No. 18-1437

IN THE

Supreme Court of the United States

WINSTON & STRAWN LLP,

Petitioner,

v.

CONSTANCE RAMOS; THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

The Center for Workplace Compliance (CWC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

CWC's member companies are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using a variety of tools, including arbitration and other forms of Alternative Dispute Resolution (ADR). Many of them have adopted companywide policies requiring the use of binding arbitration to resolve all employment-related disputes. CWC thus has a direct and ongoing interest in the issues presented in this matter regarding the validity of arbitration-specific rules that effectively preclude the use of binding, pre-dispute

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than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

arbitration by any employer with a business presence in California.

Because of its strong interest in the subject, CWC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). CWC thus has an interest in, and a familiarity with, the legal and public policy issues presented in this case. Because of its significant experience in these matters, CWC is well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to this case.

STATEMENT OF THE CASE

Petitioner Winston & Strawn LLP (Winston) is a global law firm that provides legal services across multiple industries. Pet. App. 5a. When Respondent Constance Ramos joined the firm as an income partner, she signed a partnership agreement that contained a binding arbitration provision. *Id.* The arbitration provision required the parties to mediate any dispute arising under the agreement, and if mediation was unsuccessful, to submit the dispute to binding arbitration. *Id.* at 5a-6a. The partnership agreement also included a severability clause providing in part that "if any provision of this Agreement, or any application of such provision, shall be held invalid

or unenforceable, the remainder of this Agreement ... shall not be affected thereby." Pet. App. 43a-44a.

Ramos resigned from her employment and filed suit in San Francisco County Superior Court, asserting a variety of discrimination, retaliation, and wrongful termination claims under California law without first attempting to mediate or arbitrate her claims. Pet. App. 8a. Winston moved to compel arbitration pursuant to the binding arbitration provision contained in the partnership agreement. *Id.*

The trial court found that several provisions in the arbitration clause were unconscionable, but severed them in accordance with the agreement and compelled arbitration. Pet. App. 9a-10a. Ramos insisted that the agreement was invalid and filed a petition for a writ of mandate in the California Court of Appeal, arguing that under *Armendariz v. Foundation Health Psychcare Services, Inc*., 6 P.3d 669 (Cal. 2000), the arbitration provision was unenforceable in its entirety because it failed to satisfy California's arbitration-specific "minimum requirements" and was procedurally and substantively unconscionable. Pet. App. 4a, 26a.

Agreeing, the California Court of Appeal granted Ramos's writ and reversed the trial court's decision. Pet. App. 4a. Despite the agreement containing a severability clause, the Court of Appeal refused to sever the unenforceable provisions, reasoning that under *Armendariz*, an agreement containing "multiple defects" cannot be enforced in any form. Pet. App. 44a-45a. After its petition for review was denied by the California Supreme Court, Winston filed a Petition for a Writ of Certiorari with this Court on May 17, 2019. *Winston & Strawn LLP v. Constance Ramos, et al.*, No. 18-1437 (U.S. May 17, 2019).

SUMMARY OF REASONS FOR GRANTING THE PETITION

The court below, relying on the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), improperly refused to enforce Petitioner's employment arbitration provision because it failed to meet *Armendariz*'s onerous unconscionability and process "minimum requirements." 6 P.3d at 674. Given a choice between severing the offending clauses pursuant to the agreement's severability provision and invalidating the arbitration provision entirely, the court below elected the latter, and in doing so acted in contravention of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, as interpreted repeatedly by this Court. Accordingly, review by this Court is warranted.

The FAA provides that 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." 9 U.S.C. § 2. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), this Court made it clear that states may not enforce rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 339 (citations omitted).

Yet California does just that by enforcing the arbitration-specific rules established nearly two decades ago in *Armendariz* to determine the general enforceability of arbitration agreements. Despite having ample opportunity to do so, California has repeatedly declined to reassess the validity of *Armendariz* post-*Concepcion*, including in the case below. Its misapplication of *Concepcion* is not the result of ignorance or confusion, but rather of willful disregard, as this Court's conclusion in *Concepcion* –

that state rules disfavoring arbitration are preempted by the FAA – could not be clearer. Indeed, numerous other states have refused to enforce anti-arbitration rules in light of *Concepcion*.

Armendariz not only disadvantages California employers, but also those with multi-state operations that incorporate uniform arbitration programs across their workforces. If *Armendariz* is allowed to stand, multi-state employers are all but assured that their agreements to arbitrate will be deemed unenforceable in California, resulting in both employers and employees losing the well-recognized benefits of arbitration, including "'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" *Concepcion*, 563 U.S. at 348. Accordingly, review and reversal of the decision below is warranted.

