Supreme Court of California
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Supreme Court of California
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S273802

SUPREME COURT OF THE STATE OF CALIFORNIA

ANGELICA RAMIREZ,
Plaintiff and Respondent

v.

CHARTER COMMUNICATIONS, INC.,
Defendant and Appellant

On Gant of Petition for Review from
Court of Appeal of the State of California, Second
Appellate District, Division Four, Case No. B309408

Superior Court of the State of California
for the County of Los Angeles
Hon. David J. Cowan, Dept. 20
Case No. 20STCV25987

AMENDED REPLY TO AMICUS BRIEFS

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I. INTRODUCTION

The amici supporting Charter Communications, Inc. ("Charter"), the Employer's Group, the U.S. Chamber of Commerce and the Civil Justice Association of California (collectively, the "amici") do not seriously challenge the substantive ruling that Charter's arbitration agreement contains multiple unconscionable provisions favoring the employer and disadvantaging the employees. Instead, they argue that the multiple unconscionable provisions should have been severed.

As set forth below, the amici seek an unjustified repudiation of California law on the severance of unlawful provisions in employment arbitration agreements. Such a change in law would encourage employers to include numerous unfair provisions in arbitration agreements in the hope that employees would simply submit rather than challenge them in court with no risk that the agreement would be invalidated by the courts. The proposed new rule would also unduly restrict the well established discretion of trial courts on the issue of severance.

As the U.S. Supreme Court has recently explained: "The policy is to make 'arbitration agreements as enforceable as other contracts, *but not more so*.'" (*Morgan v. Sundance, Inc.* (2022) 142 S. Ct. 1708, 1713 [emphasis added], quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404, n. 12.) Therefore, "a court may not devise novel rules to favor arbitration over litigation." (*Id.*; cf. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), 127 ["arbitration agreements are neither favored nor disfavored, but

simply placed on an equal footing with other contracts."]) The amici here would have this Court adopt severance rules that unduly favor arbitration over other agreements and that would ignore clear evidence of unlawful purpose in drafting agreements with numerous unlawful provisions.

Accordingly, the argument of the amici should be rejected.

II. THIS COURT SHOULD RE-AFFIRM LONGSTANDING AUTHORITY THAT TRIAL COURTS HAVE DISCRETION TO DENY SEVERANCE WHERE IT FINDS THAT A CONTRACT IS PERMEATED WITH ILLEGALITY

Amici argue that the California courts have applied arbitration-specific rules for severance of unconscionable provisions in arbitration agreements rather than generally applicable contract principles as required by the Federal Arbitration Act ("FAA"). Not so. As set forth below, this Court's ruling in *Armendariz* and its progeny have properly applied general contract principles of unconscionability and the law on this issue is therefore fully consonant with the FAA. In fact, this Court has emphasized that "unconscionability remains a valid defense to a petition to compel arbitration." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142 ("*Sonic III.*"))

A. Generally applicable contract law allows trial court discretion over issue of severance.

That the issue of severance is within the discretion of the trial court is a rule that has long applied in this state's generally applicable contract law. The basic statutes governing the issue are Civil Code sections 1598, 1599 and 1670.5. Section 1598

states that contracts having a "unlawful object" are void; section 1599, which states that a contract having multiple "objects," both lawful and unlawful, is void as to the unlawful objects but valid as to the lawful ones. Section 1670.5 states that where the court finds a contract to be unconscionable it "*may* refuse to enforce the contract, or it *may* enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Emphasis added.)

The harmonious application of these statutes is left to the *discretion* of the trial court: "severance is *not mandatory* and its application in an individual case must be informed by equitable considerations. [cite] Civil Code section 1599 grants courts *the power, not the duty*, to sever contracts in order to avoid an inequitable windfall or preserve a contractual relationship where doing so would not condone illegality." (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 992 [emphasis added; contracts violating Talent Agencies Act]; see also *Koenig v. Warner Unified Sch. Dist.* (2019) 41 Cal.App.5th 43, 54 ["If an agreement can be severed, the trial court has *discretion* to do so and we apply an abuse of discretion standard of review to that decision"]; *MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 803 [severance "is a *discretionary* decision for the trial court to make based on equitable considerations"]; *Baeza v. Superior Court of Kern Cnty.* (2011) 201 Cal.App.4th 1214, 1231 [applying abuse of discretion standard.]) The above-cited cases submitting the issue of severance to the discretion of the

trial court are all cases applying *general contract principles* and do not involve arbitration agreements.

