No. 13-439

IN THE

Supreme Court of the United States

CARMAX AUTO SUPERSTORES CALIFORNIA, LLC AND CARMAX AUTO SUPERSTORES WEST COAST, INC.,

Petitioners,

v.

JOHN WADE FOWLER AND WAHID ARESO,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeals

BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The California New Car Dealers Association ("CNCDA") is a California non profit mutual benefit corporation chartered to protect and advance the interests of the new motor vehicle dealer industry in

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for amicus represent that all parties were provided notice of intention of *amicus* to file this brief at least 10 days before its due date. Pursuant to Rule 37.3(a), counsel for *amicus* represent that all parties have consented to the filing of this brief. Both Petitioner and Respondents have filed blanket consent to the filing of amicus briefs.

California. The membership of the CNCDA includes over 1,100 of the approximately 1,300 new car dealers in California.

Like many California businesses, CNCDA members typically enter into arbitration contracts with their employees and customers, which agreements are designed to permit the expeditious resolution of future disputes between the parties pursuant to the Federal Arbitration Act. Because of the efficiencies derived from using arbitration to resolve disputes, CNCDA members who contract for arbitration are able to significantly cut down on costs. This allows new car dealers to pass along the resulting savings to employees in the form of higher wages and other employee benefits, and to customers through lower prices and increased services. Therefore, the ability to consistently arbitrate employee claims and other disputes pursuant to the straight-forward terms of an arbitration agreement governed by the Federal Arbitration Act is of great interest to CNCDA members.

The CNCDA and its members have watched with increasing concern over California courts and their aggressive efforts to avoid enforcing arbitration agreements pursuant to their terms, despite the preemptive effect of the Federal Arbitration Act. Notwithstanding this Court's consistent rejection of State efforts to avoid enforcement of arbitration agreements, California courts continue to interpret the savings clause provided in Section 2 of the Federal Arbitration Act by reading this Court's burgeoning arbitration jurisprudence as narrowly as possible. In this current situation, despite strong U.S. Supreme Court precedent to the contrary, California has again issued a "special" rule for arbitration agreements.

Specifically, the California court held that plaintiffs must be able to effectively "vindicate statutory rights" even if it means undermining the very purpose of the Federal Arbitration Act. But this rule only applies in construing arbitration agreements, not to construing contracts in general.

With each new attempt by California to create an exception to the Federal Arbitration Act and its firm insistence on requiring arbitration pursuant to the language of the parties' agreements, CNCDA members pay a significant price in higher costs to enforce arbitration agreements (up to and including appellate litigation involving motions to compel arbitration as is taking place under the present litigation), judicial litigation where arbitration had been previously agreed to by the parties, or both. As such, the CNCDA and its members are deeply interested in ensuring that this Court continue to instruct California courts in no uncertain terms that the Federal Arbitration Act—and the growing body of federal law of arbitraility—simply does not permit individual States to interfere as California has done in the enforcement of arbitration agreements by their own terms.

The CNCDA has participated as *Amicus* in various cases involving arbitration over more than a decade, and it has continually challenged California courts to recognize the preemptive effect of binding arbitration pursuant to the Federal Arbitration Act. Notwithstanding, California courts continue to show hostility toward arbitration agreements in direct contravention of the Federal Arbitration Act, and the present case is just another example of that judicial hostility.

Accordingly, the CNCDA and its members strongly urge this Court to protect California businesses and

the sanctity of the Federal Arbitration Act by ensuring that employers may continue to rely on arbitration agreements to manage dispute resolution costs. The present case is yet another attempt by California courts to deviate from the Federal Arbitration Act by applying a "judicially created superstructure" atop arbitration agreements that go well beyond those allowed by the Federal Arbitration Act as interpreted by this Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) ("*Stolt-Nielsen*"), *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740 (2011) ("*AT&T Mobility*"), and *American Express Co. v. Italian Colors Restaurant*, __ U.S. __, 133 S. Ct. 2304 (2013) ("*Italian Colors*").

