Respondent, v. VXI GLOBAL SOLUTIONS, LLC, Defendant and Appellant.	B346763 (Los Angeles County Super. Ct. No. 23STCV24278)

APPEAL from an order of the Superior Court of Los Angeles County. David S. Cunningham III, Judge. Affirmed.

Lathrop GPM, Laura Reathaford and Jeffrey Richmond for Defendant and Appellant.

Lavi & Ebrahimian, Joseph Lavi, Jordan D. Bello, and Brett Szmanda for Plaintiff and Respondent.

INTRODUCTION

Defendant VXI Global Solutions, LLC (Global) appeals from the trial court's order denying its motion to compel arbitration of plaintiff Tracie Bennett's claims arising out of her employment with the company. The trial court refused to enforce an arbitration agreement between the parties after finding it was both procedurally and substantively unconscionable and that the unconscionability could not be cured through severance. We affirm.

Although the execution of the parties' arbitration agreement involved a low degree of procedural unconscionability, the agreement contains several substantively unconscionable provisions, including an unreasonably broad scope, unlimited duration, and lopsided application in favor of Global and the agreement's third party beneficiaries. Because the agreement is permeated with illegality and its unconscionability cannot be cured through severance, we conclude the trial court did not abuse its discretion in refusing to enforce the agreement.

BACKGROUND

Global runs customer service call centers throughout the country. Global hired Bennett, who has a high school education, as an account associate in February 2023. Bennett worked for Global until April 2023.

When Global hired Bennett, it gave her an approximately 100-page new hire packet, which included various policies and forms. An arbitration agreement and a confidentiality agreement were included in the middle of the packet. Bennett understood that she was required to sign the arbitration and confidentiality agreements as part of her hiring.

Bennett signed the arbitration and confidentiality agreements. Bennett did not consult an attorney before signing them. Global's corporate counsel testified that Bennett "was provided with the opportunity during the new hire orientation to review the new hire packet before signing it."

The arbitration agreement, which was drafted by Global and reads as if it was written from Bennett's point of view, states in pertinent part:

"I recognize that differences may arise between [Global] (the "Company") and me during or after my employment with the Company and that those differences may or may not be related to my employment.… [¶] I understand that any reference in this Agreement to the Company will be a reference to the Company and all of its past and present partners, officers, directors and employees; all subsidiary and affiliate entities, all benefit plans, the benefit plans' sponsors, fiduciaries, administrators, affiliates and all successors and assigns of any of them.

"1. Claims Covered by this Agreement. The Company and I agree to resolve, by arbitration, all individual claims or controversies, except as excluded in paragraph 2 below, involving the Company and any of its past or present partners, officers, employees or agents, whether or not those claims or controversies arise out of my employment with the Company or the termination of my employment ("Claims"). Subject to the exclusions in paragraph 2, the Claims covered by this Agreement include, but are not limited to, claims for wages, bonuses, commissions or any other form of compensation; claims for breach of any contract, express or implied; tort claims; claims for discrimination or harassment, including but not limited to discrimination or harassment based on race, sex, religion,

national origin, age, marital status, physical or mental disability, medical condition or sexual orientation; claims for benefits; all claims for violation of or damages under any federal, state or other governmental law, statute, ordinance, Executive Order or regulation; and claims by the Company for injunctive and/or other equitable relief for, among other claims, unfair competition, the use or unauthorized disclosure or misappropriation of trade secrets or client information, the disclosure of any other confidential information or the violation of any confidentiality agreement which may be in effect between me and the Company.

"2. Claims not Covered by the Agreement. This Agreement does not apply to or cover claims by me for workers' compensation benefits or unemployment compensation benefits; claims based upon an employee pension or benefit plan, the terms of which may contain an arbitration or other dispute resolution procedure, in which case the provisions of such plan shall control; charges filed with any administrative or government agency (e.g., the National Labor Relations Board or the Equal Employment Opportunity Commission); and any other claim that cannot be referred to arbitration as a matter of law."

"5. Arbitration Fees and Costs. The Company shall pay the fees and costs of the arbitrator to the full extent required by law. The Company will deposit such funds for the Arbitrator's fee, as the Arbitrator may determine to be necessary. Both the Company and I will pay our own costs and attorneys' fees, unless otherwise required by law.

"6. Interstate Commerce. I understand and agree that the Company is engaged in transactions involving interstate commerce and that my employment involves such commerce.

"7. Requirements for Modification or Revocation. This Agreement can only be revoked or modified by a writing signed by all of the partners of the Company and me which specifically states intent by both of us to revoke or modify this Agreement.

"8. Sole and Entire Agreement. This is the complete agreement between the Company and me on the subject of the arbitration of disputes (except for any arbitration agreement in connection with any pension or benefit plan). This Agreement supersedes any prior or contemporaneous oral or written understanding on the subject. Neither the company nor I is relying on any representations, oral or written, on the subject of the effect, enforceability or meaning of this Agreement except as specifically set forth in this Agreement.

"9. Construction. If any provision of this Agreement is determined to be void or otherwise unenforceable, in whole or in part, such determination shall not affect the validity of the remainder of this Agreement."

"11. Survival of Provisions. This Agreement to arbitrate shall survive the termination of my employment and shall apply to any Claims whether they arise or are made during or after the ending of my employment or other relationship with the Company."

Finally, on its stand-alone signature page, the arbitration agreement states: "The Company and I acknowledge that we have both carefully read this Agreement, that all understandings between me and the Company relating to the subject matter of arbitration are contained in it, … and that … we have had an opportunity to discuss this Agreement with attorneys of our choice prior to signing it and we have used that opportunity to the extent we wish to do so."

The confidentiality agreement, which Bennett signed on the same day she signed the arbitration agreement, provides in pertinent part:

"EMPLOYEE agrees that disclosure or use of confidential information by EMPLOYEE, other than for the sole benefit of [Global] or by any nonsupervisory employees to engage in protected concerted activities under the [National Labor Relations Act], would be wrongful and would cause irreparable harm to [Global]. If EMPLOYEE is in doubt as to whether certain information is confidential, EMPLOYEE will treat such information as Confidential and proprietary information."

"EMPLOYEE agrees that he or she will not solicit any of [Global's] employees for a competing business or otherwise induce or attempt to induce such employees to terminate their employment with [Global] during his or her employment and for a period of one (1) year following the termination of such employment."

"EMPLOYEE agrees that it would be difficult to measure damages to [Global] from any breach by EMPLOYEE of this Agreement, and that any harm to [Global] caused by such a breach would be difficult to calculate. For these reasons, money damages may be an inadequate remedy to [Global] for EMPLOYEE'S breach of this Agreement. EMPLOYEE acknowledges that, in addition to all other remedies it may have, [Global] will be entitled to temporary and permanent injunctive relief to enforce the provisions of the Agreement, and that such relief may be granted without prior actual notice and without the necessity of proving actual damages sustained by [Global]."

In October 2023, Bennett filed a class action lawsuit against Global, asserting 10 causes of action, including claims for

failure to pay minimum wages and overtime, and failure to provide adequate meal and rest breaks.

Global moved to compel arbitration of Bennett's claims based on the arbitration agreement that Bennett signed. Bennett opposed Global's motion, arguing, among other things, that the agreement was procedurally and substantively unconscionable and that the court should refuse to enforce the agreement because it was drafted in bad faith and permeated with illegality, and its unconscionable aspects could not be removed or limited without rewriting its terms.

The trial court denied Global's motion to compel arbitration. As a threshold matter, the court found that the arbitration agreement was governed by the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). The court found that the agreement contained a low degree of procedural unconscionability because it was a contract of adhesion.

Following the decision in *Cook v. University of Southern California* (2024) 102 Cal.App.5th 312 (*Cook*), the trial court found that at least two aspects of the arbitration agreement were substantively unconscionable: (1) the scope of the agreement was unreasonably overbroad because it expressly applies to claims unrelated to Bennett's employment; and (2) the duration of the agreement was unreasonably long because it survived the termination of Bennett's employment and could only be revoked or terminated by agreement between Bennett and Global. The court rejected Bennett's other arguments that the agreement was substantively unconscionable, including her claims that it impermissibly restricted her ability to recover attorney fees and required her to waive her right to pursue a public injunction and a representative action under the Private Attorney Generals Act

of 2004 (PAGA) (Lab. Code, § 2698 et seq.). The court did not address Bennett's arguments that the confidentiality agreement's noncompete and nonsolicitation clauses, which she argued should be read together with the arbitration agreement, were unconscionable. Nevertheless, the court found that the arbitration agreement was unenforceable because its unconscionable aspects could not be severed or restricted without rewriting its terms.

Global appeals.

DISCUSSION

1. General legal principles

Where, as here, an arbitration agreement is governed by the FAA, the agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Generally applicable contract defenses, like unconscionability, may be used to invalidate arbitration agreements without violating the FAA. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125 (*OTO*); *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 650 (*Viking River*).)

"A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party." (*OTO*, *supra*, 8 Cal.5th at p. 125.) The party resisting enforcement of an arbitration agreement has the burden to establish unconscionability. (*Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, 492 (*Ramirez*).)

Unconscionability has procedural and substantive elements. (*Ramirez*, *supra*, 16 Cal.5th at p. 492.) Procedural unconscionability looks at the " 'circumstances of contract

negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.' " (*Ibid.*) This element typically is established by showing the agreement is a contract of adhesion, which is a standardized contract that is imposed and drafted by the party with superior bargaining power and relegates to the other party only the opportunity to sign or reject it. (*Ibid.*)

Substantive unconscionability focuses on the " 'fairness of an agreement's actual terms,' " looking at whether the agreement will create unfair or one-sided results. (*Ramirez*, *supra*, 16 Cal.5th at p. 493.) "Substantively unconscionable contractual clauses 'reallocate risks in an objectively unreasonable or unexpected manner.' " (*Ibid.*)

Both procedural and substantive elements must be present to deem an agreement's term unconscionable, but they need not be present to the same degree. (*Ramirez*, *supra*, 16 Cal.5th at p. 493.) Courts apply a sliding scale analysis, where the more procedurally unconscionable a contract term is, the less evidence of substantive unconscionability is required to conclude the term is unenforceable, and vice versa. (*Ibid.*) Unconscionability is determined with reference to when the contract was formed "and cannot be resolved by hindsight by considering circumstances of which the contracting parties were unaware." (*Ibid.*)

Where, as here, the evidence is undisputed, we review de novo a trial court's order denying arbitration on the grounds that the agreement to arbitrate is unconscionable. (*Ramirez*, *supra*, 16 Cal.5th at p. 493.)

2. The arbitration agreement and the confidentiality agreement should be read together

As a threshold matter, we must determine whether the arbitration agreement and the confidentiality agreement should

be read together when evaluating whether the arbitration agreement is unconscionable. We conclude that they should.

Under Civil Code section 1642, separate agreements that relate to the same subject matter and were executed in the same transaction should be construed together as one contract. (§ 1642; *Fuentes v. Empire Nissan, Inc.* (2026) 19 Cal.5th 93, 109 (*Fuentes*).) "According to that rule, documents executed as part of a single transaction are construed together, even if they do not expressly refer to one another." (*Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 482, 490 (*Alberto*).)

The arbitration agreement and the confidentiality agreement were included in Bennett's new hire packet and signed by Bennett on the same day. They were executed as part of the same transaction—Bennett's hiring—and they address similar subject matters—the resolution of disputes between Bennett and Global. The arbitration agreement broadly addresses how disputes between Bennett and Global are to be resolved, while the confidentiality agreement addresses, among other things, how disputes over alleged breaches of the confidentiality agreement are to be resolved.

Because the arbitration agreement and the confidentiality agreement were executed as part of the same transaction and address similar subject matters, they should be read together. (*Alberto*, *supra*, 91 Cal.App.5th at pp. 490–491.) Failing to read these two agreements together "artificially segments the parties' contractual relationship. Treating them separately fails to account for the overall dispute resolution process the parties agreed upon." (*Id.* at p. 491.) Unconscionability in the confidentiality agreement will, therefore, affect whether the arbitration agreement is unconscionable. (*Ibid.*)

3. Procedural unconscionability

The trial court found that the arbitration agreement had a low degree of procedural unconscionability because it was a contract of adhesion. Global does not contest this finding. While Bennett agrees that the agreement is an adhesion contract, she argues "significantly more procedural unconscionability existed" because she also presented evidence of oppression and surprise. As we explain, the agreement's formation involved a low degree of procedural unconscionability.

Adhesion contracts ordinarily contain at least a low degree of procedural unconscionability. (*Ramirez*, *supra*, 16 Cal.5th at p. 494.) Whether even closer scrutiny of an adhesion contract's fairness is required turns on the level of oppression and surprise that were involved in the agreement's formation. (*Fuentes*, *supra*, 19 Cal.5th at p. 104.)

Oppression exists when a contract involves a lack of negotiation and meaningful choice. (*OTO*, *supra*, 8 Cal.5th at p. 126.) The circumstances relevant to establishing oppression include the amount of time the weaker party is given to consider the proposed contract, the amount and type of pressure exerted on that party to sign the proposed contract, and the length of the proposed contract and the length and complexity of the challenged provision. (*Id.* at pp. 126–127.)

Here, there is little evidence of additional oppression, aside from the fact that the arbitration agreement is an adhesion contract. There is no evidence that Global pressured Bennett to sign the agreement in a short period of time. Likewise, there is no evidence that Bennett was not afforded a reasonable opportunity to review the agreement, either by herself or with the aid of an attorney, before she signed it. Indeed, the last page of

the agreement, which includes Bennett's signature, states in clear and simple language that Bennett acknowledged she "carefully read" the agreement, that "all understandings" between Global and Bennett were contained in the agreement, and that Bennett "had an opportunity to discuss the Agreement with attorneys" and "used that opportunity to the extent [she] wish[ed]" before signing the agreement.

Bennett points to evidence that she has only a high school education and was unfamiliar with arbitration and arbitration agreements when she signed the agreement in this case. Bennett did not, however, testify that she had difficulty understanding the terms of the agreement, nor does she otherwise explain how her education level limited her ability to understand the agreement's terms.

As for the length and complexity of the agreement, Bennett does not argue that the agreement is unreasonably long. She does contend, however, that the agreement is complex and difficult to parse. We disagree. While some of the sentences in the agreement are long—one sentence identifying the covered claims spans 15 lines—its language is not particularly complex or difficult to understand. Indeed, the agreement describes the types of covered and excluded claims in clear and relatively simple language without being riddled with "statutory references and legal jargon." (See *OTO*, *supra*, 8 Cal.5th at p. 128.)

In sum, the parties' execution of the arbitration agreement involved a low degree of procedural unconscionability. Accordingly, a high degree of substantive unconscionability is required to render the agreement unenforceable. (*Ramirez*, *supra*, 16 Cal.5th at p. 493.)

4. Substantive unconscionability

"The substantive unconscionability analysis 'examines the fairness of a contract's terms. This analysis "ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as ' " 'overly harsh' " ' [citation], " 'unduly oppressive' " [citation], " 'so one-sided as to "shock the conscience" ' " [citation], or 'unfairly one-sided' [citation]. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party.' " ' " (*Fuentes*, *supra*, 19 Cal.5th at p. 106.)

The trial court found two aspects of the arbitration agreement were substantively unconscionable—its scope and duration. We agree that the arbitration agreement's scope and duration are substantively unconscionable, but we also conclude that other aspects of the agreement are unconscionable. We discuss each aspect in turn.

