S273802

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANGELICA RAMIREZ,

Plaintiff and Respondent,

v.

CHARTER COMMUNICATIONS, INC.,

Defendant and Appellant.

APPLICATION TO FILE AMICUS CURIAE BRIEF;

BRIEF OF AMICUS CURIAE LIONEL HARPER, HASSAN TURNER, LUIS VAZQUEZ, AND PEDRO ABASCAL IN SUPPORT OF RESPONDENT

Review of a Decision from the California Court of Appeal,
Second Appellate District, Division Four,
Case No. B309408

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Under rule 8.520(f) of the California Rules of Court, Lionel Harper, Hassan Turner, Luis Vazquez, and Pedro Abascal (Amici) request permission to file the attached amicus curiae brief in support of Respondent Angelica Ramirez. Amici are former employees of Charter Communications, LLC, an affiliate of Appellant Charter Communications, Inc. (Charter). Like Respondent, they are allegedly bound by the Mutual Arbitration Agreement (Agreement) and Solution Channel Program Guidelines (Guidelines).

Charter's briefing relies, in part, on a court order compelling Amici to arbitrate their individual wage-and-hour claims under the terms of the Agreement and Guidelines. (*Harper v. Charter Communications, LLC* (Oct. 13, 2021) 2021 WL 4784417 (*Harper*); Charter's RJN Exhibit 9.) In *Harper*, the court found that the Agreement has at least a low degree of procedural unconscionability and at least one substantively unconscionable term, but it still found that the Agreement is enforceable under California law. (*Harper*, 2021 WL 4784417, at pp. *7–8 & n. 7.) The court certified its order for immediate appeal shortly after *Ramirez v. Charter Communications, Inc.* (2021) 75 Cal.App.5th 365 (*Ramirez*) was issued, agreeing with Amici that the unconscionability issue "involves a controlling question of law" and presents a "substantial ground for difference of opinion." (*Harper v. Charter Communications, LLC* (Apr. 22, 2022) 2022 WL 1204706, at pp. *1–2.) The Ninth Circuit denied permission to file an immediate appeal, however, shortly after this Court granted review in *Ramirez*.

As former California-based employees who are allegedly bound by the Agreement and Guidelines, Amici have a significant interest in the resolution of the unconscionability issues presented in this case, and with respect to Section K of the Agreement in particular. Charter has demanded that Amici pay, under Section K of the Agreement, at least $125,549.40 in attorney fees that it allegedly incurred in connection with two motions to

compel arbitration, one against Harper and the other against Turner, Vazquez, and Abascal.[1] (*Harper*, 2021 WL 4784417.) Charter has taken inconsistent positions on whether and to what extent the AAA's Employment Arbitration Rules and Mediation Procedures (AAA Rules) and the AAA's Employment Due Process Protocol (Due Process Protocol) apply in Amici's and other arbitrations conducted under the Agreement and Guidelines. And Charter has asked the Court to resolve the unconscionability issues in a plaintiff-specific and claim-specific manner so the decision would only apply to claims under the Fair Employment and Housing Act (FEHA), and would not apply to claims under other employee or consumer protection statutes, such as Amici's wage-and-hour claims under the Labor Code and Unfair Competition Law.

As California employees and consumers, Amici also have a significant interest in developing California unconscionability law so they and other California employees and consumers will have improved clarity and certainty in their future contracting decisions.

The attached amicus curiae brief will assist the Court in deciding this matter by: (i) highlighting several additional procedural unconscionability issues; (ii) emphasizing that unconscionability is determined at the time of contracting and is not plaintiff specific or claim specific; (iii) providing additional context to Section K's purpose and effect, and a view of the potential consequences if Section K is found to be enforceable; and (iv) showing that the Agreement has other terms that are substantively

[1] Instead of asking the court to award attorney fees under Section K, as it has done in many other cases, Charter filed "breach of contract" counterclaims in each of Amici's individual arbitrations and demanded that Harper pay at least $71,628.33, and Turner, Vazquez, and Abascal each pay at least $17,973.69. The amounts that Charter is demanding dwarf the maximum potential value of Amici's individual wage and hour claims.

unconscionable as a matter of law, and that increase the Agreement's overall unconscionability and make severance inappropriate.

Neither Amici nor their counsel represents a party to this action, has any financial or other stake in the outcome, or has received compensation for this brief. No party, or counsel for a party, participated in drafting this brief.