INTRODUCTION

The Court should grant the petition and reverse the decision below because it violates, and is therefore preempted by, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. In short, California previously created a special rule to avoid the enforcement of otherwise enforceable arbitration agreements where it determines that the arbitration agreement may interfere with the "vindication of employees' statutory rights." *Gentry v. Superior Court (Circuit City Stores)*, 42 Cal. 4th 443, 464, fn. 7 (2007). The Court of Appeal in the present dispute held that a class action waiver contained in an arbitration agreement that passed California's "unconscionability" test should be stricken if a court "finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of [wage and hour] laws for the employees alleged to be affected by the employer's violations." *See* Petitioner's Appendix ("Pet. App.") at 17a–18a. This judicial reasoning is nearly identical to the "vindication of statutory rights" doctrine which this

Court recently examined—and rejected—in *Italian Colors*. There, this Court held unequivocally that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Italian Colors*, 133 S. Ct. at 2309 (emphasis in original). But while the *Gentry* decision—and its attempt to create a public policy exception to the enforcement of arbitration agreements in favor of class treatment to which the parties did not agree—should not have survived this Court's decision in *AT&T Mobility*,[2] California courts have continued to rely on *Gentry* and its public policy exception to bar parties from enforcing arbitration agreements according to their terms. What is clear is that California courts will continue to apply the arbitration-hostile *Gentry* rule until this Court expressly rejects the rule, even though its foundations have already been expressly abrogated. *See AT&T Mobility*, 171 S. Ct. at 1753 (rule abrogated as an impediment to enforcement of arbitration as designed by the parties). The petition for writ of certiorari in this case gives this Court the perfect opportunity to send States—and specifically California courts—a clear message that this Court means what it says in its rejection of attempts to circumvent the Federal Arbitration Act through judicial hostility under the guise of judicial efficiency.

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[2] Numerous cases have held that the *Gentry* rule is no longer viable in light of *AT&T Mobility*. *See, e.g., Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp.2d 831, 840 (N.D. Cal. 2012); *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp.2d 1038, 1049 (N.D. Cal. 2012); *Lewis v. UBS Financial Services Inc.*, 818 F. Supp.2d 1161, 1167 (N.D. Cal. 2011); *Sanders v. Swift Transp. Co. of Arizona, LLC*, 843 F. Supp.2d 1033, 1035 (N.D. Cal. 2012); *Grabowski v. Robinson*, 817 F. Supp.2d 1159, 1180-81 (S.D. Cal. 2011).

And California, more than any other State, needs just such a reminder. Consistent with California's history of "be[ing] more likely to hold contracts to arbitrate unconscionable than other contracts," *AT&T Mobility*, 131 S. Ct. at 1747, the California Supreme Court very recently established watered-down guidelines, setting a lower standard for unconscionability for arbitration agreements than it has ever applied outside of the context of arbitration agreements. *See Sonic-Calabasas A, Inc. v. Moreno*, __ Cal. 4th __, 2013 WL 5645378 (Oct. 17, 2013) ("*Moreno II*").[3]

The California Supreme Court's continuing efforts to undermine the FAA by relaxing the standard for substantive unconscionability needed to bar the enforcement of arbitration agreements according to their terms has now led to a situation where lower courts in California feel forced to continue to apply the *Gentry* standard despite its clear rejection by this Court. This is best demonstrated by the pleas of the Court of Appeal provided in *Truly Nolen of America v. Superior Court*, 208 Cal. App. 4th 487, 507 (2012), which found that "[a]lthough we agree with Truly Nolen that *Concepcion* implicitly disapproved the reasoning of the *Gentry* court, the United States Supreme Court did not directly address the precise issue presented in *Gentry*. Under the circumstances, we decline to disregard the California Supreme Court's decision without specific guidance from our

[3] *Moreno II* was before the California Supreme Court on remand following an October 2011 GVR order from this Court requiring the California court to review an earlier decision in light of *AT&T Mobility*. *See Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011) ("*Moreno I*"), *cert. granted, judgment vacated,* 132 S. Ct. 496 (2011).

high court"). This is not the only California court to struggle with this issue.[4] Accordingly, this Court should grant the petition for certiorari and declare unequivocally that efforts such as those in California to propagate the same judicial hostility toward arbitration which the FAA sought to eliminate are plainly preempted by the FAA and the Supremacy Clause of the United States Constitution. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp*., 460 U.S. 1, 24 (1983) ("liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

ARGUMENT

I. This Court Should Vacate The Decision Below Because It Relies On The Same "Vindication Of Statutory Rights" Doctrine That This Court Recently Rejected In *Italian Colors*.