4.1. The arbitration agreement's unreasonable scope, unlimited duration, and lopsided application are substantively unconscionable

The arbitration agreement's opening paragraph states that Bennett recognizes that "differences may arise" between herself and Global, and that "those differences may or may not be related to [her] employment." The agreement later states that Bennett must arbitrate "all individual claims or controversies," except certain claims excluded elsewhere in the agreement, "whether or not those claims or controversies arise out of [her] employment with the Company or the termination of [her] employment." The agreement also provides that it "shall survive the termination of

[Bennett's] employment and shall apply to any Claims whether they arise or are made during or after the ending of [her] employment or other relationship with [Global," and that it cannot be modified or revoked except by a written agreement to do so signed by the parties.

When these provisions are read together, the arbitration agreement's plain language requires Bennett to arbitrate *any* claim she has against Global (except for a narrow class of expressly excluded claims), even if her claim is wholly unrelated to her employment and arises well after she stopped working for the company. In other words, the agreement requires Bennett to arbitrate nearly any claim she could have against the company for the rest of her life, until she *and* Global agree to terminate the agreement.

Several other courts have found substantively unconscionable similar language included in employment-related arbitration agreements. (See, e.g., *Cook*, *supra*, 102 Cal.App.5th at pp. 321–325 [agreement requiring for an indefinite duration the arbitration of " 'all claims, whether or not arising out of Employee's University employment, remuneration or termination' "]; *Stoker v. Blue Origin, LLC* (2026) 120 Cal.App.5th 91, 107–108 [agreement requiring arbitration for an indefinite duration of " '*any and all claims, disputes, or controversies between the Company and me*, including, *without limitation*, claims arising out of or relating to' " hiring process, employment, or termination]; *Phan v. Knight Sacramento SU Inc.* (2026) 121 Cal.App.5th 641, 654–656 [agreement requiring arbitration for an indefinite duration of " 'any claims' " the employee may have against the employer " 'that currently exist or that may arise in the future' including 'any and all claims which

arise out of the employment context *or any other interaction/relationship we had, have or may have in the future*' "].)

Global does not dispute that it would be unconscionable to require Bennett to arbitrate claims wholly unrelated to her employment, including claims that arise or accrue well after her employment has ended. Instead, Global contends that we should read the arbitration agreement in a manner that limits its application only to claims that are related to Bennett's employment.

The company argues that it would have been unreasonable at the time the agreement was executed for the company or Bennett to expect the agreement's scope to encompass claims unrelated to her employment. As a company that operates call centers, Global argues it is highly unlikely that Bennett and the company would ever interact with each other outside the context of Bennett's employment. This is a far cry, Global claims, from the circumstances in *Cook*, where it was much more likely that the plaintiff employee could develop claims against the defendant university (or vice versa) for conduct unrelated to, or occurring after the completion of, the employee's employment. (See *Cook*, *supra*, 102 Cal.App.5th at p. 318.) Global asserts that the likelihood that Bennett or the company would ever "actually develop[] claims against one another that are unrelated to Bennett's employment is infinitesimal."

We reject this argument for a couple of reasons. First, it asks us to ignore the agreement's terms. As we noted above, the agreement expressly states that Bennett must arbitrate "all individual claims or controversies … *whether or not those claims or controversies arise out of [her] employment with the Company*

or the termination of [her] employment." (Italics added.) To endorse a reading of the agreement that limits its application only to claims related to Bennett's employment would require us to ignore the italicized language or render that language surplusage. Such a reading " 'violates fundamental principles of contract interpretation.' " (*Jenkins v. Dermatology Management, LLC* (2024) 107 Cal.App.5th 633, 647.) Had Global intended for its arbitration agreement to apply only to claims related to Bennett's employment, such as claims stemming from her hiring, her work for the company, her remuneration, or her termination, it easily could have used language to that effect.

Second, Global's argument that there is an infinitesimal chance that Bennett and the company would develop claims against each other that are unrelated to Bennett's employment is undermined by another provision in the arbitration agreement, which defines the company in an exceedingly broad manner. The agreement's second opening paragraph states that Bennett "understand[s] that any reference in this Agreement to [Global] will be a reference to the Company *and* all of its past and present partners, officers, directors and employees; all subsidiary and affiliate entities, all benefit plans, the benefit plans' sponsors, fiduciaries, administrators, affiliates and all successors and assigns of any of them." (Italics added.) Further, Paragraph 1 of the agreement states that Bennett agrees to arbitrate "all individual claims or controversies … involving the Company *and* any of its past or present partners, officers, employees or agents … ." (Italics added.) Even assuming the odds are infinitesimally small that Bennett and Global would ever develop claims against each other unrelated to Bennett's employment, the same cannot be said when the arbitration agreement requires Bennett to

arbitrate any claim she has against a broad class of individuals and entities.

That Bennett must arbitrate any claim she has against Global's past or present employees, officers, administrators, and agents also creates an issue of mutuality, which is a "paramount consideration" in evaluating the conscionability of a contract. (*Alberto*, *supra*, 91 Cal.App.5th at p. 492.) By expressly defining Global to include all past or present employees, officers, administrators, and agents, those individuals and entities are third party beneficiaries of the agreement. (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 839 [by expressly requiring arbitration of claims against the company's "agents and registered representatives, the arbitration clause was intended to benefit" those third parties].) As such, those third parties can compel Bennett to arbitrate any claims she may have against them, regardless of whether they are related to her employment. (*Ibid*.) The same is not true, however, for claims that those third party beneficiaries may bring against Bennett, even if the claims do not relate to her employment. That is, Bennett cannot compel to arbitration claims brought by those third party beneficiaries without first making a showing that those beneficiaries accepted some benefit under the agreement. (*Cook*, *supra*, 102 Cal.App.5th at p. 328.) The agreement, therefore, creates a one-sided benefit in favor of its third party beneficiaries, a benefit that Global does not attempt to justify based on any legitimate " 'business realities.' " (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 117–118 (*Armendariz*).)

In short, we conclude the arbitration agreement is substantively unconscionable because it requires Bennett to

arbitrate *any* claim she has against Global and all of its past or present employees, officers, administrators, and agents, even if her claims are wholly unrelated to her employment, and it requires her to do so until she *and* Global agree to terminate the agreement. Such a requirement reallocates risks in favor of Global and its third party beneficiaries in an objectively unreasonable manner. (*Ramirez*, *supra*, 16 Cal.5th at p. 493.)

4.2. The confidentiality agreement is substantively unconscionable

Bennett also contends that the confidentiality agreement's injunctive relief and noncompete provisions are substantively unconscionable. We agree.

A contract provision is substantively unconscionable if it " 'authorizes the stronger party to obtain injunctive relief without establishing all of the essential elements for the issuance of an injunction.' " (*Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 451 (*Lange*).) That is so because such a provision lacks mutuality and exceeds the employer's legitimate need for a " 'margin of safety.' " (*Alberto*, *supra*, 91 Cal.App.5th at p. 492.)

Here, the confidentiality agreement states that Bennett agrees her unauthorized disclosure or use of Global's confidential information "would be wrongful and would cause irreparable harm to" Global. The confidentiality agreement also states that Global "will be entitled to temporary and permanent injunctive relief to enforce" the agreement, and "that such relief may be granted without prior actual notice and without the necessity of proving actual damages sustained by" the company. In other words, the confidentiality agreement entitles Global to injunctive relief for any breach of its terms by Bennett, without any requirement that the company prove the element of irreparable

harm. (See *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 446 [irreparable harm is one of the factors courts must consider when deciding whether to issue an injunction].) Because Global identifies no legitimate commercial reason for a contractual provision that relieves it of the need to establish essential elements for the issuance of an injunction, the injunctive relief provision of the confidentiality agreement is substantively unconscionable. (*Lange*, *supra*, 46 Cal.App.5th at pp. 449–451.)

The agreement's nonsolicitation clause also is unconscionable. Business and Professions Code section 16600 renders void "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of *any kind*." (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 935 (*AMN*).) Under this statute, an employer generally may not contract to prohibit a former employee from soliciting business from the employer's other employees or clients. (*Id.* at pp. 936–939.) One exception exists where the nonsolicitation prohibition is tied to the former employee's use of illegal means to solicit business, such as by using the employer's trade secrets or confidential information. (*ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1017.)

Here, the confidentiality agreement states that Bennett "agrees that … she will not solicit any of [Global's] employees for a competing business or otherwise induce or attempt to induce such employees to terminate their employment with [Global] during his or her employment and for a period of one (1) year following the termination of such employment." Because this provision is not limited to restricting Bennett from using illegal

means to solicit business from Global's employees, it is invalid. (*AMN*, *supra*, 28 Cal.App.5th at pp. 936–939.)

Because we must read the arbitration agreement together with the confidentiality agreement, the substantive unconscionability of the confidentiality agreement's noncompete and injunctive relief provisions further render the arbitration agreement substantively unconscionable.

4.3. Conclusion

Considering the arbitration agreement and confidentiality agreement together, we conclude that the arbitration agreement contains a high degree of substantive unconscionability. Accordingly, we need not address Bennett's arguments that other provisions in the agreement are substantively unconscionable. We now turn our analysis to whether the trial court correctly refused to enforce the agreement.

5. Severance

Under Civil Code section 1670.5, subdivision (a), if a contract or any term of a contract is unconscionable, the trial court may: (1) "refuse to enforce the contract"; (2) sever the unconscionable clause and "enforce the remainder of the contract"; or (3) "limit the application of any unconscionable clause as to avoid any unconscionable result." (See *Ramirez*, *supra*, 16 Cal.5th at p. 513.)

When determining whether to enforce an unconscionable contract, the court should consider whether its " 'central purpose … is tainted with illegality.' " (*Ramirez*, *supra*, 16 Cal.5th at p. 516.) If it is, the unconscionability cannot be cured, and the court should refuse to enforce the contract. (*Ibid.*) At this stage of the analysis, "no bright-line rule *requires* a court to refuse enforcement if a contract has more than one unconscionable

term." (*Ibid.*) Nevertheless, "it is fair to say that the greater the number of unconscionable provisions a contract contains the less likely it is that severance will be the appropriate remedy." (*Id.* at p. 517.)

If the contract's central purpose is not tainted with illegality, the court should determine whether it can cure the contract's unconscionability by severing or restricting the unconscionable terms. (*Ramirez*, *supra*, 16 Cal.5th at p. 516.) If the court cannot cure the unconscionability without augmenting or rewriting the contract's terms, it "should refuse to enforce the contract." (*Ibid.*) "Courts cannot 'rewrite agreements and impose terms to which neither party has agreed.' " (*Ibid.*)

We review for abuse of discretion a trial court's decision whether to refuse to enforce an unconscionable contract or sever its problematic terms. (*Ramirez*, *supra*, 16 Cal.5th at p. 513.)

Although the trial court did not engage in an extensive discussion of why it refused to enforce the parties' arbitration agreement, it found that it could not cure the agreement's central unconscionability—i.e., its overbroad scope—"without rewriting the agreement." As we explain, the court was correct in determining that the agreement's unconscionability cannot be cured without reforming or rewriting its terms. We also explain why the agreement is tainted with illegality and for that additional reason, the court did not abuse its discretion in refusing to enforce it. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18–19 [we review the trial court's ruling, not its reasoning].)

Although there is no bright-line rule rendering an arbitration agreement unenforceable based on the sheer number of its unconscionable terms, the greater the number of

unconscionable provisions, "the less likely it is that severance will be the appropriate remedy." (*Ramirez*, *supra*, 16 Cal.5th at p. 517.) Here, we have determined that the agreement, when read together with the confidentiality agreement, includes at least five substantively unconscionable provisions, a considerable number. In addition, one of the central mechanisms of the arbitration agreement is riddled with overreach and unfairness—i.e., the requirement that Bennett arbitrate all present and future claims she may have against not just Global, but a broadly defined group of third party beneficiaries, regardless of whether any of those claims have anything to do with her employment or arise well after her employment ends, and without any reciprocal requirement that would force those third party beneficiaries to submit to arbitration any claims they may have against Bennett, whether related to her employment or not. Because unconscionability permeates the arbitration agreement, the trial court correctly refused to enforce it. (*Ramirez*, *supra*, 16 Cal.5th at p. 516.)

Even if the arbitration agreement were not tainted with illegality, its unconscionability cannot be severed or limited without rewriting the agreement's terms. To be sure, the problematic portions of the confidentiality agreement—the injunctive relief and nonsolicitation provisions—could be severed without fundamentally altering the arbitration agreement. But the same cannot be said for the unconscionable provisions contained in the arbitration agreement itself.

For instance, Global asserts that we can strike from the agreement the phrases "and that those differences may or may not be related to [Bennett's] employment" and "whether or not those claims or controversies arise out of [Bennett's]

employment" to ensure the agreement applies only to claims relating to, or arising out of, Bennett's employment. We disagree. Nothing in the agreement's remaining language would limit its scope only to employment-related claims. Rather, after removing the language proposed by Global, the agreement would now state that it applies to "all individual claims or controversies" involving Global. That language, on its face, would still include *any* claims involving Global, including those unrelated to Bennett's employment. To properly limit the scope of the agreement, we would need to add language that requires the parties to arbitrate only employment-related claims. As we already explained, courts cannot rewrite contracts or add terms to them to remove their unconscionable aspects. (*Ramirez*, *supra*, 16 Cal.5th at p. 516.)

In short, we conclude that the trial court did not abuse its discretion when it found that the arbitration agreement's central unconscionability could not be severed and refused to enforce the agreement.

6. Our unconscionability analysis is not preempted by the FAA

Finally, the dissent argues that our use of the unconscionability doctrine to invalidate the parties' arbitration agreement is preempted by the FAA. By refusing to enforce the parties' arbitration agreement, the dissent argues that our decision and others like it, such as *Cook*, *supra*, 102 Cal.App.5th 312, display "an antipathy to arbitration" that contravenes the FAA and United States Supreme Court precedent requiring state courts "to place arbitration agreements 'on equal footing with all other contracts.' " (*Kindred Nursing Centers L.P. v. Clark* (2017) 581 U.S. 246, 248 (*Kindred Nursing*).) This rule precludes state courts from "singl[ing] out arbitration agreements for disfavored

treatment." (*Ibid.*) Instead, courts may invalidate arbitration agreements only on " 'grounds as exist at law or in equity for the revocation of any contract.' " (*DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, 54 (*DIRECTV*), quoting 9 U.S.C. § 2.) As we explain below, the FAA does not preempt the use of the unconscionability doctrine in this case.

In *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic*), the California Supreme Court rejected a similar concern to the one raised by the dissent. There, the Court addressed the viability of the unconscionability doctrine as applied to arbitration agreements following *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339–341 (*Concepcion*). (See *Sonic*, at pp. 1142–1145.)

The California Supreme Court began its discussion "by noting that after *Concepcion,* unconscionability remains a valid defense to a petition to compel arbitration. Quoting the FAA's saving clause, *Concepcion* reaffirmed that the FAA 'permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract" ' (*Concepcion, supra,* 563 U.S. at p. __ [131 S.Ct. at p. 1746], quoting 9 U.S.C. § 2), including ' "generally applicable contract defenses, such as fraud, duress, or unconscionability … " [citations]' (*Concepcion,* at p. __ [131 S.Ct. at p. 1746])." (*Sonic*, *supra*, 57 Cal.4th at pp. 1142–1143.) The California Supreme Court reiterated that "it has long been the proper role of courts enforcing the common law to ensure that the terms of a bargain are not unreasonably harsh, oppressive, or one-sided." (*Id.* at p. 1143.)