Charter argues that the decision in *Ramirez* is a result of "undue" and "unexplained" judicial "hostility" that "can only be based on the nature of the Agreement as an arbitration agreement." (Opening Brief at 62.) It also insists that it was "attempting to draft a fair agreement." (Reply Brief at 11.) But the existence of "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." (*Armendariz v. Foundation Health Psychcare Service, Inc.* (2000) 24 Cal.4th 83, 124 (*Armendariz*).) Charter's defense of its Agreement and Guidelines, and its belief that it is the real victim in this dispute, miss the mark completely.

Ramirez reached the right result for the right reasons. The Agreement is procedurally and substantively unconscionable, and liberal severance of unconscionable terms would have been improper. The court of appeal could have supported its conclusion that the Agreement should not be enforced by finding more procedural unconscionability than mere adhesion, and more substantively unconscionable terms. In fact, because Section K so is unreasonably favorable to Charter, and because its purpose and effect is to shield a form contract from legitimate challenges and to chill employee rights, Section K's oppression and unfairness are themselves a sufficient basis for courts to refuse to enforce the Agreement.

The policy underlying the Federal Arbitration Act (FAA) is about enforcing fair arbitration contracts according to their terms while taking into account any state law contract formation, enforceability, and scope defenses that may apply. (9 U.S.C., §§ 2–4.) It is "not about fostering arbitration." (*Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708, 1713.) And it is not about interpreting contracts in any way that will make them enforceable, or adopting liberal severance principles that protect companies that draft

adhesive form contracts from the consequences of their decisions. The FAA does not save the Agreement from California unconscionability law.

Charter did not design the Agreement and Guidelines simply to move employee disputes out of court into arbitration. Charter designed them to give itself a more favorable forum and put employees at a disadvantage whenever disputes arise. And Charter designed Section K to be a shield from formation, enforceability, and scope challenges, and a sword for punishing employees whose counsel advocate against arbitration but are not entirely successful.

The Court should closely scrutinize the Agreement's overall fairness because it has more than a low degree of procedural unconscionability. The Court should then confirm that the Agreement has numerous terms that are unreasonably favorable to Charter, and that severance is not appropriate in these circumstances. The Court should reject Charter's arguments that it is the real victim in this dispute, and that California law and the FAA require enforcement of one-sided and unfair form agreements.

I. The Agreement Has More Than A "Low" Degree Of Procedural Unconscionability.

Charter admits the take-it-or-leave-it nature of the Agreement establishes at least a "low" degree of procedural unconscionability. (Opening Brief at 22–23.) Charter is wrong, however, that adhesion is the Agreement's "only" procedurally unconscionable feature, and that procedural unconscionability is "not at issue." (Opening Brief at 22-23.) The Court should confirm that procedural unconscionability does not *require* adhesion, and that the proper analysis must account for other oppressive or surprising circumstances that could require "closer scrutiny of [the contract or clause's] overall fairness." (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126 (*OTO*)).

A. The procedural unconscionability analysis accounts for, but does not require, adhesion.

The "procedural unconscionability analysis 'begins with an inquiry into whether the contract is one of adhesion.'" (*Ibid.*, quoting *Armendariz,* 24 Cal.4th at p. 113). While adhesion is certainly an important factor and proper starting point for the analysis, it is not the *sine qua non* of procedural unconscionability. A contract or clause[2] may have "an element of procedural unconscionability notwithstanding [an] opt-out provision," and an opt out provision does not mean there is "no element of procedural unconscionability" such that "a court would have no basis under common law unconscionability analysis to scrutinize or overturn even the most unfair or exculpatory of contractual terms." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 451, 470 ["freedom to choose" is a "factor" in the analysis], abrogation with respect to class arbitration waivers recognized by *Iskanian v. CLS Transportation Los Angeles* (2014) 59 Cal.4th 348, 360.)

Some courts have departed from this analytical framework, however, and interpreted California law as *requiring* adhesion before there can be *any* procedural unconscionability. (See, e.g., *Alkutkar v. Bumble Inc.* (N.D. Cal. Sept. 8, 2022) 2022 WL 4112360, at p. *9 ["The existence of a meaningful opportunity to opt out of arbitration necessarily renders the Arbitration Agreement and its delegation clause procedurally conscionable as a matter of law."], citing *Mohamed v. Uber Techs., Inc.* (9th Cir. 2016) 484 F.3d 1201, 1211.) Charter has benefited from this misinterpretation of California law, and it is relying on cases that found the Agreement has *no* procedural