The authority governing severance in employment arbitration agreements is in accord. In *Armendariz*, this Court evaluated an employment arbitration agreement contract and found that there were multiple unconscionable provisions that favored the employer. The Court then turned to the issue of severability and evaluated the issue based on the statutes noted above. It essentially equated the analysis of illegality and unconscionability in contracts and held that severance should be denied if the "central purpose of the contract is tainted with illegality." (*Armendariz,* at p. 124.) On the other hand, the unconscionable provisions should be severed and the remainder of the contract enforced if the illegal provisions are merely ancillary to the purpose. There is also an additional caveat: the agreement must enforceable on its own once the offending provisions are severed and cannot be "augmented… with additional terms" crafted by the court. (*Id.,* at p. 125.)

It concluded that:

> [T]wo factors weigh against severance of the unlawful provisions. First, the arbitration agreement contains more than one unlawful provision; it has both an unlawful damages provision and an unconscionably unilateral arbitration clause. Such *multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage.* In other words, given the multiple unlawful provisions, the trial court *did not abuse its discretion* in concluding that the arbitration

> agreement is permeated by an unlawful purpose. (*Id.* at p. 124 [emphasis added.])

As is evident from the above passage the assessment of whether an agreement has an unlawful purpose is left to the determination of the trial court in its discretion. Moreover, the fact that an agreement has "multiple defects" is evidence that may support the conclusion that the employer was engaged in a "systematic effort" to create an "inferior forum" to its advantage and the disadvantage of the employee.

The Court also noted that an overly liberal favoring severance would encourage employers to "overreach" in crafting unconscionable arbitration agreements:

> An employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter. (*Id*. at p. 124 fn. 13.)

This Court has re-affirmed the basic principles governing severance as delineated by *Armendariz* and they have been uncontroversially applied in the Court of Appeal in the decades since. (See, e.g, *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1075 [applying *Armendariz* and finding severance appropriate where there was only one unlawful provision]; *Leon v. Pinnacle Prop. Mgmt. Servs.* (2021) 72 Cal.App.5th 476, 492; *Ali v. Daylight Transp., LLC* (2020) 59 Cal.App.5th 462, 482, review denied, April 14, 2021; *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 918; *Baxter v. Genworth N. Am. Corp.* (2017) 16 Cal.App.5th 713,

737-38; *Magno v. Coll. Network, Inc.* (2016) 1 Cal.App.5th 277, 292; *Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 223; *Carmona v. Lincoln Millennium Car Wash Inc.* (2014) 226 Cal.App.4th 74, 90.)

B. The rule proposed by the Employers Group brief would violate general contract principles by restricting the trial court's discretion.

The Employer's Group brief, however, argues that this Court should abandon these principles and instead adopt a rule that strips the trial courts of their discretion and would allow court to deny severance only in the most extreme circumstances. Its proposed rule would state that the trial court "*must* sever the unconscionable provisions" except in extreme circumstances, such as where "the only logical conclusion is that the drafting party was operating in bad faith." (See Employer's Group Brief at p. 15 [emphasis in original.]) The proposed rule would apparently disallow the trial court from inferring an improper purpose from the fact there are multiple unlawful provisions in an agreement. There is no basis in California law for such a test and, as described above, it would contravene generally applicable contract principles, which hold that the issue of severance is submitted to the discretion of the trial Court. As such, the Employer's Group rule, favoring arbitration agreements by requiring severance in virtually all circumstances, would violate the guidance of *Morgan v. Sundance, supra,* that "a court may not devise novel rules to favor arbitration over litigation."

As such, the Employer's Group proposed severance rule must be rejected.

C. The Chamber Brief also advocates an unwarranted change in law.

The Chamber of Commerce and Civil Justice Association Brief ("Chamber Brief") argues that a "more than one unconscionable provision" rule is improper because it disfavors arbitration agreements more than other contracts in which the focus is on the purpose of the contract rather than the number of unlawful provisions. This argument mischaracterizes the holding in this case as well as in the other cases it cites. The point is not a merely numerical one but rather that when there are numerous unconscionable provisions the trial can properly conclude that the employer's *purpose* in drafting the agreement was not merely to refer the matter to arbitration but rather to create a forum that disfavors the employee. The number of provisions simply provides *evidence of the employer's purpose* in drafting the agreement. (*Armendariz,* at p. 124.)