The California Supreme Court then addressed what limits *Concepcion* and the FAA place on state unconscionability rules as

they apply to arbitration agreements. (*Sonic*, *supra*, 57 Cal.4th at pp. 1143–1144.) The Court explained that state unconscionability rules "must not facially discriminate against arbitration and must be enforced evenhandedly." (*Id*. at p. 1143.) Nor may such rules, "even when facially nondiscriminatory, … 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." ' " (*Ibid*., quoting *Concepcion*, *supra*, 563 U.S. at p. 348.)

Notably, the Court explained that "state law rules that do not 'interfere[ ] with fundamental attributes of arbitration' (*Concepcion, supra,* 563 U.S. at p. __ [131 S.Ct. at p. 1748]) do not implicate *Concepcion*'s limits on state unconscionability rules." (*Sonic*, *supra*, 57 Cal.4th at p. 1143.) This means, the Court observed, that "a facially neutral state law rule is not preempted simply because its evenhanded application 'would have a disproportionate impact on arbitration agreements.' (*Concepcion,* at p. __ [131 S.Ct. at p. 1747].) Under *Concepcion,* a state law rule is preempted when its impact is such that it interferes with fundamental attributes of arbitration. (*Id*. at p. __ [131 S.Ct. at p. 1748].)" (*Sonic*, at p. 1144.)

The Court pointed to examples of arbitration agreements that have been found to be unconscionable for reasons "that have nothing to do with fundamental attributes of arbitration." (*Sonic*, *supra*, 57 Cal.4th at p. 1144.) For instance, the Court previously "found unconscionable a $50,000 threshold for an arbitration appeal that decidedly favored defendants in employment contract disputes." (*Ibid.*, citing *Little v. Auto Stiegler, Inc.* (2003)

29 Cal.4th 1064, 1071–1074.) The Court also pointed to two Court of Appeal decisions. The first "found unconscionable an arbitration agreement with a damages limitation clause under which 'the customer does not even have the theoretical *possibility* he or she can be made whole.' " (*Sonic*, at p. 1144, citing *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407.) The second "found unconscionable an arbitration agreement that, among other things, 'impos[ed] upon [the employee] the obligation to pay [the employer's] attorney fees if [the employer] prevails in the proceeding, without granting her the right to recoup her own attorney fees if she prevails.' " (*Sonic*, at p. 1144, citing *Ajamian v. CantoCO2e, L.P.* (2012) 203 Cal.App.4th 771, 799–800.)

The California Supreme Court explained that these examples show that "the 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.' " ' " (*Sonic*, *supra*, 57 Cal.4th at p. 1145.) "These include 'terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.' " (*Ibid.*)

The Court reaffirmed that "[a]fter *Concepcion,* courts may continue to apply the unconscionability doctrine to arbitration agreements." (*Sonic*, *supra*, 57 Cal.4th at p. 1145.) "As the FAA contemplates in its savings clause (9 U.S.C. § 2), courts may

examine the terms of adhesive arbitration agreements to determine whether they are unreasonably one-sided. What courts may not do, in applying the unconscionability doctrine, is to mandate procedural rules that are inconsistent with fundamental attributes of arbitration, even if such rules are 'desirable for unrelated reasons.' " (*Ibid.*, quoting *Concepcion*, *supra*, 563 U.S. at p. 351.)

The dissent contends that this portion of *Sonic* "cannot be valid" following the United States Supreme Court's post-*Concepcion* arbitration decisions. We disagree with the dissent's critique of *Sonic*.

Assuming *Sonic*'s discussion of the unconscionability doctrine's viability is only dicta, it is well settled that dicta from the California Supreme Court should be followed, especially where, as in *Sonic*, the Court conducted a thorough analysis of the issues. (*Aviles-Rodriguez v. Los Angeles Community College Dist.* (2017) 14 Cal.App.5th 981, 990.) The dissent points to no case from the California Supreme Court or the United States Supreme Court, and we are aware of none, that expressly calls into question or overrules *Sonic*'s discussion of the viability of California's unconscionability doctrine after *Concepcion*.

Indeed, the California Supreme Court continues to follow that portion of *Sonic* and, as recently as 2024, has applied the unconscionability doctrine to arbitration agreements that are governed by the FAA. (See, e.g., *OTO, supra*, 8 Cal.5th at pp. 123–138 [2019 decision following *Sonic* and refusing to enforce arbitration agreement on unconscionability grounds]; *Ramirez*, *supra*, 16 Cal.5th at pp. 492–519 [2024 decision finding arbitration agreement procedurally and substantively

unconscionable and reaffirming that the FAA does not preempt California's unconscionability doctrine].)

Even the Ninth Circuit continues to apply California's unconscionability doctrine to refuse to enforce arbitration agreements that are governed by the FAA. (See *Ronderos v. USF Reddaway* (9th Cir. 2024) 114 F.4th 1080, 1094–1099 (*Ronderos*); *Heckman v. Live Nation Entertainment, Inc.* (9th Cir. 2024) 120 F.4th 670, 680–689.) And in at least one of those decisions, a majority of the panel relied on the portion of *Sonic* discussed above to reject a preemption argument like the one raised by the dissent in this case. (See *Ronderos*, at p. 1103, citing *Sonic*, *supra*, 57 Cal.4th at pp. 1142–1145.) Notably, these Ninth Circuit decisions invalidated arbitration agreements based on unfairly one-sided provisions that are more commonly found in the arbitration context, an approach that is consistent with the one approved by the Court in *Sonic*. (See, e.g., *Ronderos*, at pp. 1094–1099 [refusing to enforce arbitration agreement that: (1) imposed on just the employee a one-year limitations period for initiating claims in arbitration; and (2) permitted the employer to bring claims for injunctive relief against the employee in court]; *Heckman*, at pp. 681–689 [refusing to enforce arbitration agreement that imposed the following provisions that favored the drafting party: (1) unfairly one-sided mass arbitration protocols; (2) unduly restrictive limitations on discovery and briefing in arbitration; (3) an unfairly one-sided right to appeal an arbitrator's decision; and (4) an unfairly one-sided procedure for selecting an arbitrator].)

For these reasons, we continue to follow *Sonic* and the California Supreme Court's other recent decisions that hold our state's unconscionability doctrine remains a viable defense to

arbitration agreements that are governed by the FAA. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455–456 [we are generally bound by decisions of the California Supreme Court].)

We also disagree with the dissent's assertion that *Concepcion* and the United States Supreme Court's other decisions addressing arbitration undermine our application of the unconscionability doctrine to the parties' arbitration agreement in this case. In *Concepcion*, the Court considered whether the FAA preempts California's rule rendering unconscionable certain class waivers in consumer arbitration agreements. (See *Concepcion*, *supra*, 563 U.S. at pp. 340–341.) The Court observed that although unconscionability is "a doctrine normally thought to be generally applicable," courts cannot rely on " 'the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.' " (*Id.* at p. 341.)

The Court then held that California's rule against class waivers was preempted by the FAA. (*Concepcion*, *supra*, 563 U.S. at pp. 344–352.) The Court's analysis focused on how such a rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Id.* at p. 344.) The Court explained that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." (*Id.* at p. 348.) According to the Court, "class arbitration *requires* procedural formality" beyond what is normally involved in individual arbitration, because if "procedures are too informal," due process considerations would

prevent absent class members from being bound by the arbitration. (*Id*. at p. 349.) The Court also noted that "class arbitration greatly increases risks to defendants" because it increases the stakes beyond what is typically involved in individual arbitration with limited appellate review. (*Id*. at pp. 350–351.) Because California's class waiver rule " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " the Court concluded that it contravenes the FAA's objectives. (*Id*. at p. 352.)

Although *Concepcion*'s preemption analysis focused on the way California's anti-class waiver rule created a procedure that "interferes with fundamental attributes of arbitration" (*Concepcion*, *supra*, 563 U.S. at p. 344; see also *id*. at pp. 344–352), the dissent homes in on the high Court's observation in an earlier portion of the opinion that some facially neutral state rules can "have a disproportionate impact on arbitration agreements" (*Concepcion*, at p. 342). The dissent then conducts a statistical analysis to illustrate how in the past five years, California courts have used the unconscionability doctrine to invalidate arbitration agreements at a higher rate than other types of contracts. The dissent claims these statistics show that California courts use the unconscionability doctrine in a manner that disfavors arbitration and is preempted by the FAA.

But the high Court in *Concepcion* noted a similar trend, at least as it existed in California in 2011, and it did not disapprove of our courts' general application of the unconscionability doctrine to arbitration agreements that are governed by the FAA. Specifically, the Court observed that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." (*Concepcion*, *supra*, 563 U.S. at p. 342.)

Rather than relying on those statistics to preempt our courts' use of the doctrine as applied to arbitration agreements, the Court noted that the statistics were "not definitive." (*Ibid*.) The dissent cites no high Court decision, and we are aware of none, that has since preempted or otherwise undermined a general application of California's unconscionability doctrine to arbitration agreements. In fact, the high Court continues to acknowledge that unconscionability remains a viable defense to arbitration agreements under the FAA. (See *Viking River*, *supra*, 596 U.S. at p. 650 [" 'A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" ' "].)

The other United States Supreme Court's decisions that the dissent cites invalidated California rules that require the availability of judicial or administrative forums for certain classes of claims or preclude the waiver of the right to pursue class or representative claims in arbitration. (See, e.g., *Southland Corp. v. Keating* (1984) 465 U.S. 1 [statute requiring judicial consideration of claims brought under franchise investment statute]; *Perry v. Thomas* (1987) 482 U.S. 483 [statute permitting wage collection actions to be brought in court regardless of any agreement to arbitrate such claims]; *Preston v. Ferrer* (2008) 552 U.S. 346 [statute granting state labor commissioner exclusive jurisdiction over issues that the parties agreed to arbitrate]; *DIRECTV*, *supra*, 577 U.S. 47 [courts' continued use of the class waiver rule that was invalidated in *Concepcion*]; *Lamps Plus, Inc. v. Varela* (2019) 587 U.S. 176 [contract interpretation principle used to find ambiguous

arbitration provisions provide for class arbitration]; *Viking River*, *supra*, 596 U.S. 639 [rule invalidating agreements to arbitrate only individual component of a representative claim for certain labor violations].) In addition, *Kindred Nursing* held that the FAA preempts a Kentucky rule that renders arbitration agreements unenforceable if they are not executed by principals or representatives who are expressly authorized to waive the principal's access to the courts. (See *Kindred Nursing*, *supra*, 581 U.S. 246.) All these decisions disapproved state-created rules that impose blanket prohibitions on arbitration in certain contexts or impose procedures that are inconsistent with the "fundamental attributes of arbitration" and create "scheme[s] inconsistent with the FAA." (*Concepcion*, *supra*, 563 U.S. at p. 344.)

None of these decisions preclude a court from engaging in a "straightforward application" of California's standards for determining unconscionability and the severability of unconscionable provisions. (*Ronderos*, *supra*, 114 F.4th at p. 1103.) It is still "the proper role of courts enforcing the common law to ensure that the terms of a bargain are not unreasonably harsh, oppressive, or one-sided." (*Sonic*, *supra*, 57 Cal.4th at p. 1143.)

Nor do the statistics that the dissent has gathered otherwise suggest that California courts use unconscionability to single out arbitration. Black letter law shows that adhesive contracts, regardless of whether they contain arbitration provisions, are particularly susceptible to an unconscionability defense, while negotiated contracts, even those containing arbitration provisions, are rarely subject to such a defense.

As noted above, any successful unconscionability defense requires that a litigant establish both procedural and substantive unconscionability. (*Ramirez*, *supra*, 16 Cal.5th at pp. 492–493.) Because virtually all adhesive contracts are procedurally unconscionable, a signatory to such a contract, as was the case here, will generally be able to meet this prong. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244 (*Baltazar*).) Negotiated contracts, on the other hand, are rarely procedurally unconscionable. (*Ibid*.) Unconscionability, therefore, has little application to negotiated contracts. For these reasons, unconscionability is a contract defense that is well suited for challenging adhesive, but not negotiated, contracts. (See, e.g., *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 769 [non-arbitration case noting the "significant overlap" between adhesive contracts and the unconscionability doctrine]; *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 214 (*California Grocers Assn*.) [non-arbitration case explaining that "[t]he notion of 'procedural' unconscionability merely addresses the question whether a contract is adhesive"].)

Adhesion contracts are a common vessel for arbitration provisions. For instance, such provisions often appear in employment and consumer contracts, which businesses typically present to employees and consumers on a take-it-or-leave-it basis. (See *Armendariz*, *supra*, 24 Cal.4th at pp. 115–116.) It follows, then, that unconscionability is a common defense to motions to compel arbitration that are based on adhesive employment or consumer contracts.

But arbitration provisions also appear in non-adhesive negotiated contracts. (See, e.g., *Hartnell Community College*

Dist. v. Superior Court (2004) 124 Cal.App.4th 1443, 1446–1448 [appeal from order compelling college district and faculty association to arbitrate their claims under an arbitration provision included in an arms' length bargaining agreement].) Yet those contracts rarely are struck down as unconscionable because only in unusual cases will there exist procedural unconscionability when both parties to the contract have strong, if not equal, bargaining power. Indeed, our Supreme Court has recognized that there is no procedural unconscionability in "contracts that have been freely negotiated by roughly equal parties." (*Baltazar*, *supra*, 62 Cal.4th at p. 1244.) Instead, other types of defenses or challenges to the enforceability of a contract—like impossibility, illegality, rescission, mistake, and frustration of purpose—are better suited for challenging arms' length contracts because those doctrines do not require a showing of procedural unconscionability. (See Civ. Code, § 1441 [requirements for voiding contractual provisions due to impossibility of performance]; Civ. Code, § 1608 [requirements for voiding contract as illegal]; Civ. Code, § 1689, subd. (b) [requirements for unilaterally rescinding a contract]; *Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944 [requirements for proving affirmative contract defense of unilateral mistake of fact]; *Dorn v. Goetz* (1948) 85 Cal.App.2d 407, 410–413 [requirements for establishing frustration of purpose defense to enforcement of a contract].) It is, therefore, unsurprising that some contractual defenses, like unconscionability, will have broader application in an adhesive context, while other defenses will more broadly apply in non-adhesive contexts.

Consequently, adhesive contracts, regardless of whether they include arbitration provisions, have long been a target of

unconscionability challenges. (See, e.g., *Steven v. Fidelity & Cas. Co. of New York* (1962) 58 Cal.2d 862, 879 [non-arbitration case noting that for adhesive contracts, "California courts have long been disinclined to effectuate clauses of limitation of liability which are … unconscionable"]; *Diaz v. Thor Motor Coach, Inc.* (2026) 118 Cal.App.5th 589 and cases discussed therein [non-arbitration cases applying unconscionability analyses to forum selection clauses contained in recreational vehicle manufacturers' adhesive warranty agreements]; *California Grocers Assn.*, *supra*, 22 Cal.App.4th at pp. 214–217 [non-arbitration case noting that the "preliminary question" for court's unconscionability analysis "is whether we have a contract of adhesion"].)

In addition, our Legislature has made orders denying motions to compel arbitration immediately appealable, a procedural posture advantaging parties seeking to enforce arbitration agreements. (See Code Civ. Proc., § 1294, subd. (a).) As a result, unconscionability challenges to adhesive contracts that contain arbitration provisions more frequently make their way to California's appellate courts. This procedural quirk that treats unsuccessful attempts to enforce arbitration provisions more favorably than other appeals, in turn, generates more appellate decisions on this topic than it would for other cases. In contrast, parties litigating unconscionability or other contractual theories outside of the arbitration context typically cannot appeal until the entirety of their case has been resolved via a demurrer, summary judgment, or trial because of California's one final judgment rule. (See Code Civ. Proc., § 904.1, subd. (a)(1).)