[2] A contract can be adhesive but have non-adhesive clauses. For example, a form contract may not be negotiable, but a consumer or employee may be able to "opt out" of an arbitration clause or certain waivers. A contract also can be non-adhesive but have adhesive clauses. For example, a consumer or employee may have the ability to opt out of a stand-alone arbitration contract (like the Agreement), but the actual terms of the contract are not negotiable.

unconscionability based on an opt out opportunity that Charter (arguably) gave then-current employees via an October 6, 2017 mass email. (See, e.g., Charter's Request for Judicial Notice (RJN) Exhibit 16 [the Agreement is not procedurally unconscionable based on opportunity to opt out]; RJN Exhibit 22 [same]; RJN Exhibit 25 [same]; RJN Exhibit 34 [same]; RJN Exhibit 36 [same]; RJN Exhibit 37 [same]; RJN Exhibit 40 [same]); Reply Brief at 41–42 [asking the Court to consider numerous cases where trial courts found the Agreement was not unconscionable and unenforceable].)

If the Court were to accept Charter's narrow view of procedural unconscionability, Charter and other employers would be able to enforce substantively unconscionable terms simply by including an opt out provision in an otherwise adhesive contract, because California law requires that "[b]oth procedural and substantive unconscionability must be shown for the defense to be established." (*OTO*, 8 Cal.5th at p.125.) This result would harm employees and consumers and be contrary to California precedent and public policy. The Court should reject Charter's narrow view of procedural unconscionability and disapprove of the cases that found the Agreement has no procedural unconscionability simply because Charter (arguably) gave an employee an opportunity to opt out.

B. Charter's reliance on the AAA Rules and Due Process Protocol increases the procedural unconscionability.

The Agreement is a five-page single-spaced contract that cites multiple statutes, uses undefined legal terms and jargon, and includes numerous cross-references. The Guidelines are a separate 24-page document that, among other things, emphasizes Charter's strong preference for individual arbitrations and includes a strict timeline and discovery limits that are inconsistent with the terms of the Agreement and the AAA Rules.

The Agreement and Guidelines do not refer to, attach, or include a hyperlink to the AAA Rules or Due Process Protocol. (*Ramirez*, 75

Cal.App.5th at p. 385 n. 10 [the Agreement does not incorporate the AAA Rules by reference].) The Agreement and Guidelines simply identify the AAA for purposes of selecting an arbitrator and administering the arbitration. (Reply Brief at 15.) Nevertheless, Charter relies heavily on the AAA Rules and Due Process Protocol when employees raise unconscionability challenges. (*Ramirez*, 75 Cal.App.5th at p. 385 n. 10; *Durruthy v. Charter Communications, LLC* (S.D. Cal. Nov. 23, 2020) 2020 WL 6871048, at p. *9 [Charter relied on AAA Rules to counter unconscionability challenge].)

Charter's reliance on the AAA Rules and Due Process Protocol to supplement or save the Agreement actually increases the procedural unconscionability. Relying on the AAA Rules and Due Process Protocol, but not referring to or giving copies of them to employees until *after* a dispute arises, shows Charter is "artfully hid[ing]" them "by the simple expedient" of referring to the AAA in the Agreement and Guidelines. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246; *OTO*, 8 Cal.5th at p.129 [circumstances suggested the agreement was "drafted with an aim to thwart, rather than promote, understanding"].)

There is no reason for employees to know that the AAA Rules and Due Process Protocol exist; that Charter intends for them to supplement the Agreement and Guidelines; that an arbitrator may apply them in addition to or instead of the Agreement and Guidelines; or that they provide rights and obligations, and vest arbitrators with powers and discretion, not set forth in the Agreement or Guidelines.[3] (*Baltazar*, 62 Cal.4th at p. 1246 [procedural

[3] While Charter's briefing focuses on several specific AAA Rules, there are multiple rules that could supplement (and in several cases conflict with) the Agreement and Guidelines. (AAA Rule 1 [right to seek judicial intervention]; AAA Rule 4 [timing and pleading requirements]; AAA Rule 5 [right to change a claim]; AAA Rule 6 [right to challenge arbitrability and jurisdiction]; AAA Rule 8 [topics and timing for management conference]; AAA Rule 9 [scope of discovery and arbitrator discretion]; AAA Rule 12

unconscionability challenge "might have force if [it] concerned some element of the AAA rules of which she had been unaware"]; *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393, 395–396 [challenge depended in some manner on rules that were not provided and that employer argued "saved" an unconscionable agreement]; *Ali v. Daylight Transport, LLC* (2020) 49 Cal.App.5th 462, 476–477 [failure to provide the AAA Rules "exacerbated the procedural unconscionability" where unconscionability challenge concerned rules that were not provided with or delineated in the parties' agreement].)