And the established general contract law principles leave the evaluation of such evidence in the discretion of the trial court. The discretion of trial courts in this matter is supported even by the authorities cited by the Chamber. (See *Adair v. Stockton Unified School Dist.* (2008) 162 Cal.App.4th 1436, 1450 ["a court *may* sever the void provision"]; *Baeza v. Superior Court of Kern Cnty.*, *supra*, 201 Cal.App.4th 1214, 1230 [severance "appropriately directed to the sound discretion of the ... trial courts in the first instance."])

Lange v. Monster Energy Co. (2020) 46 Cal.App.5th 436, is instructive on this point. In *Lange,* the trial court had mistakenly stated that it had no discretion to sever offending portions of the agreement when there were multiple unconscionable provisions. This was wrong because there is no "*per se* rule" barring severance in such cases. (*Id.* at 455.) However, the *Lange* court affirmed that a trial court's ruling on severance is reviewed for abuse of discretion and that a trial court could rely on the existence of "multiple unconscionable clauses… as evidence of 'a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage.'" (*Id.* at p. 454, quoting, *Armendariz,* at p. 124.)

Although the Chamber Brief does not propose an alternative test or rule for severance as the Employer's Group does, it also is essentially asking this Court to eliminate or severely limit the discretion of trial courts in evaluating to the level of unconscionability in an agreement to decide whether severance is appropriate. Based on the foregoing, this too would be a departure from generally applicable contract principles.

D. The types of provisions at issue evince an intent to limit employee rights rather than simply arbitrate disputes.

The amici briefs reveal also an overbroad view of what an "arbitration" agreement actually is. An arbitration agreement is supposed to be an agreement to resolve particular disputes between identified parties in accordance with fair and agreed-upon rules in a private neutral forum instead of in court,

supposedly with greater efficiency and cost-savings. But an arbitration agreement is not supposed to be a vehicle for creating a forum that favors one party over the other (e.g., employers over employees, or companies over consumers.)

In fact, Charter's and many other employers' and companies' form agreements have expanded far beyond the original concept of an arbitration agreement, to include as many allegedly "collateral" terms as possible that restrict or limit employees' and consumers' rights and options. (See, e.g., Employer's Brief at pp. 19–24 [arguing that many of the challenged contract provisions are "collateral" to the central intent to move a dispute from court into arbitration].) It is no coincidence that such "collateral" terms invariably favor the employer. When these terms multiply, the arbitration concept itself becomes collateral to the agreement and the "collateral" terms become main purpose.

For example, restrictions on the statute of limitations periods have nothing to do with arbitration. Instead, it is a limitation of the employee's ability to vindicate his or her rights. To take another example, exempting from arbitration the types of claims that are more likely to be brought by an employer, the stronger party, does not further the purpose of arbitrating disputes between the employer and the employee, but it does favor the employer. Furthermore, the attorney's fee provision had the added effect of discouraging any challenges to improper provisions in the agreement. These types of provisions indicate that the intention in drafting the agreement was not simply to

arbitrate disputes but rather to obtain a favorable forum and limit employees' ability to vindicate their rights.

In the case of long complicated arbitration agreements such as Charter's – which include not only an arbitration agreement but entire set of rules and procedures separate from the agreement itself – the arbitration agreement becomes a vehicle to import as many employer-favorable rules and conditions as possible, rather than an agreement to arbitrate disputes in a neutral forum. Yet Charter and its amici argue that because the "arbitration" part of a contract is a lawful, that forum should be preserved regardless of how many illegal, one-sided, and unreasonably favorable provisions the drafting party placed within the contract. (Chamber Brief at 18–19.)

Had Charter – or other employers – wanted to ensure that employment disputes go to arbitration, there are literally thousands of simple arbitration agreements in publicly available sources – caselaw, industry guides, etc. – that can and have been enforced by the courts. A simple arbitration agreement incorporating, for example AAA rules, would have raised none of the issues that invalidated the agreement here and would have ensured that the matter was arbitrated rather than litigated in court. Clearly Charter had something more in mind when it drafted its complicated arbitration scheme.

When viewed in context, a severability rule of the sort advocated here would merely be a get out of jail free card, empowering employers to impose any number unlawful

provisions on its employees under the guise of an arbitration agreement without any possible downside for the employer.

Under these circumstances severance would simply encourage employers to "overreach" as this Court warned in *Armendariz*.