Relatedly, for contract defenses outside of the fast track that the Legislature has created for orders denying motions to compel arbitration, the parties will have far greater opportunity

to reach resolution and avoid any appeal at all. Indeed, it would appear that forum disputes, like disputes over the enforcement of arbitration provisions, are less likely to resolve through settlement than other types of contractual disputes, where the disputes primarily revolve around money. Thus, it is hardly surprising that appeals addressing whether adhesive arbitration provisions are unconscionable are relatively common in the California appellate docket, while unconscionability decisions for other contract cases are harder to find.

Put simply, arbitration provisions appear in both adhesive and negotiated contracts. But only those provisions that are included in adhesive contracts generally will be susceptible to unconscionability challenges. The difference between these two types of cases is that one involves adhesive contracts while the other does not. California's courts, therefore, are not singling out arbitration for disfavored treatment under the unconscionability doctrine. They simply are applying the unconscionability doctrine in a manner consistent with its purpose—as a defense to adhesive contracts.

Finally, the dissent accuses us of inventing "hypothetical" concerns to justify our substantive unconscionability analysis, even though the dissent engages in the same analysis to conclude the confidentiality agreement's nonsolicitation clause is unenforceable without any evidence that Bennett has engaged in conduct that could implicate that clause. An unconscionability analysis requires courts to evaluate legality at the time the contract is created—i.e., before either party has had an opportunity to perform under its terms. (See *Ramirez*, *supra*, 16 Cal.5th at p. 493.)

In sum, our analysis of the parties' arbitration agreement in this case applies these well-settled and generally applicable rules of unconscionability. The arbitration provision in this case is unconscionable because it is part of an adhesive employment contract that secures arbitration indefinitely. The provision also compels Bennett to arbitrate claims that are wholly unrelated to her employment with Global, against a wide range of people and entities that are not her employer, and it does not give her a reciprocal right to compel those third parties to arbitrate any claims they may bring against her. It also imposes an illegal nonsolicitation provision on Bennett and allows Global to secure injunctive relief against Bennett without proving irreparable harm. As our case law shows, the law gives parties with superior bargaining power significant leeway to draft adhesive contracts that include arbitration provisions. (See, e.g., *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 243–250 [rejecting unconscionability challenge to delegation clause in adhesive arbitration agreement because the clause did not lack mutuality, as it required both sides to arbitrate any disputes between them]; *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 894–897 [rejecting unconscionability challenge to adhesive arbitration agreement's delegation clause]; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 178–185 [severing unconscionable attorney fees provision but otherwise rejecting unconscionability challenge to arbitration agreement because it included a bilateral arbitration requirement binding both parties].) The law does not, however, permit stronger parties to draft adhesive contracts that are oppressively harsh or unfairly one-sided. (See *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 585, citing *Graham v. Scissor-Tail, Inc.*

(1981) 28 Cal.3d 807, 817–818.) The contract in this case fails this basic test.

DISPOSITION

The order denying Global's motion to compel arbitration is affirmed. Bennett shall recover her costs on appeal.

VIRAMONTES, J.

I CONCUR:

STRATTON, P. J.

WILEY, J., Dissenting:

The majority opinion uses a prohibited state law method to invalidate federally protected arbitration. The Supreme Court of the United States prohibits this method because of its negative and highly disproportionate impact on arbitration. (See *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 341–342 (*Concepcion*).) The majority opinion invites preemption—again.

California courts have developed a special branch of the general unconscionability doctrine to squelch arbitration whenever we state judges think the details of arbitration need regulating. The doctrine is at odds with general California contract law. This special branch arose only in, and it applies only to, arbitration.

This branch of California law is an *arbitration special*. That is, it is a state contract law rule that applies only to, or that derives its meaning from the fact that the subject is, arbitration.

Federal law preempts a state rule like that. Instead, state contract law rules must be *generally* applicable and not specific to arbitration cases.

This is the rule of equal treatment. (*Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310, 327 (*Hohenshelt*).)

There is no equal treatment in this case. The majority takes apart this arbitration contract using a 20-pound sledgehammer found nowhere else in general contract law.

California state arbitration law and the supreme federal preemption power have been butting heads for years. In these collisions, California state law always loses.

Our record is dispiriting. Consider our defeats:

1. *Southland Corp. v. Keating* (1984) 465 U.S. 1, 16–17 [preempting California arbitration law];
2. *Perry v. Thomas* (1987) 482 U.S. 483, 491 (*Perry*) [same];
3. *Preston v. Ferrer* (2008) 552 U.S. 346, 349–350, 355–356, 359 (*Preston*) [same];
4. *Concepcion*, *supra*, 563 U.S. at pp. 337–338, 352 [same];
5. *CarMax Auto Superstores Cal., LLC v. Fowler* (2014) 571 U.S. 1189 [preempting California arbitration law; petition for writ of certiorari granted, judgment vacated, and case remanded for further consideration in light of *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228];
6. *DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, 53 (*DIRECTV*) [preempting California arbitration law, and scolding California state courts for intransigence on arbitration];
7. *Lamps Plus, Inc. v. Varela* (2019) 587 U.S. 176, 189 (*Lamps Plus*) [preempting California arbitration law]; and
8. *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 649, 662 (*Viking River*) [same].

From 1984 through 2022, a span of less than 40 years, there have been eight arbitration preemptions. On average, there has been one every four or five years. The last one was in 2022, so a believer in simple averages might predict another one soon. I write in the hopes that California state law will draw back from this brink.

I

Tracie Bennett worked at VXI Global Solutions, LLC for less than two months. When her employment ended, she filed a class action against Global. She alleged 10 standard class action employment claims: minimum wage, meal and rest breaks, and so forth. Global moved to compel arbitration, but the trial court denied the motion.

Additional facts are scanty because each party filed but one skeletal declaration in the trial court. The employer's declaration had only six substantive sentences. Bennett's declaration also was brief.

We do know Bennett's job title was "account associate" and she worked at Global for about six weeks. We do not know if she was fired or whether she quit.

Bennett stated her education ended with her high school diploma.

Global ran telephone call centers and handled calls for its clients. The operations are spread across the United States. We do not know much else about the company: its size, its affiliated entities, if any, or whether it does anything besides operate call centers.

The details of contract formation also are sparse.

The agreement reported, with our italics, Bennett and Global acknowledged "that we have had an *opportunity* to discuss this Agreement with attorneys of our choice prior to signing it and we have used that opportunity *to the extent we wish to do so*."

The employer stated "Plaintiff Bennett received a new-hire packet. As with all new hires, Plaintiff Bennett was provided with the opportunity during the new hire orientation to review

the new hire packet before signing it." Bennett signed the included arbitration agreement on February 28, 2023.

Global did not pressure Bennett to sign. Bennett did not claim Global rushed her with a tight deadline, or used intimidation, or the like. Bennett averred she was required to sign the documents by a certain date, but she does not say when she got the documents.

Bennett apparently had the opportunity to consult a lawyer but decided against it. She swore in her declaration that "I did not have any assistance from an attorney to review the hiring documents, including the arbitration agreement, before I signed the documents."

Nothing suggests Global restricted Bennett's access to counsel.

We do not know whether the materials Global presented Bennett were paper copies or whether everything was online. Neither do we know if there was face-to-face interaction during the process, or whether it was partly or entirely remote.

The parties' agreement states that Global engaged in interstate commerce and that Bennett's employment involved interstate commerce. This point is vital, because it opened the door to preemptive federal scrutiny.

The trial court denied Global's motion to compel arbitration. First, it determined the Federal Arbitration Act governed the contract. Then it ruled "the degree of procedural unconscionability is low." The trial court decided the contract was substantively unconscionable and the offending defects could not be severed.

The trial court did not accept all of Bennett's arguments about substantive unconscionability. It rejected her claims that

the agreement altered Bennett's entitlement to attorney fees, or that it waived either her representative PAGA claims or her right to seek a public injunction. The court also ruled the jury waiver was not overbroad.

II

The contracts were not unconscionable. The levels of procedural and substantive unconscionability were low. One provision in the confidentiality agreement ran afoul of state law but had nothing to do with arbitration or with the facts of this case. The trial court easily and conventionally should have severed this provision. I would remand for the trial court to send the case to arbitration.

Two flaws infect the majority's contrary approach: (1) a harsh and arbitration-specific *method*, (2) which leads to *results* that interfere with arbitration to a far greater extent than with any other kind of contract.

The harsh *method* faults this contract on grounds that are used nowhere else in contract law: scope, duration, clause-by-clause demands for mutuality in hypothetical situations, and restrictive severance of objectionable but irrelevant contract terms. After putting this contract through this arbitration-specific wringer, the disproportionate *result* then is predictable. "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." (*Concepcion*, *supra*, 563 U.S. at p. 342, internal quotations omitted.) I survey recent cases to illustrate this forbidden consequence.

A

The party seeking arbitration bears the burden of proving the existence of an arbitration agreement. (*Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1128.) Global

established the arbitration agreement exists. Bennett does not dispute she signed it.

Unconscionability is a venerable and desirable contract law doctrine. The doctrine is about someone using oppressive power over another to force them into an unfair deal.

An antebellum exemplar arose when the ship Richmond, a whaling vessel, ran aground in arctic waters 5,000 miles from the nearest port. Winter was near, meaning sea ice soon would crush the ship and destroy its full cargo of valuable oil. The only three ships in the neighborhood rescued the crew. These other whaling ships did not have full holds. With the supposed assent of the Richmond's master, the other three captains held an "auction" and bought the Richmond's oil for cents on the dollar. Once back home, however, the owner of the Richmond sued to void the so-called auction and to recover the true market value of the oil. The Supreme Court of the United States agreed this "auction" contract was unconscionable: "The contrivance of an auction sale, under such circumstances, where the master of the Richmond was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract." (*Post v. Jones* (1857) 60 U.S. 150, 159.)

As the party opposing enforcement of the contract, Bennett bore the burden of establishing her claim of unconscionability. She had to show unfairness both in the *procedure* by which her contract was formed and the *substance* of its terms. (*Fuentes v. Empire Nissan, Inc.* (2026) 19 Cal.5th 93, 99 (*Fuentes*).)

This distinction between *procedural* and *substantive* unconscionability is fundamental. Yale Professor Arthur Allen Leff devised it in his landmark article, *Unconscionability and the Code—The Emperor's New Clause* (1967) 115 U.Pa. L.Rev. 485, 487, 488, 489, 509 (*Leff*).

As Professor Peters wrote, since Leff's 1967 article, "no one has ever again been able to address the problem of unconscionability without incorporating the watershed distinctions" Leff created. (Peters, *Arthur Leff as a Scholar of Commercial and Contract Law* (1981) 91 Yale L.J. 230, 231.)

Leff critiqued the 21 years of effort—1941 to 1962—the American Law Institute spent trying to clarify the concept of unconscionability. Leff famously concluded ALI's decades of work resulted only in "amorphous unintelligibility." To boot, Leff condemned the ALI's commentary accompanying that work on unconscionability as *irrelevant*. (*Leff*, *supra*, 115 U.Pa. L.Rev. at p. 488.) The Restatement's entire formulation of unconscionability, Leff charged, was *vacuous*. (*Id.* at p. 541.) Leff concluded "it is easy to say nothing with words." (*Id.* at p. 559.)

Leff's penetrating analysis retains its power. For instance, he mercilessly dissected Judge Skelly Wright's much-cited unconscionability decision in *Williams v. Walker-Thomas Furniture Co.* (D.C. Cir. 1965) 350 F.2d 445. (*Leff*, *supra*, 115 U.Pa. L.Rev. at pp. 551–557.) I have looked, and to my knowledge no one has rebutted Leff's scathing critique.

Historically, then, the doctrine of unconscionability has been a difficult creature to identify and capture. "[S]cholars uniformly describe unconscionability as an ambiguous and undefinable concept." (Bridwell, *The Philosophical Dimensions of*

the Doctrine of Unconscionability (2003) 70 U. Chi. L. Rev. 1513, 1514; see also 1513–1514 [after well over one hundred law review articles, legal scholars believed "they were unable to provide courts with a "reasoned elaboration of what is unconscionable"].)

More than half a century later, however, some things are clear.

A written arbitration agreement is valid, irrevocable, and enforceable, except on grounds for the revocation of *any* contract. This principle establishes *an equal-treatment rule*: a court may invalidate an arbitration agreement based on generally applicable contract defenses, but the court may not formulate rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. (*Hohenshelt*, *supra*, 18 Cal.5th at p. 341; see also *Kindred Nursing Centers L.P. v. Clark* (2017) 581 U.S. 246, 248 (*Kindred*) [federal law preempts state rules that single out arbitration agreements for disfavored treatment].)

The equal-treatment rule means California courts may not create unconscionability rules that apply only in arbitration cases. The highest courts of our state and nation condemn that sort of selective contract law. The law requires Bennett to advance *generally applicable arguments*, not ones specific to arbitration contracts.

B

The trial court was right to find "the degree of procedural unconscionability is low."

Global apparently gave Bennett a meaningful opportunity to review the written material, given that the burden was on Bennett and she offered no contrary evidence. Bennett thus had ample time to consider the contract. Global did not block Bennett

from asking questions about the agreement. Neither did it tell her to hurry up. Bennett reported neither surprise nor high-pressure tactics. The font was easily readable. There was no language barrier. The contract language was straightforward: the words were not complex and there were no 900-word paragraphs. (Cf. *Fuentes*, *supra*, 19 Cal.5th at pp. 104–105 [agreement was one mammoth paragraph of about 900 words squeezed into about three vertical inches of text].)

The contract was a form, but that does not change this assessment. The form is Global's, as its logo at the top makes clear. We can presume Global presented its form to Bennett on a take-it-or-leave-it basis: even if she had tried, Bennett would have been powerless to bargain over terms. Absent evidence on this point, of which there is none, this presumption accords with common experience. Some employees enjoy strong bargaining positions, but they are the exceptions and not the rule. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 115 (*Armendariz*); Lab. Code, § 515, subd. (a).)

Form contracts often are pejoratively called contracts of adhesion. But they could just as well be called *contracts of convenience*.

"Form contracts have social utility. 'Through advance knowledge on the part of the enterprise offering the contract that its relationship with each individual consumer or offeree will be uniform, standard and fixed, the device of form contracts introduces a degree of efficiency, simplicity, and stability. When such contracts are used widely, the savings in cost and energy can be substantial. An additional benefit is that the goods and services which are covered by these contracts are put within the reach of the general public, whose sheer size might prohibit

widespread distribution if the necessary contractual relationships had to be individualized. Transactional costs, and therefore the possible prices of these goods and services, are reduced. [¶] In short, form contracts appear to be a necessary concomitant of a sophisticated, mass-consumption economy. They have social and economic utility.' " (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 818, fn. 15; see also *Leff*, *supra*, p. 504; Karl Llewellen, *Book Review* (1939) 52 Harv. L.Rev. 700, 701.)

Half a century ago, the scholarly view was that "Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts." (Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power* (1971) 84 Harv. L. Rev. 529, 529.)

This view is dated. In the last 50 years, forms have become *more* common because technology, prominently including the internet, has continued to drive down transaction costs. In 2026, many buyers want one-click transactions that get the item here by 11 a.m. tomorrow. The idea of devoting time to customizing a contract may strike the typical 2026 consumer as bothersome at best.