Charter is reserving the right to insist on strict compliance with the Agreement and Guidelines, and using the AAA Rules as a fallback whenever employees raise enforceability challenges. It is surprising and oppressive for Charter to withhold from employees copies of arbitration rules and procedures that it intends to cite and rely on when a dispute arises. Employees cannot understand their contractual rights and obligations, or the procedures that they may be allowed or required to follow, when Charter subtly hides relevant arbitration rules and protocols.

The Court should hold that Charter's reliance on the AAA Rules and Due Process Protocol increases the procedural unconscionability and requires closer scrutiny of the Agreement's overall fairness.

[arbitrator qualifications]; AAA Rule 16 [right to object to arbitrator]; AAA Rule 23 [confidentiality]; AAA Rule 24 [postponements]; AAA Rule 27 [right to request dispositive motions]; AAA Rule 30 [rules of evidence]; AAA Rule 32 [right to request interim relief]; AAA Rule 36 [obligation to object]; AAA Rule 37 [right to request extensions].) The Due Process Protocol also has information that would be important for employees to know before a dispute arises. (Due Process Protocol B.3 [right to have access to "all information reasonably relevant"]; Due Process Protocol C.1–3 [explanation of arbitrator roster selection and training].)

II. Unconscionability Is Determined At The Time The Contract Was Made And Is Not Plaintiff Specific Or Claim Specific.

The unconscionability of a "contract or any clause of the contract" is determined "at the time it was made." (Cal. Civ. Code, § 1670.5, subd. (a).) It is a doctrine of deterrence that seeks to prevent unconscionable contracts from being formed. (*Armendariz*, 24 Cal.4th at p. 124 n. 13.)

Substantive unconscionability does not depend on whether a particular contract term is directly implicated by the specific claims at issue. (*Najarro v. Superior Court* (2021) 70 Cal.App.5th 871, 882–883 [representative action waiver was unconscionable even when employee did not bring a representative claim]; *Subcontracting Concepts (CT), LLC v. De Melo* (2019) 34 Cal.App.5th 201, 212 [unenforceable waiver increased the unconscionability because "determining unconscionability . . . does not involve comparing the terms of the arbitration clause with the nonarbitration claims" being pursued]; *Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir. 2002) 298 F.3d 778, 784–785 [rejected argument that unconscionable contract terms only matter if they apply to the specific claims at issue].)

Yet Charter is advocating for an unconscionability analysis and result that is plaintiff specific and claim specific. Charter has argued (unsuccessfully) in this action and other actions that unconscionability depends on the specific plaintiff and claims at issue. (*Ramirez*, 75 Cal. App. 5th at p. 384 [rejected Charter's argument and held that "how [Respondent] chose to enforce her claims does not affect the unconscionability analysis, which generally looks to an agreement 'at the time it was made'"], citing Cal. Civ. Code, § 1670.5, subd. (a); *Durruthy*, 2020 WL 6871048, at p. *8 [rejected Charter's argument and held that unconscionability does not depend on the specific plaintiff and claims at issue].) Charter understandably wants to limit an unconscionability finding to the specific plaintiff and specific claims at issue so it can continue to argue that the Agreement is not

unconscionable and unenforceable with respect to other employees and other types of claims, such as Labor Code and Unfair Competition Law claims.

The Court should confirm that unconscionability is determined at the time the contract was made and does not turn on the specific plaintiff or specific claims at issue. (*Mills v. Facility Solutions Group, Inc.* (2022) 84 Cal.App.5th 1035, 1057–1058 [same unconscionability analysis applied to Labor Code claims], citing *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473, 489 [FEHA claims], and *Ramirez*, 75 Cal.App.5th at p. 378 [FEHA claims].)

III. Section K's Purpose Is To Discourage Contract Formation, Enforceability, And Scope Challenges, And Its Effect Is To Chill The Exercise Of Constitutional And Statutory Rights.

Unconscionability sometimes requires inquiry into the "commercial setting, purpose, and effect" of the contract or clause at issue. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911; Cal. Civ. Code, § 1670.5, subd. (b).) Section K of the Agreement fails on each point.