Fidelity with this Court's decision in *AT&T Mobility* requires that the decision below be vacated, as it rests entirely upon the notion that a State public policy may prefer class action treatment over individual arbitration when an extensive, case-specific, pre-arbitration judicial inquiry into the relative effectiveness of individual arbitration versus class treatment. The imposition of such a pre-arbitration balancing test "interferes with the fundamental attributes of

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[4] *See also, Nelsen v. Legacy Partners Residential, Inc.,* 207 Cal. App. 4th 1115, 1131 (2012) ("the continuing vitality of *Gentry* has been called into serious question by a recent decision of the United States Supreme Court holding that a state law rule requiring classwide arbitrations based on public policy grounds rather than the parties' arbitration agreement itself *does* violate the FAA") (emphasis in original).

arbitration" in a manner which this Court has expressly said violates the Federal Arbitration Act. *AT&T Mobility*, 131 S. Ct. at 1748. This *Gentry* requirement that the practical effectiveness of arbitration be weighed against class wide treatment is a creation of State law, and *AT&T Mobility* made it clear that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. Even the dissent in the *Italian Colors* decision recognized the broad application of federal preemption when a State rule conflicts with the FAA:

> "When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA" purposes and objectives. If the state rule does so—as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation." *Italian Colors*, 133 S. Ct. at 2320 (KAGAN, J., dissenting.)

Where the conflict is between the FAA and a State law, the State law must "automatically bow to the other." *Id*. This clear precept should be more than enough to support direct abrogation of the *Gentry* rule by this Court.

But even if one were to assume, *arguendo*, that *Gentry* were sufficiently grounded in the federal law concept of "effective vindication" that was addressed in the *Italian Colors* decision, the limiting language of the *Italian Colors* decision makes it clear that California courts may not consider its application in this case.

Even federal laws that interfere with arbitration in accordance with the terms of parties' agreements are preempted by the FAA unless they are necessary to

protect the very "right to pursue" claims, as articulated by this Court in *Italian Colors*, 133 S. Ct. at 2310. The rule adopted by the California decision would below prohibit bilateral arbitration according to the terms of parties' agreements if—after the court has received evidence and held a preliminary hearing on the matter—it is determined "that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." *See* Pet. App. at 17a–18a (relying upon *Gentry*, 42 Cal. 4th at 463. This is not the "right to pursue" standard, but an effective "vindication of statutory rights" standard. As such, the rule applied below is plainly preempted by the FAA.

In the *Italian Colors* decision late in the Court's recently-concluded term, the Court reversed the Second Circuit Court of Appeal, which had applied a broader reading of the "effective vindication" standard born from *dicta* from an earlier decision of this Court. 133 S. Ct. at 2310, fn. 2. Relying upon this Court's more recent decisions in *AT&T Mobility* and *Stolt-Nielsen*, *Italian Colors* held that under the FAA, arbitration agreements between the parties must be enforced according to their terms without regard to whether an alternative may ultimately prove to be a more economical dispute resolution option. (*Id*., 133 S. Ct. at 2308–09.) Under *Italian Colors*, the Court restricted application of the "effective vindication" standard to cases where the agreement would expressly deny access to the dispute resolution forum, whether by overt language "forbidding the assertion of certain statutory rights," or where the agreement "makes access to the forum impracticable" through filing and administration fees. *Italian Colors*, 133 S. Ct. at 2310-11, *citing Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

The reasoning behind these two examples is clear: if either the claims themselves are explicitly barred or the forum is too expensive to access, the claimant has lost the very right to pursue his or her claims. But any and all other advantages, benefits, or *even practical necessities* inserted by state law into the rules of arbitration are not eligible for an effective vindication exception to FAA preemption. *Italian Colors*, 133 S. Ct. at 2311 ("the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy") (*emphasis in original*).