This point is profound: for most modern commerce, for most people, for most of the time, *all contracts are forms*. A major reason is convenience. This is not some trick a cabal of corporations foisted on protesting consumers. It is what people

generally want, because people generally prefer spending less time studying transactions and spending more time doing things they enjoy.

Nevertheless, California law holds that *some* procedural unconscionability exists in every standardized contract that, "imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Fuentes*, *supra,* 19 Cal.5th at p. 103.)

Some procedural unconscionability existed. The court correctly assessed its level as low.

Citing *Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, 492, 494 (*Ramirez*), Bennett concedes, as she must, that the simple existence of an adhesion contract establishes only a low degree of procedural unconscionability.

Bennett nevertheless launches many attacks on the form of the contract, and then she does the same for the substance of the contract. I will treat the full multitude of Bennett's complaints because their profusion is so typical of the way modern California counsel are accustomed to attacking every conceivable detail of arbitration contracts. California trial judges handling a civil docket are familiar with this gamut, on both procedural and substantive grounds. The majority opinion picks out some offerings on this menu ultimately to craft a punishing method of review that exists only when arbitration is the issue. The common result is predictable: death to you, arbitration.

Bennett argues the font size was too small. The record shows the text is easily readable, however, and different from the "nearly unreadable" font size in the *Fuentes* case. (*Fuentes*, *supra*, 19 Cal.5th at p. 100; see also *Fuentes v. Empire Nissan,*

Inc. (2023) 90 Cal.App.5th 919, 923 ["strikingly minute," "tiny and blurred," "largely unreadable"].)

If we assume Global gave Bennett material online, then small font was irrelevant because the interested reader can use a device to enlarge text on the screen. (See *Basith v. Lithia Motors, Inc.* (2023) 90 Cal.App.5th 951, 955 ["Technology made the online image adjustable. Viewers could use a bigger monitor or keyboard strokes to magnify the size of the words"].)

If we assume the materials were hard copies, then there exists a tradeoff between font size and document size: larger fonts use up more paper. The font is small on an average grocery receipt, for instance, because the store wants to fit a lot of useful information on a scrap of paper. The same goes for prescription printouts and medication labels. These small fonts are not unfair. They are typical and rational.

The font in Global's agreement was Arial 9.2. This font size is innocuous. It is larger font than in the heading of decisions from this court explaining the prohibition on citing unpublished opinions. It is larger than footnotes in the Official California Reports, which are in 9 point font. According to the most recent U.S. Government Publishing Office Style Manual published in 2016 (see p. 307), federal agencies generally set footnotes in 7, 8, or 9 point font (<https://www.govinfo. gov/content/pkg/GPO-STYLEMANUAL-2016/pdf/GPO-STYLEMANUAL-2016.pdf> [as of Nov. 8, 2026], archived at <https://perma.cc/WLU5-LB3Z>]; cf. 21 C.F.R. § 101.2(c) [federal regulations on food labeling require information to "appear prominently and conspicuously, but in no case may the letters and/or numbers be less than one-sixteenth inch in height"].)

Bennett cites no non-arbitration case holding Arial 9.2 to be a procedurally unconscionable contract font size. This font size argument fails.

Bennett likewise asserts the arbitration agreement was "buried" in 100 pages of documents Global gave her. "Buried" is pejorative. Bennett does not identify material Global gave her that was unnecessary filler designed only to discourage curiosity. Employers are rarely faulted for giving new hires too much information about the new job.

The employer highlighted the importance of the arbitration agreement. It included its proposed contract as an appendix to other materials. It required her to sign this three-page document. Global also required Bennett to sign a confidentiality agreement. These signature requirements emphasized the importance of these two contracts and distinguished them from accompanying materials.

Bennett also argues she had a high school diploma only and was unfamiliar with the topic of arbitration. Her briefing characterizes the arbitration agreement as "complex, including statutory references and legal jargon … ." The record debunks the supposed semantic complexity of this document. For a legally-binding document, this wording is pedestrian. It is neither see-Spot-run nor unnecessarily prolix.

No general contract rule states the contracting process is suspect when one side writes down legalistic language and the other side lacks a college degree. Were that true, it would cast unwarranted doubt, for instance, on many real estate transactions and car loans.

In short, the trial court properly rated the level of procedural unconscionability as low. I agree with my colleagues

in the majority on this point. The level of procedural unconscionability was as close to zero as any form can get. Procedurally, then, this contract was just like what everyone uses all the time.

C

There was no substantive unconscionability (1) that mattered on these facts and (2) that could not easily and simply be severed.

The trial court faulted two aspects of the deal: *scope* and *duration*. Bennett endorses these criticisms and piles on many more. The majority accepts some of these points, adds others, and ignores the rest. Again I go through the panoply because this mass of special attacks is standard in California arbitration law today. California judges have lived in this atmosphere so long that we mistake it for normal, even though it utterly departs from general contract law.

1

The trial court ruled the *scope* of the contract was unfair because it covered non-employment as well as employment claims. This, however, was not overly harsh or so one-sided that it shocks the conscience. It was not even close.

Bennett claimed the contract was unfair because it was "overbroad in scope." *General* contract law, however, has never contained a doctrine of "overbreadth." The contrary is true. The familiar principle of contract law is to allow *parties* to determine the scope of their relationship. (E.g., Civ. Code, § 1636 [interpret contracts to effectuate the mutual intention of the parties].)

This freedom to construct a world of private ordering allows parties to make their own law tailored to their particular plans. Bennett does not elaborate or defend the notion that courts

generally will oversee the "proper" scope of all contracts. Bennett's notion is another arbitration-specific invention running hard against the grain of general contract law.

Apart from the non-existence of a *general* overbreadth doctrine, Bennett in *particular* fails to explain what was unfair about this contract's scope. She offers three speculative hypotheticals: her conceivable slip-and-fall in the Global parking lot outside of work hours; an imaginary mishap as a customer of one of Global's call centers; and a theoretical plaintiff suing a co-worker at Global for "claims unrelated to her employment, like defamation, conversion, stalking, assault, or other common claims … ." The majority endorses Bennett's attack.

This scope is not unfair. Contracts commonly have a scope that is sweeping. Standard settlement contracts, for instance, commonly attempt to expand their scope to the maximum extent the English language permits.

For instance, encompassing words like the following are routine in non-arbitration contracts, as every experienced trial judge will recognize: "claimants, for themselves and each of their present and former heirs, trustees, executors, administrators, partners, sureties, employees, attorneys, agents, representatives, predecessors, successors, and assigns." These people "unconditionally and irrevocably waive, release, and forever discharge the defendant and each of its present, former and future parents, predecessors, successors, assignees, affiliates, subsidiaries, principals, shareholders, joint ventures, officers and directors, attorneys, agents, representatives, and employees from and against any and all past and present claims (including subrogation claims), counterclaims, actions, causes of action, lawsuits, fees, costs, losses, controversies, promises, demands, or

liabilities, of whatever kind or character, whether known or unknown."

Lawyers often generate, and trial courts often encounter, these feats of semantic indulgence. The drafting lawyers are trying to visualize every possible circumstance and to capture them all. That is not unfair. It is customary and usual, because clients commonly want the deal to cover every eventuality, no matter how remote or outlandish the prospect might seem at first. Lawyers write this way because experience has taught the profession to be prudent and detail-oriented. Clients want competent contract attorneys who anticipate problems and plug potential holes.

Bennett cites a number of cases to support her claim. Later I discuss *Cook v. University of Southern California* (2024) 102 Cal.App.5th 312 (*Cook*). This and all the other unconscionability precedents Bennett or the majority cite are arbitration cases. None manifests an equal-treatment rule.

In sum, Bennett's scope argument founders.

The majority does not attempt to show its scope critique appears anywhere in contract law outside of arbitration. This scope critique is an arbitration special. It is not evenhanded.

2

Bennett argues the agreement was unfair because of its *duration*: it survived her employment and could be revoked or modified only in a writing signed by Bennett and all of Global's partners. The indefinite nature of the contract's duration, she contends, shows it was unfair.

Nonsense.

No *general* contract law doctrine holds that indefinite contract duration is unfair. General law is to the contrary.

Parties often strike deals that are to remain in place indefinitely or until all parties agree to end them.

Alternatively, parties may specify their contracts have a lengthy duration, or courts may interpret the contract to imply such a term. (E.g., *RMR Equipment Rental, Inc. v. Residential Fund 1347, LLC* (2021) 65 Cal.App.5th 383, 386 [long term water requirements contract]; *Lura v. Multaplex, Inc.* (1982) 129 Cal.App.3d 410, 413–414 [long term employee commission contract]; *Thomson v. Hodgson* (9th Cir. 2025) 150 F.4th 1097, 1105–1107 [long term musical royalties contract].)

Long lasting arrangements are commonplace throughout the economy and over the breadth of general contract law. Long term relationships—made binding by long term contracts—can be important for the parties by helping them to achieve long term goals.

When parties embark on an enormous venture, the time frame can stretch far into the future. Dams, power plants, underground subways, towering skyscrapers, enormous cathedrals, mighty bridges: the planned duration can stretch over many decades.

The duration of associated contracts can match the mammoth scale of these projects. Contract law lets people think big. It makes spectacular achievements possible by enforcing reliable trust over the very long run. This aspect of contract law has tremendous utility. It enables our civilization to construct what is monumental and enduring.

In the context of this case, it can be rational for the parties to set a duration that extends past the end date of employment. Trial judges familiar with employment lawsuits know many are filed *after* employment ended, as in this case. What then would

be the logical end date for an employment contract? That would depend on the statute of limitations, whether there might be estoppel or tolling of the statute for some reason, and whether these and other relevant doctrines might evolve in the future. The parties may believe these matters cannot be predicted with certainty. A sensible conclusion would be to extend the contract until all sides are satisfied its purpose has run its course. If the relationship ends, the contract may become moot as a practical matter. Then no one need do anything.

For these reasons, the duration of this contract was logical. This term corresponded to the situation and the interests at stake. It was not unfair.

Flexibility about duration is another aspect of the freedom of contract. The contrary view is peculiar to arbitration.

The majority does not attempt to show its duration critique appears anywhere in contract law outside of arbitration. This duration critique is an arbitration special. It is not evenhanded.

3

The majority joins with Bennett by faulting this arbitration contract because it lacks *mutuality*. The majority asserts this issue of mutuality arises because "Bennett must arbitrate any claim she has against Global's past or present employees, officers, administrators, and agents." The result makes these other people into third party beneficiaries of this contract, reasons the majority, and hypothetically these others can force Bennett into arbitration while she would not be able to do the same to them. "The agreement, therefore, creates a one-sided benefit in favor of its third-party beneficiaries," concludes the majority. This is a fatal offense to the paramount consideration of mutuality, concludes the majority.

This concern is strictly hypothetical. It has no basis in the facts Bennett alleged in her complaint. The majority thus invents a hypothetical mutuality concern to invalidate this arbitration contract.

This technique is powerfully destructive. It also has no parallel in general contract law.

General contract law does not require mutuality. The Restatement (Second) of Contracts states that, "[i]f the requirement of consideration is met, *there is no additional requirement* of

(a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or

(b) *equivalence in the values exchanged*; or

(c) '*mutuality of obligation*.' " (Rest. (2d) Contracts § 79, italics added.)

Mutuality is not a general contract law rule. (See, e.g., 3 Williston of Contracts (4th ed. 2026 May 2026 Update) § 7:22.) Recall that line about the peppercorn being enough. (https://www.lawteacher.net/cases/chappell-v-nestle.php.)

The unconscionability doctrine is centrally concerned with overall contract unfairness that shocks the conscience, but the majority offers no example of an unconscionability case—outside the arbitration context, that is—where a court goes through the contract in search of hypothetical problems to destroy the deal.

Demanding *equivalence in the values exchanged* for every clause, for every imaginable hypothetical case, increases the power of California courts to regulate arbitration to our standards of fairness.

No other branch of contract law, however, uses imaginary hypotheticals to flyspeck contracts to death.

Justice Kagan condemned a method that "hypothesized a slim set of both patently objectionable and utterly fanciful" situations as a method of disfavoring arbitration. (*Kindred*, *supra*, 581 U.S. at p. 253.) That style of analysis "reveals the kind of 'hostility to arbitration' that led Congress to enact the [Federal Arbitration Act]." (*Id.* at p. 254, citing *Concepcion*, *supra*, 563 U.S., at 339.) "And doing so only makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans." (*Ibid.*)

Stephen Broome wrote in 2006 that the "mutuality test evidences an overt bias against arbitration by the California courts … ." (Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act* (2006) 3 Hastings Bus. L.J. 39, 40 (*Broome*).) The Supreme Court of the United States cited Broome's article. (*Concepcion*, *supra*, 563 U.S at p. 342.)

The majority does not attempt to show its hypothetical mutuality critique appears anywhere in contract law outside of arbitration. This hypothetical mutuality critique is an arbitration special. It is not evenhanded.

4

Bennett argues the confidentiality agreement lacks mutuality because it permits Global to seek injunctive relief, "but requires that Bennett concede factors favoring injunctive relief, i.e., agree that disclosure would cause irreparable harm, agree that any damages would be difficult to measure for a breach that injunctive relief be granted, agree that injunctive relief be granted, and agree that [Global] is entitled to immediate injunctive relief." The majority endorses this argument.

For the sake of argument, I will assume it is proper to read the arbitration contract and the confidentiality contract as one.

This attack still fails. Global's interest in getting injunctive relief for trade secret violations was valid and typical. *The only authority Bennett or the majority muster are arbitration cases.* Bennett and the majority cannot identify a rule of general applicability that casts doubt on a trade secret holder's power to include provisions of this kind in its confidentiality agreements.

Global's interest in protecting its trade secrets was legitimate. Injunctive relief is a key way to protect trade secrets.

The primary purpose of California's trade secret law is to promote and reward innovation and technological development and to maintain commercial ethics. (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 878 (*Bunner*).)

"Injunctions issued under California's trade secret law serve significant government interests. The logic of the law of trade secrets recognizes that private parties invest extensively in certain information that loses its value when published to the world at large. Trade secret law thus creates a property right defined by the extent to which the owner of the secret protects his interest from disclosure to others. By doing so, it allows the trade secret owner to reap the fruits of its labor and protects the owner's moral entitlement to these fruits. Trade secrets thus have been recognized as a constitutionally protected intangible property interest. By creating a limited property right in information, trade secret law creates an incentive for investment in innovation. Trade secret law prompts innovators to proceed with the discovery and exploitation of their inventions. Without trade secret protection, organized scientific and technological

research could become fragmented, and society as a whole would suffer." (*Bunner*, *supra*, 31 Cal.4th at pp. 880–881.)

"Trade secret law also maintains standards of commercial ethics. It minimizes the inevitable cost to the basic decency of society when one steals from another. It thereby recognizes that good faith and honest, fair dealing is the life and spirit of the commercial world." (*Bunner*, *supra*, 31 Cal.4th at p. 881.)

"[P]rohibiting the disclosure of trade secrets acquired by improper means is the only way to preserve the property interest created by trade secret law and its concomitant ability to encourage invention." (*Bunner*, *supra*, 31 Cal.4th at p. 881.)

A trade secret is a peculiar kind of property because its only value consists in keeping it private. The right to exclude others thus is central to the definition of this property interest. (*Bunner*, *supra*, 31 Cal.4th at p. 881.)