Section K's commercial setting supports a finding of substantive unconscionability. Charter has no evidence showing that it has a "legitimate commercial need" to require that employees pay its costs and attorney fees if they unsuccessfully resist arbitration for one or more claims or disputes. (*Armendariz*, 24 Cal.4th at p. 117.) Lower-level employees cannot afford to pay Charter's costs and attorney fees related to a motion to compel arbitration, which can range from $5,000 to over $70,000. And courts already have the power to impose costs and attorney fees on parties and counsel as sanctions, so there is not a legitimate commercial need for Charter to seek protection from frivolous or improper challenges.[4] (Fed. R. Civ. P. 11; Cal. Code Civ. Proc., § 128.7; Cal. Rules of Court, rule 2.30.)

[4] Section K requires employees who unsuccessfully advocate against arbitration to pay Charter's costs and attorney fees as a consequence for

Section K's purpose and effect also support a finding of substantive unconscionability. Its nominal purpose is "enforcement" of the Agreement. (Opening Brief at 29.) Its actual purpose and effect, however, is to discourage employees from challenging the Agreement's formation, enforceability, and scope, and to punish employees like Amici with breach of contract counterclaims that seek potentially ruinous costs and attorney fees if their advocacy against arbitration is not entirely successful.[5]

Section K chills employees' constitutional and statutory rights to petition courts for the redress of grievances, including grievances related to the formation, enforceability, and scope of arbitration agreements. (See U.S. Const., amend. I [constitutional right to petition]; Cal. Const., art. 1, § 3(a) [constitutional right to petition]; 9 U.S.C. §§ 3–4 [a party may raise defenses to arbitration, and a court must be "satisfied" that an issue is referrable to arbitration before it compels arbitration]; Cal. Civ. Code, §§ 1281, 1281.2 [a party may raise defenses to arbitration, and the court may order arbitration

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"breaching" the Agreement. Section K does not make the employee's payment obligation contingent on a finding that the arguments against arbitration were frivolous, improper, or in bad faith. There is no basis to read Section K as implicitly incorporating language or requirements that are never mentioned in or contemplated by the Agreement itself. Charter does not read such limitations into Section K when it prevails on a motion to compel arbitration and demands payment of costs and attorney fees, and employees have no reason to know such limitations at the time of contracting.

[5] Section K's payment obligations do not take into account whether the arguments against arbitration were partially successful (e.g., a court severed one or more unconscionable terms, or found one or more claims were not arbitrable). And Section K is not mutual or fair. Charter has identified around three dozen cases where it moved to compel arbitration (see Charter's RJN Exhibits 6–45), but it has not identified any cases where an employee moved to compel arbitration. (*Durruthy*, 2020 WL 6871048, at p. *12 ["Because the employer is far more likely to attempt to enforce this Agreement against an employee, this provision will almost always yield one-sided results, a hallmark of substantive unconscionability."].)

"if it determines" that arbitration is required and should not be delayed]; *Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 769–770 [party does not breach a contract by "asking a court to resolve disputed issues over an arbitration agreement's applicability or enforceability," and cannot be punished for vindicating a statutory right].)

The FAA does not provide for an award of costs or attorney fees to a party who successfully compels or resists arbitration. (9 U.S.C., § 1 et seq.; see also Cal. Civ. Code, § 1280 et seq.) And the FAA does not require enforcement of a contractual fee-shifting provision simply because it is embedded within an arbitration agreement. The unconscionability analysis of a fee-shifting provision like the one embedded in Section K is not unique to arbitration. The analysis would be the same if a contract required employees to pay Charter's costs and attorney fees for unsuccessfully resisting a motion to dismiss for failure to exhaust administrative remedies, a motion to transfer venue, a motion for summary judgment based on statute of limitations, or any other type of motion that is far more likely to be filed by an employer than an employee. "The FAA does not require enforcement of such a provision [simply] because it has been placed in an arbitration agreement." (*Patterson*, 70 Cal.App.5th at p. 492.)

Section K's contractual fee-shifting provision is substantively unconscionable because it "creates a chilling effect on [an employee] enforcing his rights because it exposes him to the possibility of paying attorney's fees . . . if he lost . . . the threshold issue of arbitrability." (*Lim v. TForce Logistics, LLC* (9th Cir. 2021) 8 F.4th 992, 1000; *Armendariz*, 24 Cal.4th at pp. 110–111 [it is unconscionable to impose any "*type* of expense that [an employee] would not be required to bear if he [] were free to bring the action in court"]; *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1256 [public policy "unequivocally prohibits an employer from recovering attorney fees for defending a wage and hour claim"];

Pokorny v. Quixtar, Inc. (9th Cir. 2010) 601 F.3d 987, 997 ["loser pays" provision is unconscionable because it unfairly favored the employer and exposed employees to a "risk of incurring greater costs than they would bear if they were to litigate their claims in federal court"]; *Storms v. Paychex, Inc.* (C.D. Cal. Jan. 14, 2022) 2022 WL 2160414, at p. *14 [provision that lets an employer recover fees for compelling arbitration is "substantively unconscionable because it deters employees from challenging the enforceability of the Arbitration Agreement in a judicial proceeding"].)