REASONS FOR GRANTING THE PETITION

I. REVIEW OF THE DECISION BELOW IS WARRANTED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

This Court should review the decision below to resolve an issue of significant importance to the employer community: whether California's arbitration-specific rules in *Armendariz v. Foundation Health Psychcare Services, Inc*., 6 P.3d 669 (Cal. 2000), are preempted by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, as interpreted by this Court in a consistent line of cases, including *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Despite this Court's pronouncement in *Concepcion* that states cannot enforce rules that apply only to arbitration agreements, *id.* at 339, California courts, relying on

Armendariz, continue to do so. Those decisions have the effect, if not intended purpose, of disadvantaging arbitration and enforcing state rules that apply specifically and only to arbitration. California has had multiple opportunities since *Concepcion* to correct this error, but has repeatedly refused to do so. Review by this Court thus is sorely needed to correct the persistent recalcitrance of the California courts to conform to federal arbitration law.

A. This Court's FAA Jurisprudence Makes It Clear That Courts Must Not Enforce Rules That Apply Only To Arbitration Agreements, And Not To Other Types Of Contracts Generally

1. The FAA expresses a strong policy favoring arbitration

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Section 2 of the FAA is the "primary substantive provision" of the Act. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It provides that 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." 9 U.S.C. § 2. Accordingly, Section 2's savings clause permits the invalidation of arbitration only on the basis of generally applicable contract defenses, such as fraud, duress, or unconscionability.

This Court repeatedly has reaffirmed the strong federal policy favoring the enforceability of arbitration agreements, *see, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), which aims "to place

arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24 (citations omitted); *see also Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000). Indeed, this Court has declared "on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) ("'The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate'") (citation omitted).

2. This Court long has rejected state rules disfavoring arbitration

To that end, this Court's longstanding precedent makes clear that no state may hold private agreements to arbitrate to a higher standard of enforceability than is generally applicable to other private contracts without running afoul of the FAA. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). Whether statutorily or judicially created, a state law that imposes greater burdens on the enforceability of mandatory agreements to arbitrate than apply to other types of contracts is incompatible with, and therefore is preempted by, the FAA. Because *Armendariz* represents such a rule, this Court should grant the petition, overturn *Armendariz*, and reverse the decision below.

In *Southland Corp. v. Keating*, this Court held that a state law requiring resolution by judicial forum of all applicable claims – and thus precluding the enforcement of valid mandatory arbitration agreements – impermissibly conflicts with, and is preempted by, Section 2 of the FAA. 465 U.S. at 16. It observed:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be a part of a written ... contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract."

465 U.S. at 10-11 (footnote omitted).

This Court in *Southland* thus concluded, "In enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10. The Court reaffirmed that principle in *Perry v. Thomas*, observing that:

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that

> in which it otherwise construes nonarbitration agreements under state law.

482 U.S. at 492 n.9 (citations omitted).

Subsequently, in *Doctor's Associates, Inc. v. Casarotto*, this Court ruled that "[c]ourts may not ... invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." 517 U.S. at 687. There, the Court considered the validity of a Montana state law that imposed a special notice requirement for all contracts subject to arbitration. Because this special notice requirement applied only to agreements to arbitrate, and not "'any contract,'" the Court concluded that the requirement "is thus inconsonant with, and is therefore preempted by, the federal law." *Id.* at 688.

Reinforcing those principles, the Court in *AT&T Mobility LLC v. Concepcion* made it abundantly clear that state rules purporting to place burdens on arbitration agreements that do not exist for other types of contracts are incompatible with the FAA and, therefore, are invalid. 563 U.S. at 340. *Concepcion* addressed the question whether California's special rule in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), to determine the enforceability of an arbitration agreement containing a class action waiver was preempted by the FAA. 563 U.S. at 352. In holding that it was, this Court reasoned that Section 2's savings clause allows for general contract defenses to invalidate an arbitration agreement, but "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343. Therefore, by essentially "[r]equiring the availability of classwide arbitration," *id.* at 344, California's *Discover Bank* rule "create[d] a scheme inconsistent with the FAA," *id.*, that "[stood]

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 352.