E. The Harper brief indicates the danger posed by agreements such as this one.

As noted above, the one-sided attorney's fees clause of the Charter agreement has the (intended) effect of discouraging employees from challenging any of the unfair provisions of the agreement in court. The amicus brief of Lionel Harper, Hassan Turner, Luis Vazquez, and Pedro Abascal amply demonstrates the risk employees face simply by trying to obtain a judicial determination of their rights with respect to such an agreement as Charter is now seeking upwards of $125,000 against these employees on an agreement that the Court of Appeal has now found to be unconscionable and unenforceable. Even *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473 found that the attorney's fees clause was unenforceable as written.[1]

The fact that this clause was included further demonstrates the underlying illegal purpose of Charter's agreement in protecting the one-sided and unconscionable provisions of the agreement and attendant rules.

[1] The Chamber Brief also misrepresents the holding in *Patterson* as "finding no substantive unconscionability," when, in fact the question of unconscionability was not at issue at all in *Patterson*; the Court was not addressing whether agreement was enforceable as whole on unconscionability grounds.

III. EMPLOYERS ARE NOT FACED WITH UNCERTAINTY OR DIFFICULTY IN DRAFTING ARBITRATION AGREEMENTS

The Chamber Brief contends that affirming the Court of Appeal here would "throw a legal monkey-wrench into the ability of parties to agree to resolve specified disputes by arbitration instead of litigation in court." (Chamber Brief at p.10.) The Employer's Group similarly warns of supposed "uncertainty" and unpredictability faced by employers as to whether their arbitration agreements will be enforced unless a broad rule requiring severance under nearly all circumstances is adopted. (Employers Group Brief at p. 11, 13, 40-41.) Nonsense.

First, contrary to the claims of judicial hostility to arbitration in California courts, there are numerous cases dating back decades in which courts severed unconscionable terms in arbitration agreements based on the principles described above, with the exercise of discretion left to the trial court.

Employers have access to ample guidance in drafting arbitration agreements that will be enforced by the Courts – and which will not – simply by consulting the vast caselaw on the subject.

Issues of predictability and uncertainty arise only when employers try to "push the envelope" and include unusual, illegal and restrictive provisions in their agreements that disfavor employees. As noted above, the application of an overly liberal severance rule would have the ill effect of encouraging the inclusion of as many unlawful provisions as possible with

severance as the fallback position protecting the arbitration agreement. This would simply encourage employer overreach.

IV. AFFIRMING THE COURT OF APPEAL WOULD NOT FRUSTRATE MUTUAL INTENT TO ARBITRATE

Charter and its amici suggests that refusing to sever unconscionable provisions frustrates both sides' intentions and deprives both sides of the benefits of arbitration. (See, e.g., Chamber Brief at pps. 16–17; Employer Group Brief at pps. 15, 25, 32–33.) The supposed concern for the intent of employees is disingenuous at best. Employees who challenge the enforceability of an arbitration agreement clearly do not believe in the supposed benefits of arbitration. Otherwise, they would be going straight to arbitration; alternatively they would be addressing the courts for severance while agreeing to arbitrate the underlying dispute in what they perceive as a fair and neutral arbitral forum.

In adhesive form contracts where only the stronger party chooses the terms, the notion that both sides intend for the choice of an arbitral forum to remain enforceable regardless of how many illegal or unconscionable terms the drafting party inserts into the contract is a fiction. As this Court noted in *Armendariz*, "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute… and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz*, at p. 115.)

The supposed "mutual intent" of the parties cannot be divorced from contracting realities, especially when admittedly non-negotiable terms are imposed on weaker parties, include

numerous one-sided waivers, rights, and obligations, and when such terms reveal a conscious effort by the stronger party to extract every advantage possible. That is the whole purpose of the procedural and substantive unconscionability analysis: to determine if the consent to the adhesive terms of the contract was meaningful enough that it must be enforced or if the terms were so one-sided and unfair that formal consent is not a sufficient basis to enforce the agreement.

V. CONCLUSION

Based on the foregoing, the arguments Charter's amici should be rejected by this Court.

DATED: May 22, 2023

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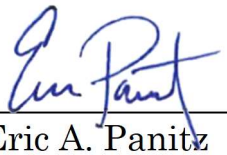

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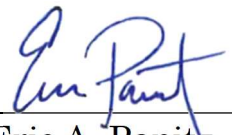

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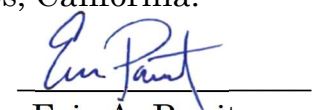

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