The unconscionability of Section K is the same for FEHA claims *and* other employee claims. (*Ramirez*, 75 Cal.App.5th at pp. 377–382 [FEHA claims]; *Durruthy*, 2020 WL 6871048, at p. *12 [FEHA claims]; *Mills*, 84 Cal.App.5th at p. 1058 [Labor Code and UCL claims].) The Labor Code, for example, also has fee-shifting provisions that favor employees and "cannot be contravened by a private agreement." (Cal. Civ. Code, § 3513; Cal. Lab. Code, § 218.5 [prevailing employees may recover costs and fees, but prevailing employers must show bad faith to recover costs and fees]; Cal. Lab. Code, §§ 226, subd. (h), 1194, 1198.5, subd. (*l*), 2699, subd. (g)(1), and 2802 [only prevailing employees can recover costs and fees].)

Section K's chilling effect is not mutual or minimal. Employees like Respondent and Amici already face possible repercussions for suing an employer. (*Gentry*, 42 Cal.4th at pp. 457–459.) Because the costs and attorney fees related to a single motion can easily exceed the maximum potential recovery for meritorious employee claims—especially wage-and-hour claims with predictably small potential recoveries—finding that fee-shifting provisions like Section K are enforceable will discourage legitimate challenges to form contracts, turn employees and consumers who make unsuccessful arguments into counterclaim defendants, and further chill their willingness to bring any claims against an employer. (See, e.g., Answering Brief at 12 [Charter sought $6,480 in attorney fees]; *Patterson*, 70

Cal.App.5th at p. 479 [Charter sought $10,583 in attorney fees]; RJN Exhibit 42 [Charter awarded $4,455 in attorney fees].)

Essentially, Charter is using Section K to require employees to preemptively waive the litigation privilege. (Cal. Civ. Code, § 47, subd. (b).) Section K is only implicated when litigation is filed or contemplated, and an employee advocates against the formation, enforceability, or scope of the Agreement. It treats unsuccessful arguments against arbitration as unlawful breaches of contract. And it treats Charter's costs and attorney fees as a form of breach of contract damages that an employer could not otherwise recover from an employee. It is an unabashed attempt by a stronger drafting party to shield a form contract from any challenges by a weaker party, and to punish employees with serious monetary consequences if they or their counsel unsuccessfully advocate against arbitration.[6]

Finding Section K enforceable will chill employees' exercise of constitutional and statutory rights, interfere with counsel's ability to zealously advocate against unfair contracts and clauses, and protect companies from reasonable challenges to form contracts. It will also encourage companies to overreach, inflate their costs and attorney fees, and pursue monetary claims against employees who lose procedural motions. The Court should confirm that Section K's "fees for compelling arbitration" provision is unconscionable and unenforceable under California law, and that California law is not preempted by the FAA.

IV. There Are Other Substantively Unconscionable Provisions That Increase The Agreement's Overall Unfairness.

Ramirez correctly held that the Agreement improperly shortens certain statutes of limitations (Section E), lets Charter recover an interim

[6] A Section K claim is also a strategic lawsuit against public policy (SLAPP) because it punishes employees for protected speech and petitioning activities.

award of costs and attorney fees for compelling arbitration (Section K), requires arbitration of claims more likely to be brought by an employee but not claims more likely to be brought by Charter (Sections A and B), and restricts discovery necessary to vindicate statutory claims[7] (Section I and Guidelines). The Court should affirm each of these holdings.

The Court should also hold that there are other provisions that are substantively unconscionable as a matter of California law, and that provide further support for finding the Agreement "permeated by significant unconscionable terms." (*Id.*; see also *Durruthy*, 2020 WL 6871048, at p. *8 ["multiple provisions of this Agreement are substantively unconscionable" and "represent an attempt to enforce a one-sided alternative to litigation that favors the employer."]; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [courts have discretion to decide questions of law raised for the first time on appeal]; *Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1810 [the exercise of discretion is proper when issues of public interest or public policy are involved]; *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 89 [substantive unconscionability is a question of law that can be resolved for the first time on appeal when the factual record is developed and there is not a material factual dispute concerning the challenged provision]; *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal. 4th 1, 7 n. 2 [there are "sound policy reasons" to "resolve issues of public importance"].)