But as was the case with the agreement at issue in *Italian Colors*, the agreement addressed by the California court below did not purport to bar assertion of any specific claim or claims, nor did it establish forum costs or fees that could functionally bar any claimant from proceeding to arbitration for the resolution of claims. Rather, the court below declared that, under *Gentry*, courts have the authority to disregard an otherwise valid class arbitration waiver if they find that class procedures could be significantly more "effective". *See* Pet. App., at 19a (*relying upon Gentry*, 42 Cal. 4th at 463. The California Supreme Court, in *Gentry*, explained its belief that this departure from arbitration in accordance with the terms of parties' agreements is justified as being necessary for the effective vindication of statutory claims. *Gentry*, 42 Cal. 4th at 450 ("We conclude that at least in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights"). This type of efficiency analysis was the same argument expressly rejected by this Court in reversing the Circuit Court decision in *Italian Colors*, 133 S. Ct. at 2310 ("Enforcing the waiver of class arbitration bars

effective vindication, respondents contend, because they have no economic incentive to pursue their antitrust claims individually in arbitration").

As set forth by this Court, regardless of the impracticality of bringing claims, as long as plaintiffs maintain the "right to pursue" those claims, the effective vindication doctrine cannot be used to avoid FAA preemption. *Italian Colors*, 133 S. Ct. at 2311–12, fn. 5 ("the FAA does . . . favor the absence of litigation when that is the consequence of a class-action waiver, since its principal purpose is the enforcement of arbitration agreements according to their terms"). The *Gentry* rule is therefore preempted by the FAA because it imposes preliminary litigation hurdles, in the form of a potentially time-consuming and expensive pre-arbitration evaluation of the factual and legal arguments regarding the relative efficiency of arbitration versus judicial litigation, or of class-action procedures versus individual claims only. This pre-arbitration balancing of the selected arbitration process against dispute resolution mechanisms that might otherwise have been available in the absence of an arbitration agreement was expressly rejected by this Court in *Italian Colors*:

> "The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy

> resolution that arbitration in general and bilateral arbitration in particular was meant to secure. ***The FAA does not sanction such a judicially created superstructure***. *Italian Colors*, 133 S. Ct. at 2312 (emphasis added).

The decision below expressly recognizes that this *Gentry* balancing test is not a casual analysis. Noting that "[t]he *Gentry* analysis is fact intensive," the court below recognized that the parties would require "additional discovery to establish a complete factual record as to the *Gentry* factors" as part of pre-arbitration judicial litigation. *See* Pet. App., at 19a. This is the very type of "judicially created super-structure" that the *Italian Colors* majority found incompatible with the FAA.

This Court should grant review and prevent the California court from imposing such a burden on parties who have entered into arbitration agreements covered by the FAA.

II. The California Decision Below Is Unfortunately All Too Consistent With California's Historical And Ongoing Hostility Toward Arbitration Agreements And Should Be Vacated By This Court.

In this Court's *AT&T Mobility* opinion, it noted that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *AT&T Mobility*, 131 S. Ct. at 1747 (*citing Stephen A.* Broome, *An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006) *and* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Uncons*cionability, 52 BUFFALO L.

REV. 185, 186-187 (2004)). Indeed, many of this Court's decisions regarding FAA preemption have overturned California law. *See, e.g. Perry v. Thomas*, 482 U.S. 483 (1987); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Southland Corp. v. Keating* 465 U.S. 1 (1984); *AT&T Mobility*, 131 S. Ct. at 1740; *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (granting writ of certiorari, reversing California Supreme Court decision, and remanding in light of *AT&T Mobility*).