Once the information constituting a trade secret is disclosed to others, the holder of the trade secret has lost its property interest in the information. "The protection of trade secrets and the benefits to research and development derived from the government's recognition of this property right *depend on the judiciary's power to enjoin disclosures* by those who know or have reason to know of their misappropriation." (*Bunner*, *supra*, 31 Cal.4th at p. 881, italics added.)

There is no less restrictive way of protecting an owner's constitutionally recognized property interest in its trade secrets. (*Bunner*, *supra*, 31 Cal.4th at p. 881.)

Injunctive relief thus is central to trade secret protection. As a trade secret holder, Global's contractual effort to make this remedy readily available to it was usual and proper.

Once again, Bennett's only authorities for attacking these provisions are decisions about arbitration agreements. (See *Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 486–487, 492–493 (*Alberto*) [arbitration case]; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 233 [same]; *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 78 [same].)

If there is a *general* rule disfavoring contractual efforts to make injunctive relief more easily available in trade secret cases, Bennett has not identified it. She gives us only arbitration specials. They are preempted.

5

Bennett and the majority identify an invalid provision in the confidentiality agreement. This provision has nothing to do with this case. It is easily severable. This irrelevant and severable provision is not a good reason to condemn this arbitration agreement.

Paragraph eight in the confidentiality agreement purports to prohibit Bennett from soliciting Global's employees to terminate their employment with Global.

This anti-raiding clause is unenforceable because it is not limited to a bar on improper means. (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 936; cf. *ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1017 [former employee may use general knowledge, skill, and experience acquired in former employment in competition with a former employer, but the former employee may not use confidential information or trade secrets in doing so].)

The trial court declined to address the anti-raiding clause.

This was sensible for two reasons: *irrelevant* and *severable*.

First, the anti-raiding clause is *irrelevant*. Its connection to Bennett's case is delicious fiction. Bennett worked at Global as an "account associate" at a call center for six weeks. Her complaint does not allege she then left to compete with Global. The factual relationship between the anti-raiding clause and this case is nil.

This analysis is not hypothetical. It compares Bennett's actual complaint to the actual text of the anti-raiding clause and then questions how one logically relates to the other. Answer: there is no actual relationship. This analysis of actualities is the opposite of hypothetical.

Second, the anti-raiding clause is *severable*. The strong legislative and judicial preference is to sever an offending term and to enforce the balance of the agreement. The relevant statute is Civil Code section 1599, which contemplates a judicial refusal to enforce an entire agreement only when it is permeated by unconscionability. (See *Ramirez*, *supra*, 16 Cal.5th at p. 514.)

Courts may liberally sever any unconscionable portion of a contract and enforce the rest when the illegality is collateral to the contract's main purpose, when it is possible to cure the illegality by means of severance, and when enforcing the balance of the contract would be in the interests of justice. (*Ramirez*, *supra*, 16 Cal.5th at p. 514.)

The illegality here is collateral to the main purpose of the arbitration contract. Prohibiting Bennett from raiding Global's employees is unrelated to the purpose of arbitrating the Labor Code allegations that Bennett has made against Global.

The proper course would be to cure this illegality by severing it. Striking paragraph eight from the confidentiality

agreement would leave the arbitration agreement intact. This slice of the knife would be straight, clean, and easy.

Enforcing the balance of the agreement also is in the interest of justice. The parties agreed that "[i]f any provision of this [Arbitration] Agreement is determined to be void or otherwise unenforceable, in whole or in part, such determination shall not affect the validity of the remainder of this Agreement." It serves the spirit and letter of this clause to sever the anti-raiding provision clause, which is unrelated to arbitration. (See *Ramirez*, *supra*, 16 Cal.5th at p. 517 ["if the contract contains a severance clause, the court should take it into account as an expression of the parties' intent that an agreement curable by removing defective terms should otherwise be enforced"].)

On the actual facts of this case, one can find no need to deter Global from pursuing a scheme of widespread illegality. The anti-raiding provision in paragraph eight is the lone problem in an otherwise unobjectionable agreement. (See *Ramirez*, *supra*, 16 Cal.5th at p. 517 ["the greater the number of unconscionable provisions a contract contains the less likely it is that severance will be the appropriate remedy"].)

To sum up, there was no substantive unconscionability (1) that mattered on these facts and (2) that could not easily and simply be severed. To reach the contrary conclusion of substantive unconscionability requires the majority to employ a collection of destructive weapons used *only* in arbitration cases. This approach is not evenhanded.

D

The *Cook* decision*, supra,* 102 Cal.App.5th at pp. 320–330, displayed antipathy to arbitration of the kind that prompted Justice Breyer to chide California courts for their intransigence

on the topic. (See *DIRECTV*, *supra*, 577 U.S. at p. 53.) The Supreme Court of the United States addressed California's continuing defiance of federal law. The " 'Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.' … The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." (*Ibid.*)

The California Supreme Court has heeded the direction of the Supreme Court of the United States. Our Supreme Court applies an equal-treatment rule. Under this guidance, *Cook* must fall.

Pamela Cook sued the University of Southern California for causes of action arising from her former employment at USC. USC moved to compel arbitration. The Court of Appeal affirmed the trial court's denial of this motion. The court said the degree of procedural unconscionability was low. (*Cook*, *supra*, 102 Cal.App.5th at p. 321.) Substantive unconscionability, on the other hand, was present to an unacceptable degree for three reasons: contract scope, contract duration, and lack of mutuality. (*Id.* at pp. 321–328.) I treat each in turn.

First, the *Cook* opinion held that the "the agreement's broad *scope* is substantively unconscionable." (*Cook*, *supra*, 102 Cal.App.5th at p. 325, italics added.) As noted above, however, contract law has never contained a general doctrine of "overbreadth" that limits the permissible scope of contracts. The *Cook* decision cited unconscionability decisions holding "broad scope" to be a problem. *But all these decisions concerned arbitration.* (See *id.* at pp. 321–325.) That is what the equal-

treatment rule forbids: inventing new state rules that apply only in arbitration cases, where their effect is to the detriment of arbitration. This version of the unconscionability doctrine "singles out arbitration agreements for disfavored treatment." (*Kindred*, *supra*, 581 U.S. at p. 248.) That is forbidden.

Second, *Cook* held the contract's *duration* was unacceptable: "The arbitration agreement specifically provides that it will survive unless and until Cook and USC's president specifically terminate the agreement in a writing, signed by both parties, which expressly mentions the arbitration agreement." (*Cook*, *supra*, 102 Cal.App.5th at p. 326.) According to *Cook*, this indefinite duration revealed fatal unconscionability. (*Ibid.*) This holding is unsustainable, however, because—in practice—it preys only upon arbitration. Contract law contains no general rule bounding the duration of contracts. So far as the *Cook* decision attempted to show, this duration objection has never driven unconscionability holdings outside the arbitration field. I know of no unconscionability holding outside the arbitration field that espoused this logic. It is an arbitration special.

Third, the *Cook* opinion faulted the arbitration agreement for its supposed lack of mutuality. Once again, however, *the opinion cited only arbitration cases as precedents for its application of the unconscionability doctrine.* (*Cook*, *supra*, 102 Cal.App.5th at pp. 326–328.)

In sum, the *Cook* opinion applied a version of the unconscionability doctrine that puts only arbitration on the chopping block. Holdings like that invite a ninth reprimand from the Supreme Court of the United States.

Later California state cases follow *Cook*. They magnify the problem.

E

So much for *method*. Now to *results*. The results are no more evenhanded than the method.

This section takes up the empirical question of whether the application of the unconscionability doctrine today in fact has been evenhanded.

My approach is simple legal research: look up cases on Westlaw, read them, sort them, and count them.

I have tried to use human intelligence. At any rate, I have used no artificial intelligence. I suspect people with more wits and resources could, using an array of tools, check and extend my basic inquiry. Widespread and expanded research along these lines would be desirable.

1

I inquire into the actions of courts because actions speak louder than words.

The question is this: when California state courts use the doctrine of unconscionability to impair or invalidate a contract, *how often* is that contract about arbitration? For the years 2021 to 2025, the answer is: *disproportionately often, and overwhelmingly so*.

For these years, and depending on exactly how we define "unconscionability," California courts used the unconscionability doctrine to interfere with arbitration 79 percent to 90 percent of the time. These percentages show a *highly* disproportionate impact.

To rephrase, take the cases in which courts used unconscionability to invalidate part or all of a contract. Question: how often was that contract about arbitration? Answer: from *79 percent to 90 percent* of the time. In other words, California

courts target arbitration in the overwhelming supermajority of the cases.

Put in yet other terms, recent California decisions have disproportionately used the supposedly general doctrine of unconscionability to focus on and to impair or extinguish a particular kind of contract: arbitration.

This is not evenhandedness. This is antipathy to arbitration. The antipathy is extreme.

2

My survey includes unpublished as well as published cases, because California courts often impair an arbitration contract without publishing their decisions. Nevertheless, an invalidated contract is legally unenforceable whether or not the decision is published. I cite unpublished cases, not to support some legal assertion with their nonexistent legal authority, but to show the reality of how California courts decide arbitration cases.

3

To repeat, lawyers, scholars, and empiricists on all sides of the arbitration debate should scrutinize, critique, and expand the following initial research foray.

Broome suggested California state courts began expressing their hostility to arbitration in *1997*. (See *Broome*, *supra*, 3 Hastings Bus. L.J. at pp. 49–50 & fn. 51, citing *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1547–1548.)

1997 was 29 years ago.

I have not attempted to tackle 29 years of data. I confine my analysis to cases decided in 2021 to 2025, which is about all I can manage for now.

For the sake of completeness, however, it would be desirable to expand this inquiry to encompass the universe of

data. Future parties to arbitration disputes may want to check and expand my feeble effort. It would be ideal if scholars and arms-length observers would join in.

4

My research method has been to search Westlaw for California state cases with these queries and to obtain these results:

- unconscionab! & DATE(=2021) returned 146 cases
- unconscionab! & DATE(=2022) returned 135 cases
- unconscionab! & DATE(=2023) returned 140 cases
- unconscionab! & DATE(=2024) returned 152 cases
- unconscionab! & DATE(=2025) returned 140 cases

These searches produced a total of 713 cases. I reviewed the 713 cases to see in which courts used *something like* the unconscionability doctrine to invalidate part or all of a contract.

Why do I say *something like* the unconscionability doctrine? As Professor Leff explained, a hallmark of the unconscionability doctrine is its indefinite character. So I culled the 713 cases to determine those in which courts were applying *something like* this doctrine.

This effort required some judgment calls, and judgment calls deserve explanation and justification. I invite scrutiny of my judgment calls, which I hope readers conclude are reasonable and which are at least explicit and therefore subject to open debate.

In the interest of casting a wide net, then, I included cases of the following four categories.

First, in *In re Marriage of Valkov and Valkova* (Feb. 15, 2022, B304187) 2022 WL 455279 [nonpub. opn.] (*Valkov*), the court set aside a post-marital stipulated property division in a

marital dissolution case. (*Id*. at p. *1.) The wife argued she was under duress, the terms were unconscionable, and the husband had unclean hands. (*Id*. at p. *10.) The appellate court affirmed the trial court's decision setting aside the stipulated property division based on the finding the wife was under duress and on other "equitable grounds." (*Id*. at p. *11.) Thus, the court did *not* explicitly state the stipulation was unconscionable. But this analysis of "inherent equitable authority to set aside a stipulated agreement" closely resembles an unconscionability holding, and indeed the wife used that very word. (*Id*. at pp. *10, 11.) I therefore include this case in my sample, despite the absence of an express judicial embrace of the unconscionability doctrine.

Second, in an unlawful detainer action brought after a foreclosure sale, the trial court found that a procedural irregularity plus a grossly inadequate price meant it would be "unconscionable" to allow a home loan lender to profit at the home loan borrower's expense from the lender's "misleading communications." (*Genova Capital, Inc. v. Field* (July 21, 2022, B303697) 2022 WL 2849079 [nonpub. opn.], at p. *8 (*Genova*).) The court did not expressly invalidate any contract, but simply denied the lender possession after the foreclosure sale, pending an "unlimited quiet title action." (*Id*. at p. *2.) This rule specifically concerns real estate foreclosure sales, as explained in *Millennium Rock Mortgage Inc. v. T.D. Service Co*. (2009) 179 Cal.App.4th 804, 809–810. Consequently, this rule is not a general contract law doctrine. Yet this rule resembles unconscionability analysis by focusing on the process of contract formation and the substantive unfairness of the contractual result. I include this case.

Third, a series of decisions invalidated certain aspects of contracts that the Dameron hospitals required patients to sign before hospital admission. These decisions found aspects of these contracts of adhesion to be unenforceable because the effects were beyond the patients' expectation. (See *Dameron Hospital Assn. v. Progressive Casualty Insurance Co.* (2025) 111 Cal.App.5th 530, 536, 543 (*Dameron IV*); *Dameron Hospital Assn. v. AAA Northern Cal., Nevada & Utah Ins. Exchange* (2022) 77 Cal.App.5th 971, 993–994 (*Dameron III*); *Dameron Hospital Assn. v. United Services Automobile Assn.* (Jan. 5, 2022, C087225) 2022 WL 41914 [nonpub. opn.] at p. *8 (*Dameron II*); *Dameron Hospital Assn. v. Geico Casualty Co.* (Oct. 4 2021, C086546) 2021 WL 4519651 [nonpub. opn.], at pp. *7–9 (*Dameron I*).) The decisions did not self-consciously apply the doctrine of unconscionability or cite unconscionability precedents. They used the word "unconscionable" once, and then in a descriptive rather than a doctrinal way. Yet their focus on both procedural and substantive unfairness qualifies them as kin to the unconscionability doctrine. I include these cases.

Fourth, in *Razaqi v. Khurush* (Nov. 21, 2025, C099636, C101262) 2025 WL 3250832 [nonpub. opn.], at pp. *8–11 (*Razaqi*), the trial court awarded statutory fees and sanctions in a family law matter after concluding that basing fees on the 40 percent contingency fee contract between the wife and her lawyer would be unconscionable. The appellate court upheld the statutory fees and sanctions but did not address unconscionability. I include this decision because professional regulation of attorney conduct, including sanctions for "unconscionable" attorney behavior, seems to be a genre of unconscionability analysis. It is difficult precisely to assess this

case because the appellate court did not discuss or describe the basis for the trial court's unconscionability ruling. I hope to err on the side of casting a wide net, however, so I include this case.

I also include cases where a court invalidates part of a contract but then severs that part. This use of the unconscionability doctrine destroys at least a part of the parties' agreement.

On the other hand, some cases use some variant of the word "unconscionability" but, in my view, are *not* applications of the contract law doctrine of unconscionability.

In a couple of cases, for instance, courts found a party would suffer "unconscionable injury" such that the statute of frauds should not be applied to a contract; thus, the unconscionability finding allowed the agreement to be *enforced*. (E.g., *Tukes v. Richard* (2022) 81 Cal.App.5th 1, 25–26; *Twelve Tribes of Israel, U.S.A., Inc. v. Barnum* (Mar. 17, 2022, B299838) 2022 WL 804783 [nonpub. opn.], at p. *11.) This is the opposite of the contract law defense of unconscionability, which *annuls* contract enforcement. I exclude decisions of this sort.

In another category, courts determine whether *default judgment awards* are "totally unconscionable and without evidentiary justification." In one case, the court found the punitive damages award failed the standard because the party's financial condition was not sufficiently considered. (*Brahms v. Wilk* (Sept. 20, 2022, G060250) 2022 WL 4393494 [nonpub. opn.], at p. *5.) In another, the trial court vacated the attorney fees portion of the default judgment award as unconscionable, but the appellate court reversed. (*Coastline JX Holdings LLC v. Letwak & Bennett* (May 16, 2022, G059646) 2022 WL 1534602 [nonpub. opn.], at pp. *1, 2, 5.) These are not contract law cases; there is

no contract to validate or invalidate. Rather, these appellate courts were reviewing the propriety of trial court damage awards. These are not applications of the contract law doctrine of unconscionability. I exclude this type of opinion.