A. Section D is substantively unconscionable because the class waiver extends to non-arbitrable claims.

Section D states that employees "may only bring claims against [Charter] in their individual capacity and not as a plaintiff or class member

[7] The burden to show inadequate discovery cannot be high because it necessarily comes at the start of a dispute. And employees with multiple types of claims will necessarily require more and different types of discovery.

in any purported class or representative proceeding, whether those claims are covered claims under Section B, or excluded claims under Section C."

The FAA permits enforcement of class arbitration waivers (*Iskanian*, 59 Cal.4th at p. 360), but it does not preempt California law for class waivers that apply outside of arbitration to non-arbitrable claims. (*Garrido v. Air Liquide Industrial U.S. LP* (2015) 241 Cal.App.4th 833, 837–838 [non-arbitrable claims are not governed by the FAA and "*Gentry*'s holding has not been overturned under California law in situations where the FAA does not apply"); *Meyer v. Kalanick* (S.D.N.Y. 2016) 185 F.Supp.3d 448, 458 [the High Court's decisions "do not invalidate *in toto* the California rule that class action waivers may be held unconscionable," "do not invalidate California's unconscionability rule outside the arbitration context," and are "not readily transferable to class actions outside the arbitration setting"].)

Section D's class waiver is invalid and substantively unconscionable because it extends to non-arbitrable claims that are expressly excluded from arbitration. (*Gentry*, 42 Cal.4th at pp. 463–464 [class waivers "cannot . . . be used to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical obstacles in the way of employees' prosecution of those claims"]; *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 160–161 [one-sided class waivers that operate effectively as an exculpatory contract clause are contrary to public policy and unconscionable]; Cal. Civ. Code, § 1668 ["All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."].)

B. Section D is substantively unconscionable because it includes an invalid representative action waiver.

Section D also waives representative standing and precludes employees from bringing claims as a plaintiff or member in any form of "representative proceeding," whether in arbitration or in court.

Section D's representative action waiver is invalid under California law, and the FAA does not preempt California law with respect to the broad waiver. (*Viking River Cruises Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1924–25; *Harper v. Charter Communications, LLC* (E.D. Cal. Sept. 7, 2022) --- F.Supp.3d ---, 2022 WL 4095889, at p. *4–5 [Section D's representative action waiver is invalid as a matter of law]; *Potts v. Sirius XM Radio Inc.* (C.D. Cal. Oct. 25, 2022) 2022 WL 17098184, at p. *6 ["Since the Class Action Waiver is non-severable, and the term 'representative action' must be interpreted to include both [plaintiff's] 'individual' and 'non-individual' PAGA claims, the Agreement is not enforceable."].) The waiver increases the Agreement's overall unfairness even though Respondent did not personally bring a PAGA claim. (*Marinez v. Vision Precision Holdings, LLC* (E.D. Cal. Dec. 30, 2019) 2019 WL 7290492, at p. *12 ["[T]he very presence of a representative PAGA waiver may deter litigants from even trying to bring a claim in the first place, thereby undermining state law and public policy."].)

Section D's representative action waiver is substantively unconscionable as a matter of law. (*Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 831 [in prior appeal "we affirmed the ruling that the PAGA waiver was substantively unconscionable and held PAGA was not preempted by the [FAA]"); *Najarro*, 70 Cal.App.5th at pp. 882–883 [representative

action waiver was substantively unconscionable]; *Mills*, 84 Cal.App.4th at pp. 1062–1064 [representative action waiver invalid].)

C. Section K is substantively unconscionable because it limits employees' rights to recover costs and attorney fees.

Section K's "fees for compelling arbitration" provision is substantively unconscionable for the reasons explained above and in Respondent's brief. Section K also requires the parties to bear their own "costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees." This part of Section K also is substantively unconscionable.

The court of appeal took note of, but did not rule on, the "bear your own fees" part of Section K. (*Ramirez*, 75 Cal.App.5th at p. 376, n. 6 (Section K also "deprives an employee of his or her statutory right to recover attorney fees"). The bear your own fees provision "purports to deprive an employee of his or her statutory right to recover attorney fees if the employee prevails" on a claim under FEHA, the Labor Code, and other statutes where prevailing employees can recover costs, expenses, and attorney fees. (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 251; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 709–710 [provision that deprived employee of a favorable fee-shifting rule was unconscionable and arbitrator could not simply disregard the provision); *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 797 [provision that "arguably strips [employee] of her right to recover attorney fees under the California statutory claims" is unconscionable].)