Given that the foundation for the *Gentry* decision—California's *Discover Bank* decision—was unequivocally rejected by this Court in *AT&T Mobility*, there is a growing chorus of cases declaring the *Gentry* rule abrogated and no longer of consequence. However, most of these are federal decisions.[5] Of those California decisions involving a post-*AT&T Mobility* analysis of *Gentry*, most have been reluctant to consign *Gentry* to the scrap heap of history absent some overt recognition by the California Supreme Court that *Gentry* is no longer good law.[6]

But the California Supreme Court continues in its attempts to defy both the FAA and this Court's interpretation of FAA's preemptory powers, including most recently its ruling just last month in *Moreno II* on remand from this Court to issue an opinion consistent with *AT&T Mobility*.[7] But on remand, the

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[5] *See*, *supra*, Footnote 2

[6] *See*, *Truly Nolen of America*, 208 Cal. App. 4th at 507; *see also*, *supra*, Footnote 4.

[7] In *Moreno I*, the California Supreme Court had held that contracts which grant primary jurisdiction to a party other than the California Labor Commissioner to resolve wage disputes—with arbitration agreements notably the only such contracts identified by the court—are against public policy and unenforceable until after the Commissioner has issued an order.

California Supreme Court attempted to distinguish *AT&T Mobility* as applicable only to "the unconscionability of class arbitration waivers in consumer contracts" and not employment contracts. *Moreno II*, 2013 WL 5645379, at *11. This awkward attempt to narrow the scope of *AT&T Mobility* came almost out of nowhere—unconscionability was only raised as a potential issue *sua sponte* by the California Supreme Court shortly before the case was submitted ahead of the *Moreno I* decision.

Further, this ruling was inconsistent with a number of further decisions by this Court on the issue. *See, e.g., Marmet Health Care Center, Inc. v. Brown,* __ U.S. __, 132 S. Ct. 1201, 1203 (2012) (applying *AT&T Mobility* outside of the mass-consumer contract setting to hold that state law prohibiting arbitration of certain tort claims is preempted by FAA); *Nitro-Lift Technologies L.L.C. v. Howard*, __ U.S. __, 133 S. Ct. 500, 503-04 (2012) (applying *AT&T Mobility* to hold that state law prohibiting arbitration of employment-related disputes (non-compete agreements) is preempted by FAA). Indeed, the California Supreme Court's attempt to distinguish *AT&T Mobility* as related only to consumer contracts blatantly ignores the fact that this Court had specifically ordered the California Supreme Court to reconsider its initial *Moreno I* decision—clearly an employment arbitration case—in light of *AT&T Mobility*.

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51 Cal.4th at 695. To reach this decision, the California Supreme Court ignored this Court's decision in *Preston*, where this Court made it clear that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Preston*, 552 U.S. at 359.

But while *Moreno II* ultimately held a blanket rule precluding arbitration enforcement prior to submission of original jurisdiction to a state agency for non-binding determination preempted under the FAA, the State tribunal continued to refuse to apply *AT&T Mobility* to protect the parties' right to dispute resolution according to their own selected terms. In remanding the case, the California Supreme Court watered down longstanding California law on substantive unconscionability, announcing a new lower standard for unfairness for arbitration agreements when compared to other non-arbitration agreements. This results in a law that disfavors arbitration agreements and is no longer a generally-applicable standard for contract enforcement, as the Savings Clause under FAA Section 2 requires. 9 U.S.C. § 2 (arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*") (*emphasis added*).

California's general rule of substantive unconscionability states that "[i]nadequacy of consideration may be so excessively gross and unconscionable" as to render a contract substantively unconscionable, but only "where the inadequacy is so gross as to *shock the conscience* and common sense of all men." *Herbert v. Lankershim,* 9 Cal. 2d 409, 476 (1937) (emphasis added). Indeed, even as recently as last year, the California Supreme Court reinforced this general standard, as it is applied outside of the context of arbitration. *See Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (US), LLC 55 Cal.4th 223, 246 (2012) ("A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to shock the conscience").