This Court's command in *Concepcion* was clear: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 351. Yet, California does just that, if not more, by continuing to apply *Armendariz*'s arbitration-specific rules to determine the general enforceability only of arbitration agreements and not contracts in general, based on a misguided policy rationale that this Court rejected outright in *Concepcion*. Because this Court's FAA jurisprudence makes it clear that states may not enforce special rules that apply to and disadvantage only arbitration agreements, California's *Armendariz* doctrine, on which the lower court relied in refusing to compel arbitration, is preempted by the FAA. Accordingly, review and reversal of the decision below is warranted.

B. California's *Armendariz* Doctrine Imposes Special Rules Regarding The Enforceability Of Mandatory Arbitration Agreements That Are Not Required For Other Types Of Contracts, In Direct Contravention Of This Court's FAA Jurisprudence

1. The *Armendariz* doctrine is not a generally applicable contract defense within the meaning of the FAA

In *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court invalidated an employment arbitration agreement that would have required the plaintiffs to arbitrate their state-based discrimination claims rather than commence a civil action in a judicial forum. 6 P.3d at 679.

In reaching that conclusion, the court crafted a number of special rules to determine the enforceability of an arbitration agreement, purportedly to ensure that the plaintiffs' statutory rights may be fully vindicated.

First, the court adopted a five-factor "minimum requirements" test that must be met in order for an arbitration agreement to be found enforceable. *Id.* at 681-82. The court found that an arbitration agreement is lawful only if it:

> (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

Id. at 682 (citation omitted). Thus, only if those conditions are met, "an employee who is made to use arbitration as a condition of employment 'effectively may vindicate [his or her] statutory cause of action in the arbitral forum.'" *Id.* (citation omitted). In crafting these requirements, the court reasoned that forcing an employee to waive the right to pursue discrimination claims in court would violate the strong public policies underlying the state's antidiscrimination laws. *Id.* at 680-82.

Second, the court adopted a special rule of unconscionability under which an employer must present a "reasonable justification" for imposing binding arbitration. *Id.* at 692. "Without such justification," the court said, the agreement is assumed to be unconscionable. *Id.* at 694. Third, the court created a "two-strike" rule whereby an arbitration agreement is unenforceable *in its entirety* if it fails to comply

with two or more of the minimum requirements, even where the agreement contains an express severability provision. *Id.* at 695-96.

Applying *Armendariz*, the court below held that Winston's arbitration agreement was unenforceable because it purportedly failed to satisfy several of the minimum requirements, including by forcing Ramos to "pay her own attorney's fees, [and] bear half of the cost of arbitration, and [by] limiting the arbitrator's authority to provide relief authorized by statute …." Pet. App. 36a. The court also found these terms and the agreement's confidentiality clause to be substantively unconscionable, concluding that the latter provision was especially offensive as it ostensibly prevented Ramos from gathering evidence to present her case. Pet. App. 36a-40a.

Compounding its error, the court, again relying on *Armendariz*, refused to sever the offending provisions despite the agreement's explicit severability clause, holding that the arbitration clause was entirely unenforceable "as a matter of law," Pet. App. 41a, because the court was "unable to cure the unconscionability simply by striking these clauses and would instead have to reform the parties' agreements in order to enforce it." Pet. App. 45a.

California's *Armendariz* doctrine is in direct contravention of this Court's FAA jurisprudence because its rules do not constitute general contract defenses applicable to all other types of contracts. As this Court emphasized in *Concepcion*, "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343 (citations omitted). As such, under this Court's

precedents – including *Perry* and *Concepcion* – "it is not logically possible to abstain from considering the uniqueness of arbitration as a basis for unconscionability … while simultaneously finding that factors unique to arbitration support a finding of unconscionability, as in *Armendariz*." Michael Schneidereit, *A Cold Night: Unconscionability As a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 Hastings L.J. 987, 1005 (2004).

Therefore, to the extent the court below reflexively applied *Armendariz* without regard to its questionable continued viability in light of *Concepcion*, review and reversal of its decision is warranted.

2. Without further guidance from this court, California will remain free to disregard the clear command in *Concepcion* that state rules that burden arbitration are preempted by the FAA

While it may have been arguably understandable for the California Supreme Court prior to *Concepcion* to refrain from overturning or limiting its scope, the court has had ample opportunity post-*Concepcion* to reassess the continued viability of the *Armendariz* doctrine, but has continuously refused to do so. In *Sonic-Calabasas A, Inc. v. Moreno* ("*Sonic I*"), for example, decided pre-*Concepcion*, it refused to compel individual arbitration of the plaintiff's state wage claims, concluding that doing so would deprive the plaintiff of his right to invoke a special, statutorily-created wage dispute resolution mechanism referred to as the "'Berman' hearing." 247 P.3d 130, 133 (Cal. 2011). This Court subsequently granted the employer's petition for a writ of certiorari, vacated the judgment, and remanded the case for reconsideration

in light of *Concepcion*. *Sonic-Calabasas A, Inc. v. Moreno*, 565 U.S. 973 (2011).