In yet another category, the court in *Bai v. Rodeo Concierge, Inc.* (Aug. 31, 2022, B305596) 2022 WL 3908603 [nonpub. opn.] affirmed a holding that defendants had violated statutes prohibiting unlawful car leasing laws: Penal Code section 571, which outlaws certain types of car subleasing; and Civil Code section 3343.5, which creates a private right of action to enforce Penal Code section 571. (*Id.* at pp. *9–10.) The combination of these statutes do arguably involve a form of unconscionability, but they convert it from a contract law shield into a tort law sword. Because this is not the contract law defense of unconscionability, I exclude this case.

I exclude *Northstar v. Apollo Couriers, Inc.* (Aug. 28, 2025, B334620) 2025 WL 2475253 [nonpub. opn.]. There the trial court decided an arbitration contract was unenforceable under California law, but the appellate court barely mentioned unconscionability. Rather it affirmed primarily on the grounds of an inadequate appellate presentation of the record. (*Id.* at pp. *2–3.) Perhaps my judgment call is wrong, but I exclude this case to err on the side of caution.

5

These parameters yield a sample of 100 decisions from 2021 to 2025. These 100 decisions are the cases in which California courts invalidated contracts, in whole or in part, on unconscionability grounds.

In this list, I count the dispute in *Ramirez* as just one case. This case traveled up and down the appellate ladder and

culminated in nullification of the arbitration contract in *Ramirez v. Charter Communications, Inc.* (2025) 108 Cal.App.5th 1297, 1308. Despite the multiple opinions, *Ramirez* remains but one case about just one contract.

6

Of these 100 decisions that used *something like* unconscionability reasoning to impair or invalidate contracts, how many cases involved arbitration? The answer is 79:

1. *Alvarez v. Altamed Health Services Corp.* (2021) 60 Cal.App.5th 572
2. *Betancourt v. Transportation Brokerage Specialists, Inc.* (2021) 62 Cal.App.5th 552
3. *Fisher v. MoneyGram Intern., Inc.* (2021) 66 Cal.App.4th 1084
4. *Cruz v. Calop Business Systems* (Mar. 30, 2021 B306688) 2021 WL 1205631 [nonpub. opn.]
5. *De Leon v. Pinnacle Property Management Services, LLC* (2021) 72 Cal.App.5th 476
6. *Bouarich v. Comerica Management Co., Inc.* (May 5, 2021 B302958) 2021 WL 1782995 [nonpub. opn.]
7. *Veitenhans v. Hikvision USA, Inc.* (May 27, 2021 B302552) 2021 WL 2153773 [nonpub. opn.]
8. *Salgado v. Carrows Restaurants, Inc.* (June 1, 2021 B304799) 2021 WL 2199436 [nonpub. opn.]
9. *D'Avella v. Overhill Farms, Inc.* (Oct. 26, 2021 B303644) 2021 WL 4958910 [nonpub. opn.]
10. *Nunez v. Cycad Management LLC* (2022) 77 Cal.App.5th 276
11. *Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal.App.5th 643

12. *Borisoff v. Pullman Group, LLC* (Jan. 11, 2022, B297162, B298972, B299796) 2022 WL 99257 [nonpub. opn.]
13. *Williams v. Sonic Automotive, Inc.* (Apr. 29, 2022, A162007) 2022 WL 1284194 [nonpub. opn.]
14. *Sellers v. World Fin. Group, Inc.* (June 23, 2022, D078934) 2022 WL 2254998 [nonpub. opn.]
15. *Mirzoyan v. W. Coast Wound & Skin Care Inc.* (June 28, 2022, B310901) 2022 WL 2314478 [nonpub. opn.]
16. *Shekarchi v. Fischbach* (June 28, 2022, B311989) 2022 WL 2314551 [nonpub. opn.]
17. *Ojeda v. Vahi, Inc.* (Aug. 16, 2022, B313717) 2022 WL 3367500 [nonpub. opn.]
18. *Mills v. Facility Solutions Group, Inc.* (2022) 84 Cal.App.5th 1035
19. *Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626
20. *Beco v. Fast Auto Loans, Inc.* (2022) 86 Cal.App.5th 292
21. *Ramos v. Monschein Industries, Inc.* (Dec. 19, 2022, F083299) 2022 WL 17752221 [nonpub. opn.]
22. *Patterson v. AVX Design & Integration* (Jan. 19, 2023, B313948) 2023 WL 312212 [nonpub. opn.]
23. *Herlitz v. Capital Senior Living, Inc.* (Jan. 24, 2023, C097245) 2023 WL 367782 [nonpub. opn.]
24. *Mendez v. WTMG, Inc.* (Feb. 3, 2023, C095759) 2023 WL 1459930 [nonpub. opn.]
25. *Rodriguez v. Jonathan Club* (Feb. 24, 2023, B317622) 2023 WL 2202680 [nonpub. opn.]

26. *Platt, LLC v. OptumRx, Inc.* (Mar. 15, 2023, A163061) 2023 WL 2507259 [nonpub. opn.]
27. *Murrey v. Super. Ct.* (2023) 87 Cal.App.5th 1223
28. *Gostev v. Skillz Platform, Inc.* (2023) 88 Cal.App.5th 1035
29. *Alberto*, *supra*, 91 Cal.App.5th 482
30. *Haydon v. Elegance at Dublin* (2023) 97 Cal.App.5th 1280
31. *Hasty v. American Automobile Assn.* (2023) 98 Cal.App.5th 1041
32. *Barraza v. Tesla, Inc.* (Apr. 11, 2023, A165347) 2023 WL 2887547 [nonpub. opn.]
33. *Rice v. Gulfstream Aerospace Corporation* (May 9, 2023, B316079) 2023 WL 3314990 [nonpub. opn.]
34. *Nathaniel v. Greene Motors, Inc.* (May 25, 2023, A165056) 2023 WL 3638790 [nonpub. opn.]
35. *Herrera v. Behavioral Systems Southwest, Inc.* (June 27, 2023, G061702) 2023 WL 4195766 [nonpub. opn.]
36. *King v. Baker Petrolite LLC* (June 29, 2023, B321248) 2023 WL 4246784 [nonpub. opn.]
37. *Sawyer v. KeHE Distributors, Inc.* (July 12, 2023, E078024) 2023 WL 4484440 [nonpub. opn.]
38. *Bonilla v. Reiter Berry Farms, Inc.* (Aug. 28, 2023, H050268) 2023 WL 5525877 [nonpub. opn.]
39. *Johnson v. Stoneridge Creek Pleasanton* CCRC LLC (Oct. 30, 2023, A165800) 2023 WL 7125117 [nonpub. opn.]

40. *Mena v. Muscolino Inventory Services, Inc.* (Nov. 16, 2023, B321559) 2023 WL 7852745 [nonpub. opn.]
41. *Hutcheson v. UBS Financial Services, Inc.* (Oct. 31, 2023, A166376) 2023 WL 7143186 [nonpub. opn.]
42. *Smith v. Folsom Investors, L.P.* (Dec. 20, 2023, C097549) 2023 WL 8794888 [nonpub. opn.]
43. *Cook*, *supra*, 102 Cal.App.5th 312
44. *Jenkins v. Dermatology Management, LLC* (2024) 107 Cal.App.5th 633
45. *Monroy v. Donsuemor, Inc.* (Mar. 12, 2024, A167487) 2024 WL 1068436 [nonpub. opn.]
46. *Johnston v. Sensei AG Holdings, Inc.* (Mar. 5, 2025, B334773) 2025 WL 703258 [nonpub. opn.]
47. *Arnold v. Antelope Manufactured Home Community* (Mar. 13, 2024, C097244) 2024 WL 1081934 [nonpub. opn.]
48. *Brooks v. Emer* (Mar. 14, 2025, B334409) 2025 WL 812149 [nonpub. opn.]
49. *Agundez v. Do & Co Los Angeles, Inc.* (Apr. 14, 2025, B334775) 2025 WL 1098414 [nonpub. opn.]
50. *Alvarado v. Charter Communications, LLC* (July 11, 2025, B334578) 2025 WL 1910952 [nonpub. opn.]
51. *Pike v. True Bullion, LLC* (May 1, 2024, B324634) 2024 WL 1903203 [nonpub. opn.]
52. *Guerrero v. TruConnect Communications, Inc.* (May 8, 2024, B324938) 2024 WL 2044023 [nonpub. opn.]

53. *Dopp v. Now Optics, LLC* (May 20, 2024, D081665) 2024 WL 2265759 [nonpub. opn.]
54. *Rainier v. Paradise Chevrolet Cadillac* (Jun 7, 2024, E079647, E080308) 2024 WL 2873688 [nonpub. opn.]
55. *Fredeen v. California Cemetery and Funeral Services, LLC* (Jun. 11, 2024, B326031) 2024 WL 2930024 [nonpub. opn.]
56. *Xing v. Winn Inc.* (Oct. 20, 2025, G063980) 2025 WL 2952340 [nonpub. opn.]
57. *Weisfeiler v. ByteDance Inc.* (June 20, 2025, A168006) 2025 WL 1720606 [nonpub. opn.]
58. *Helfet v. Motive Energy, Inc.* (Jul 1, 2024, B331359) 2024 WL 3243710 [nonpub. opn.]
59. *Booker v. Charter Communications, LLC* (July 11, 2025, B322813) 2025 WL 1910954 [nonpub. opn.]
60. *Jackson v. Faraday & Future, Inc.* (Jul. 24, 2024, B328046) 2024 WL 3517465 [nonpub. opn.]
61. *Lodes v. Transmodus Corp.* (Jul. 31, 2024, B332111) 2024 WL 3588890 [nonpub. opn.]
62. *Libra Securities Holdings, LLC v. Robles* (Aug. 11, 2025, B338602) 2025 WL 2304745 [nonpub. opn.]
63. *Perez v. It Works Marketing, Inc.* (Aug. 28, 2024, A168331) 2024 WL 3963524 [nonpub. opn.]
64. *Anderson v. Thrive Social Equity Manager VII, LLC* (Sep. 24, 2024, B329181) 2024 WL 4282162 [nonpub. opn.]
65. *Yeganeh v. Amerisave Mortg. Corp.* (Oct. 21, 2024, G062668) 2024 WL 4532654 [nonpub. opn.]

66. *Gonzalez v. Aten Technology, Inc.* (Oct. 21, 2025, G064777) 2025 WL 2962200 [nonpub. opn.]
67. *Becerra v. Charter Communications, Inc.* (Oct. 31, 2025, B333509) 2025 WL 3041780 [nonpub. opn.]
68. *Bonzell v. Retirement Capital Strategies, Inc.* (Nov. 25, 2024, H052392) 2024 WL 4903598 [nonpub. opn.]
69. *Sanchez v. Super. Ct.* (2025) 108 Cal.App.5th 615
70. *Ramirez v. Charter Communications, Inc.* (2025) 108 Cal.App.5th 1297
71. *Velarde v. Monroe Operations, LLC* (2025) 111 Cal.App.5th 1009
72. *Silva v. Cross Country Healthcare, Inc.* (2025) 111 Cal.App.5th 1311
73. *Young v. Refrigeration Supplies Distributor* (Dec. 15, 2025, G064837) 2025 WL 3628506 [nonpub. opn.]
74. *Rodriguez v. BW Supplies, LLC* (Dec. 16, 2025, B340191) 2025 WL 3639524 [nonpub. opn.]
75. *Gurganus v. IGS Solutions LLC* (2025) 115 Cal.App.5th 327
76. *Rahme v. Bicycle Casino, L.P.* (Dec. 30, 2025, B340203) 2025 WL 3764784 [nonpub. opn.]
77. *Barbosa v. Sierra Pacific Orthopaedic Center Medical Group, Inc.* (Dec. 15, 2025, F088971) 2025 WL 3628510 [nonpub. opn.], review granted Mar. 25, 2026, S294710
78. *Wise v. Tesla Motors, Inc.* (Dec. 22, 2025, A170983) review den. and opn. ordered nonpub. Apr.

1, 2026, S295055 [*assuming* nondisclosure agreement provisions connected to arbitration agreement were unconscionable]

79. *Chelico v. TJB Gearys, LLC* (Dec. 15, 2025, B331570) 2025 WL 3628320 [nonpub. opn.]

Of the 100 cases, 21 did *not* involve arbitration:

1. *In re Marriage of Stull* (Feb. 4, 2021, E071912) 2021 WL 389212 [nonpub. opn.] (*Stull*) [a family law court found aspects of a postmarital contract to be unconscionable]
2. *Dameron I*, *supra*, 2021 WL 4519651 [nonpub. opn.] [hospital admission contracts, as explained above]
3. *Smart Corner Owners Assn. v. CJUF Smart Cover LLC* (2021) 64 Cal.App.5th 439 (*Smart Corner*) [condominium HOA case]
4. *Knapp v. Ginsburg* (2021) 67 Cal.App.5th 504 (*Knapp*) [premarital contract]
5. *Dameron II*, *supra*, 2022 WL 41914 [nonpub. opn.] [hospital admission contracts, as explained above]
6. *Valkov*, *supra*, 2022 WL 455279 [nonpub. opn.] [postmarital contract, as explained above]
7. *In re Marriage of Zucker* (2022) 75 Cal.App.5th 1025 (*Zucker*) [premarital contract]
8. *Dameron III*, *supra*, 77 Cal.App.5th 971 [hospital admission contracts, as explained above]
9. *In re Marriage of Lukowski & Wieting* (Apr. 30, 2024, G062678) 2024 WL 1873033 [nonpub. opn.] (*Lukowski*) [premarital contract]

10. *Genova*, *supra*, 2022 WL 2849079 [nonpub. opn.] [foreclosure sale, as explained above]
11. *Last v. Super. Ct.* (2023) 94 Cal.App.5th 30 (*Last*) [premarital contract]
12. *Lathrop v. Thor Motor Coach, Inc.* (2024) 105 Cal.App.5th 808 (*Lathrop*) [Song-Beverly Consumer Warranty Act (Song-Beverly) (Civ. Code, § 1790 et seq.)]
13. *The Comedy Store v. Moss Adams LLP* (Nov. 14, 2024, B327404) 327 Cal.Rptr.3d 336 [nonpub. opn.] (*Comedy Store*) [commercial rental agreement, disapproved by *EpicentRx, Inc. v. Superior Court* (2025) 18 Cal.5th 58, 84, fn. 7]
14. *Pelascini v. Airstream, Inc.* (May 29, 2025, A169686) 2025 WL 1537776 [nonpub. opn.], review granted Sept. 17, 2025, S291386 (*Pelascini*) [Song-Beverly case]
15. *Hardy v. Forest River, Inc.* (2025) 108 Cal.App.5th 450, review granted Apr. 30, 2025, S289309 (*Hardy*) [Song-Beverly case]
16. *Dameron IV*, *supra*, 111 Cal.App.5th 530 [hospital admission contracts, as explained above]
17. *Severo v. Forest River, Inc.* (Aug. 5, 2025, B336863) 2025 WL 2218061 [nonpub. opn.], review granted Oct. 29, 2025, S292374 (*Severo*) [Song-Beverly case]
18. *Johnson v. Forest River RV, Inc.* (Aug. 22, 2025, D085014) 2025 WL 2426456 [nonpub. opn.] (*Johnson*) [Song-Beverly case]

19. *Wonacott v. Thor Motor Coach, Inc.* (Sept. 23, 2025, C099248, C100189) 2025 WL 2701567 [nonpub. opn.], review granted Dec. 30, 2025, S293617 (*Wonacott*) [Song-Beverly case]
20. *Razaqi*, *supra*, 2025 WL 3250832 [nonpub. opn.] [trial court concluded contract between the wife and her lawyer was unconscionable, as explained above]
21. *Kim v. Airstream, Inc.* (2025) 113 Cal.App.5th 201 (*Kim*) [Song-Beverly case]

8

I summarize the breakdown between the 79 arbitration cases and the 21 non-arbitration cases in this table.