But when it comes to arbitration, rather than applying this generally applied standard, the *Moreno II* court declared that "adhesive arbitration agreements" may be examined for unconscionability merely by determining "whether they are *unreasonably one-sided*." *Moreno II*, 2013 WL 5646378 at *18 (*emphasis added*).[8] Even though "evidence relevant to the unconscionability claim was not developed below," California's high court reiterated its newfound "unreasonably one-sided" standard throughout the opinion and ordered the case remanded for further consideration at the trial court

[8] This was done over a strong dissent that recognized that the majority had "improperly relaxed the unconscionability standard by using the phrase 'unreasonably one-sided' instead of 'so one-sided as to shock the conscience.'" *Moreno II,* 2013 WL 5646378, at *29 (Chin, J., Dissenting). In response, the majority scoured the jurisprudence for any support, finding only a 30-year-old reference where a panel of the California Court of Appeal had referred, in *dicta,* to unconscionability generally as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Moreno II*, 2013 WL 5646378 at *29, *citing A&M Produce Co. v. FMC Corp.,* 135 Cal. App. 3d 473 (1982). This case, in turn, was referring generally to UCC standards applicable in other states, quoting from federal appellate decisions from the East Coast which were applying Pennsylvania law. *A&M Produce*, 135 Cal. App. 3d at 486, *quoting Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445, 449 (D.C. Cir. 1965), *citing Campbell Soup Co. v. Wentz,* 172 F.2d 80, 81 (3d Cir. 1948). To suggest that this single reference should stand as a "generally applicable standard for contract enforcement" under California law—despite the more stringent "shocks the conscience" language being in much more common usage both before and after the *A&M Produce* decision—demonstrates the lengths to which California courts are continuing to go in order to maintain their own hostility to arbitration agreements, notwithstanding the FAA.

level, offering the parties a chance to adduce and present evidence regarding the relative fairness of the competing forums as a condition of enforcing the parties' agreement to submit the dispute to arbitration. *Id*.

The present base offers this Court an ideal opportunity to address the watered-down standards applied by California courts once and for all, to counter the continuing hostility shown by California courts toward arbitration agreements governed by the FAA. The *Moreno II* decision, while not before the Court at this time, only underscores the real and exigent need for the U.S. Supreme Court to step in and take action in his case to set the proper standard for State courts in considering federal preemption under the FAA. California has had plenty of opportunity to conform its arbitration jurisprudence to the standard set forth by this Court, but has consistently refused to follow the FAA and its preemption of any rules that are overtly hostile to arbitration or that set more stringent standards for enforcement of arbitration agreements than are applicable to contracts in general.

California has consistently refused to comply with this Court's growing jurisprudence in this area. It failed to do so in the case at bar—the California Supreme Court refused to even grant a Petition for Review of this case. And there can be no reasonable expectation that the California Supreme Court will, of its own accord, properly evaluate its *Gentry* standard in light of this Court's recent guidance on the preemptive power of the FAA. Because California will continue to exhibit hostility to arbitration, absent intervention from a higher authority, *amicus curiae* respectfully requests that this Court grant the instant petition and reverse the decision below.

CONCLUSION

As this Court recently reiterated, "[i]t is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Nitro-Lift Technologies*, 133 S. Ct. at 503, *quoting Rivers v. Roadway Exp., Inc*. 511 U.S. 298, 312 (1994). But California courts, rather than respecting this Court's guidance, continue to attempt to create "a great variety of devices and formulas" to disfavor and discourage arbitration in accordance with the terms of parties' agreements. *AT&T Mobility*, 131 S. Ct. at 1747 (internal citation omitted).

The *Gentry* rule, like the *Discover Bank* rule it sought "to clarify,"[9] is one such device and stands as an obstacle to the purposes and objectives of Congress in creating the FAA. *AT&T Mobility*, 131 S. Ct. at 1753. As such, the CNCDA respectfully urges this Court to grant the petition and reverse the lower court's ruling.

Respectfully submitted,

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[9] *Gentry*, 42 Cal. 4th at 452 ("We granted review to clarify our holding in *Discover Bank*") (citing *Discover Bank v. Superior Court (Boehr)* 36 Cal. 4th 148 (2005), *abrogated by AT&T Mobility*, 131 S. Ct. at 1740.