The bear your own fees part of Section K is invalid and substantively unconscionable as a matter of law, and an arbitrator cannot simply disregard it. (*Harper v. Charter Communications, LLC* (E.D. Cal. Dec. 19, 2019) 2019

WL 6918280, at p. *6 [bear your own fees part of Section K is substantively unconscionable]; *Durruthy*, 2020 WL 6871048, at pp. *9–10 [same].)

D. Section L is unconscionable because it waives employees' jury trial rights for non-arbitrable claims.

Section L states that "in the event a dispute between you and Charter is not arbitrable under this Agreement for any reason and is pursued in court, you and Charter agree to waive any right to a jury trial that might otherwise exist." But pre-dispute jury trial waivers are invalid unless authorized by statute. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 967).

Section L is invalid and substantively unconscionable as a matter of law because it improperly extends the jury trial waiver to non-arbitrable claims. (*Dougherty v. Roseville Heritage Partners* (2020) 47 Cal.App.5th 93, 107 [jury trial waiver for non-arbitrable claims was unconscionable]; *Durruthy*, 2020 WL 6871048, at p. *12 [Charter "does not deny" that the jury trial waiver for non-arbitrable claims "is unconscionable"]; *Sonico v. Charter Communications, LLC* (S.D. Cal. Jan. 27, 2021) 2021 WL 268637, at pp. *11–12 [similar waiver in prior version was substantively unconscionable].).

E. Section Q is unconscionable because its overbroad severance provision is unreasonably favorable to Charter.

Section Q has an overbroad severance provision requiring courts to sever all unconscionable and unenforceable terms (except Section D's representative action waiver) and enforce the remainder of the Agreement.

Section Q is substantively unconscionable because it is one-sided and expands California's severability doctrine in a manner that is unreasonably favorable to Charter. As the sole drafter of a take-it-or-leave-it contract, Charter could simply delete or modify any terms it believes are unreasonably favorable to employees. But applicants and employees like Respondent and

Amici must either accept all of the Agreement's terms, regardless of how unfavorable, or forgo employment opportunities. When employees successfully argue that one or more terms are invalid and unenforceable, Charter relies on Section Q to demand severance of all such provisions and enforcement of the rest. It a court grants severance and compels arbitration, Charter then demands that the employee pay its costs and attorney fees under Section K.

California law permits severance of unconscionable contract terms under certain circumstances. But it also makes clear that courts "may refuse to enforce the contract" if they find that "any clause" of the contract is unconscionable.[8] (Cal. Civ. Code, § 1670.5, subd. (a); see also *Armendariz*, 24 Cal.4th at p. 124 [courts may refuse to enforce a contract when there is "more than one" unconscionable term].)

Overbroad severance provisions in form employee and consumer contracts are contrary to the public policies underlying California's unconscionability and severability doctrines. Section Q incentivizes Charter to include in the Agreement and Guidelines as many unreasonably favorable terms as possible. It is unconscionable and unenforceable because is unreasonably favorable to Charter and goes far beyond what California's severability doctrine allows.

CONCLUSION

Charter does not use the Agreement and Guidelines simply to move employee claims from court into a neutral arbitration forum. It uses them to waive important employee rights and to impose on employees a less

[8] Section K is the type of clause that could, by itself, cause a court to refuse to enforce an entire contract because it is unreasonably favorable to Charter and seeks to punish employees who advocate against arbitration.

favorable forum. It then uses Section K to shield the Agreement from reasonable challenges, and to punish employees for advocacy that is not entirely successful. Charter's alleged "intent" does not matter—what matters are the unfair, one-sided, and non-negotiable terms that Charter chose to impose on applicants and employees as a condition of employment.

The Court should affirm the court of appeal decision in *Ramirez* and find that the Agreement and Guidelines are unconscionable and unenforceable without regard to the specific plaintiff or specific claims at issue. The Court should also clarify the proper procedural unconscionability analysis, find that Charter's reliance on the AAA Rules and Due Process Protocol increase the degree of procedural unconscionability, and hold that there are additional terms in the Agreement that are substantively unconscionable as a matter of California law.

Dated: March 3, 2023

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Pursuant to rule 8.520(c)(1) of the California Rules of Court, the undersigned hereby certifies that the amicus curiae brief contains 5,643 words, excluding the tables, application, signature block, and this certificate, according to the word count generated by the computer program used to produce the brief.

Dated: March 3, 2023

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STATE OF CALIFORNIA
Supreme Court of California

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