Type of contract	**Number of invalidations**	**Case name**
Arbitration	79	79 cases listed above
Song-Beverly warranties	7	*Lathrop*, *Pelascini*, *Hardy*, *Severo*, *Johnson*, *Wonacott*, *Kim*
Hospital admission	4	*Dameron I*, *II*, *III* & *IV*
Premarital	4	*Knapp*, *Zucker*, *Last*, *Lukowski*
Postmarital	2	*Stull*, *Valkov*

Real estate foreclosure	1	*Genova*
Condo HOA	1	*Smart Corner*
40% attorney fee	1	*Razaqi*
Commercial forum selection clause	1	*Comedy Store*

9

Because 79 is 79 percent of 100, we see that, when California courts used unconscionability analysis to impair or destroy a contract, that contract concerned arbitration 79 percent of the time.

This is a disproportionate use of the unconscionability doctrine. The disproportion disfavors arbitration.

Indeed, the 79 percent understates the disproportionality, because I have included 12 decisions that apply *specialty* statutes in the sample of 100 cases. The pertinent comparison, however, would be cases applying the *generally* applicable contract doctrine of unconscionability. It would be logical to subtract these specialty statute cases to get a truer measure of the actual use of the general doctrine.

What is a specialty statute? The California Legislature has enacted a number of *special-purpose* unconscionability statutes. These statutes define the concept of unconscionability in particular settings. These special-purpose statutes are entirely

proper under the rule of equal treatment because they do not imperil the federal protection of arbitration.

I list three specialty statutes.

a

One familiar specialty statute is the 1970 Song-Beverly Consumer *Warranty* Act. This statute establishes a non-waivable implied *warranty* of merchantability and fitness for retail sales of consumer goods. (Civ. Code, §§ 1792, 1792.1.) The law also covers sales of new motor vehicles. (Civ. Code, § 1793.22.) In some respects, the scope of this law is disputed and will be resolved by the California Supreme Court. (See, e.g., *Lathrop*, *supra*, 105 Cal.App.5th 808, review granted Jan. 15, 2025, S287893; *Kim*, *supra*, 113 Cal.App.5th 201; *Diaz v. Thor Motor Coach, Inc.* (2026) 118 Cal.App.5th 589, review granted May 13, 2026, S295851.) The Legislature has been active in adjusting the particular boundaries of this specialty law. (See, e.g., Letter from Governor Newsom to the Members of the California State Assembly (Sep. 29, 2024) <https://www.gov.ca.gov/wp-content/uploads/2024/09/AB-1755-SIGNING-Message.pdf> [as of Nov. 8, 2026], archived at <https://perma.cc/ZFX7-GRUK>.)

Some courts have used the word "unconscionability" in connection with this warranty statute. (See, e.g., *Kim*, *supra*, 113 Cal.App.5th at pp. 209–220.)

Warranties have been a long-standing focus of the unconscionability doctrine. (E.g. *Henningsen v. Bloomfield Motors, Inc.* (1960) 32 N.J. 358, 161 A.2d 69, cited in *Sonic-Calabasas*, *supra*, 57 Cal.4th at p. 1143; *Leff*, *supra*, at pp. 523–524 [discussing *Henningsen*].)

Concurring Justice Staniforth gave a pungent and enduring statement of the unconscionability doctrine in a leading

California warranty case: "No experienced farmer would spend $32,000 for equipment which could not process his tomatoes before they rot and no fair and honest merchant would sell such equipment with representations negated in its own sales contract." (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 497; see also *id.* at pp. 485–493 [majority analysis].)

The Song-Beverly Consumer Warranty Act did not create a contract law doctrine of general application. For that reason, the appropriate course is to exclude the seven Song-Beverly cases from our sample of *general-purpose* unconscionability decisions.

b

A second specialty statute is Family Code section 1615. This statute is entitled "Unenforceable agreements; *unconscionability*; voluntariness." The italics are mine.

This statute deals exclusively with premarital agreements, and their enforceability—or, more accurately, their *un*enforceability. The statute's obvious concern is that, before a wedding, one side has more resources and may railroad the low-resource side into an extremely unfair deal. The Legislature decreed these premarital agreements are *presumptively involuntary* and therefore unenforceable unless a court finds, in writing or on the record, the statute's exacting requirements have been satisfied. (See *Last*, *supra*, 94 Cal.App.5th at pp. 38–40; see also *Knapp*, *supra*, 67 Cal.App.5th at pp. 531–534.)

There are four decisions in this category, as the table summarized: *Knapp*; *Zucker*; *Last*; and *Lukowski*.

c

A third specialized doctrine of unconscionability stems from Civil Code section 5986, which concerns "common interest

developments" like condominium complexes. The Legislature passed this law to stop a condo developer from taking advantage of its ability, early in the formation of condominium associations, to insert provisions into covenants, conditions, and restrictions that shield the developer from suits by a condo homeowners association for construction defects. (*Smart Corner*, *supra*, 64 Cal.App.5th at p. 463.) The *Smart Corner* decision used the word "unconscionable" when analyzing issues in this specialized statutory area. (E.g., *id.*, at pp. 451–471.) *Smart Corner* is the lone case in this category.

We are concerned with none of these specialty statutes. Our focus is strictly on the supposedly *general* contract law doctrine of unconscionability.

10

The earlier list of 100 included 12 specialty cases: seven Song-Beverly cases, four premarital contracts, and one condominium case. Subtracting these 12 specialty cases from 100 reduces our list to 88. This correction yields a 90 percent rate, because 79 arbitration cases out of a total of 88 rounds to 90 percent.

In sum, this record shows California courts use the unconscionability doctrine in an overwhelmingly targeted way: to go after arbitration.

F

I comment on nine specific reactions the majority opinion offers to my dissent.

In essence, the overall reaction is to cite many California arbitration precedents and say *but this is how we always do it in arbitration cases.* That is the problem.

1

My respected and beloved colleagues cite *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1144 (*Sonic-Calabasas*).

The state court *holding* in *Sonic-Calabasas* supports my view. That holding was that the California Supreme Court was wrong in its earlier decision because that earlier decision was *preempted by the federal equal treatment rule.* (*Sonic-Calabasas*, *supra*, 57 Cal.4th. at pp. 1139–1142.) The equal treatment rule is controlling, as I have tried to demonstrate. I have applied it. The majority opinion departs from it.

In dicta, the state court decision in *Sonic-Calabasas* also stated (with my emphasis) that a facially neutral state-law rule is not preempted simply because its *evenhanded* application would have a *disproportionate* impact on arbitration agreements. (*Sonic-Calabasas*, *supra*, 57 Cal.4th at p. 1144, citing *Concepcion*, at p. 341–342, 131 S.Ct. at p. 1747.)

This 2013 dictum cannot be valid under the 2017 opinion of *Kindred*, *supra*, 581 U.S. at p. 248.

The reach of federal preemption is always a question of federal law. (Cf. *Sandler v. Modernizing Medicine, Inc.* (9th Cir. 2026) 170 F.4th 1209, 1213 (*Modernizing Medicine*) ["To have state law (rather than federal law) control the content of that rule in a way that disfavors arbitration would subject it to FAA preemption"].) To support a proposition of federal law in this context requires an authoritative *federal* citation. *Sonic-Calabasas* was not a federal citation.

The 2013 dictum is counter to *Kindred's* equal treatment rule. The dictum asserts a facially neutral state-law rule is not preempted simply because its *evenhanded* application would have a *disproportionate* impact on arbitration agreements.

An application is not *evenhanded* if its impact is *disproportionate*.

As Justice Kagan wrote, the Federal Arbitration Act preempts any state rule discriminating on its face against arbitration. The Act *also* "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (*oh so coincidentally*) have the defining features of arbitration agreements." (*Kindred*, *supra*, 581 U.S. at p. 251, italics added.) States may not apply generally applicable contract defenses " 'in a fashion that disfavors arbitration.' " (*Id*. at p. 255, citing *Concepcion*, *supra*, 563 U.S., at p. 341.)

What explains a supposedly evenhanded application of a rule that "*oh so coincidentally*" lands so hard on arbitration? (*Kindred*, *supra*, 581 U.S. at p. 251, italics added.) The obvious reason is that we do not like arbitration and we want to rein it in according to our special California state standards.

2

The majority opinion says a procedural quirk explains why appellate courts get so many arbitration cases. I agree we get many arbitration cases. But why do we *impair or invalidate them so disproportionately*? The procedural quirk cannot explain that. Hostility to arbitration, instantiated in a uniquely punishing method of review, does explain that.

3

The majority opinion finds comfort in like-minded decisions from the Ninth Circuit. I am doubtful the Ninth Circuit can be counted as a consistent fan of our state court approach to arbitration. (See *Modernizing Medicine*, *supra*, 170 F.4th at p. 1213 ["The district court thus erred in allowing state-court cases (purporting to apply state law) to dictate the outcome here"]; cf.

Lamps Plus, *supra*, 587 U.S. 176, 182–189 [reversing the Ninth Circuit by preempting its application of California state law].)

4

The majority opinion quotes *Concepcion*'s description of Broome's 2006 statistics as "not definitive." Indeed they were not definitive. And neither are my percentages of 79 percent to 90 percent definitive, for they stem merely from *713* recent cases rather than from an analysis of *all* decisions in the relevant universe. But while not *definitive*, these numbers are *suggestive*. They suggest disproportionate hostility to arbitration. I invite others to offer improved quantitative analyses.

5

The majority opinion states "unconscionability is a contract defense that is well-suited for challenging adhesive, but not negotiated, contracts." This does not explain why, in a state where, for decades, some 30 million people are constantly buying and selling all manner of goods and services by means of form contracts that are take-it-or-leave-it, it is only the *arbitration* contracts that bear the brunt of appellate displeasure.

6

The majority opinion cites cases to show California courts do not *always* use the unconscionability doctrine to invalidate arbitration agreements. This is true. They just attack arbitration on *an overwhelmingly disproportionate basis*, as compared to every other kind of contract. The practice is not always and uniformly fatal. It is just more fatal, more often, than anywhere else in contract law. It is an arbitration special.

7

The majority opinion cites *Steven v. Fidelity and Casualty Co. of New York* (1962) 58 Cal.2d 862 (*Steven*). This classic

unconscionability case shows how far the majority diverges from a general application of that doctrine.

A man bought a vending machine life insurance contract at the airport and died when the plane crashed. The insurance company refused to pay his widow because of some technicalities about whether his flight was "scheduled." This venerable opinion shows a generally applicable approach to the unconscionability doctrine: simple judicial revulsion at the unfairness of a contract's result. (See *Steven*, *supra*, 58 Cal.2d at p. 876 ["we conclude that this requirement in the circumstances of this case cannot fairly be enforced against [the widow]"]; *id*. at p. 879 ["Does not such a provision approach a trap for the unwary purchasing public?"].)

This conventional unconscionability holding does *not* scrutinize either the overbreadth or the duration of the contract. Nor does it invent and examine hypotheticals about how the contract would be lopsided on facts different than those in the case.

The *Steven* decision is an excellent example of the unconscionability doctrine. That decision shows the majority, in its drive to regulate arbitration, departs from general principles of contract law.

8

The majority opinion cites *California Grocers Association v. Bank of America* (1994) 22 Cal.App.4th 205, 214 (*Grocers*). This decision powerfully proves my point: the majority has abandoned general principles of contract law.

Grocers held a bank's contract, established when a depositor opened an account, was *not* unconscionable when it set the bank's fee for returned checks at $3.00 per returned check.

(*Grocers*, *supra*, 22 Cal.App.4th at pp. 215–217.) There was no duration problem: the decision never mentioned duration, even though the duration of the contract apparently was unlimited. There was no scope problem either, even though the bank charged this fee for returned checks of many different kinds. Nor was there a mutuality problem, even though the Bank's fee was *twice* its cost of $1.50. (*Id.* at pp. 211–212.) The trial court had limited the bank's permissible fee to the cost of $1.50 plus a reasonable profit margin of 15 percent, yielding a maximum fee of $1.73. (*Id.* at p. 212.) The Court of Appeal reversed this ruling. The court did *not* require mutuality. It did *not* inquire whether, for every contract clause, each side got an even deal. The court did not use a fine-toothed comb to go through every contractual provision in a search for hypothetical problems.

That is what the majority opinion does here—when the contract concerns arbitration. There is no parallel to its punishing method in general contract law. The *Grocers* decision illustrates this point.

9

The majority opinion cites *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758 (*Dean Witter*). This mainstream unconscionability case is another benchmark showing how far the majority has traveled from general contract law. The plaintiff sued the stock brokerage house of Dean Witter for imposing a form contract about fees when the plaintiff opened his brokerage account. The contract apparently was unlimited duration. The stock broker conceded for purposes of argument that its fees were *too high*. (*Id.* at p. 768.) The court showed no interest in constructing hypotheticals that could show unfairness

on facts unrelated to the case at hand. The court *rejected* the unconscionability doctrine. (*Id*. at pp. 766–772.)

The main point of the court's analysis was a lengthy demonstration that no oppression exists when buyers can go to alternative sellers. (See *Dean Witter*, *supra*, 211 Cal.App.3d at pp. 766–772.) I completely agree. (See *Diaz v. Thor Motor Coach, Inc.* (2026) 118 Cal.App.5th 589, 601–605, review granted May 13, 2026 S295851 [dis. opn. of Wiley, J.].)

Dean Witter illustrates how unconscionability analysis works in general contract law. This standard gauges how far the majority opinion has gone astray.

G

When measured by their actions rather than by their words, California courts from 2021 to 2025 were *intensely* hostile to arbitration. About 79 percent to 90 percent of the time—depending on exactly how we define the perpetually vague doctrine of "unconscionability"—we state court judges have taken a doctrine of supposedly general application and applied it to eliminate or disrupt arbitration.

The difference between 79 percent and 90 percent does not matter. Both figures show the extreme disproportionality we see in practice. Any way you count it, the application of the unconscionability doctrine has been highly selective and extremely disproportionate from 2021 to 2025. The main target, *overwhelmingly,* is arbitration.

As the Supreme Court of the United States observed in *Concepcion*, "the judicial hostility towards arbitration that prompted the [Federal Arbitration Act] had manifested itself in a great variety of *devices and formulas* declaring arbitration against public policy. [Citation.] And although these statistics

are not definitive, it is worth noting that *California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts*." (*Concepcion*, *supra*, 563 U.S. at p. 342, italics added, internal quotations omitted.)

"*Concepcion* teaches that we must be alert to new *devices and formulas* that would achieve much the same result today." (*Epic Systems Corp. v. Lewis* (2018) 584 U.S. 497, 509, italics added.)

I dissent from the majority's use of *devices and formulas* that disfavor arbitration.

WILEY, J.