On remand, the California Supreme Court thus held, as directed, that "the FAA preempts *Sonic I's* rule requiring arbitration of wage disputes to be preceded by a Berman hearing ...." *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 205 (Cal. 2013) ("*Sonic II*"). It nevertheless refused to compel arbitration, concluding that further fact-finding was required regarding whether the agreement is unconscionable under "generally applicable *state* laws" and thus unenforceable on that ground. *Id.* at 207 (emphasis added). Likewise, in *Sanchez v. Valencia Holding Co., LLC*, the court recognized that "'*Concepcion* ... make[s] clear that such rules, even when facially nondiscriminatory, must not disfavor arbitration *as applied* by imposing procedural requirements that 'interfere[] with fundamental attributes of arbitration,'" 353 P.3d 741, 750 (Cal. 2015), but insisted still that *Armendariz*'s unconscionability test accords with the FAA as interpreted in *Concepcion* because unconscionability itself is a general contract defense.

The California Supreme Court has had many other opportunities to revisit the validity of *Armendariz* post-*Concepcion*, including here, Pet. App. 48a, but has failed to act. *See also McGill v. Citibank, N.A.*, 393 P.3d 85, 94 (Cal. 2017) (acknowledging *Concepcion*, but finding that "[t]he contract defense at issue here—'a law established for a public reason cannot be contravened by a private agreement' (Civ. Code, § 3513)—*is* a generally applicable contract defense, i.e., it is a ground under California law for revoking any contract") (citation omitted); *Baltazar v. Forever 21, Inc.*, 367 P.3d 6 (Cal. 2016) (failing to even mention *Concepcion*, but recognizing *Armendariz* in its dis-

cussion on whether an arbitration agreement was enforceable). Further, as the court below itself acknowledged, "[s]ince *Concepcion* was decided, the California Supreme Court has reaffirmed the validity of *Armendariz* multiple times." Pet. App. 19a. Laying bare its dim opinion of *Concepcion*, the lower court went on to say, "Winston cites no applicable authority holding that *Armendariz* has been invalidated on any ground *other than that stated in Concepcion*." *Id.* (emphasis added).

California's stubborn refusal to adhere to this Court's binding FAA precedent cannot be chalked up to confusion or ignorance. Rather, its actions amount to a clear contravention of the FAA and disregard for *Concepcion*. Therefore, this Court should intervene to correct, once and for all, the California courts' chronic misapplication of *Concepcion* and their efforts to evade compliance with the FAA. Otherwise, California will continue to misapply, or even worse, disregard, *Concepcion*'s mandate that rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," *Concepcion*, 563 U.S. at 339 (citations omitted), are unenforceable.

3. California's treatment of *Concepcion* stands in stark contrast to that of other states

Indeed, other state supreme courts heard this Court's command in *Concepcion* loud and clear and have followed it by refusing to enforce state rules that apply only to arbitration or derive their meaning from an arbitration agreement. *See also DirectTV, Inc., v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Kindred Nursing Centers L.P. v. Clark*, 137 S. Ct. 1421, 1426 (2017); *Epic Sys. Corp.*, 138 S. Ct. at 1622. While specifically addressing questions on the enforceability of class

waivers in arbitration agreements, the fundamental principle applied in these cases is the same – that the FAA requires courts to enforce arbitration agreements as they would any other contract, and state rules disfavoring arbitration – like *Armendariz* – are pre-empted by the FAA.

In *Machado v. System4 LLC*, for example, the Massachusetts Supreme Court enforced an arbitration agreement containing a class waiver, noting in light of *Concepcion* that "Massachusetts public policy in favor of class proceeding in certain contexts may no longer serve, *in and of itself*, as grounds to invalidate a class waiver in an arbitration agreement ...." 989 N.E.2d 464, 467 (Mass. 2013) (emphasis added). The court observed that "where the right to a class proceeding has been waived as part of an agreement to arbitrate, *Concepcion* interprets the FAA to require enforcement of that class waiver *regardless of any State law or policy to the contrary*." *Id.* at 471 (emphasis added).

Similarly, in enforcing an arbitration agreement containing a class waiver, the Nevada Supreme Court in *Tallman v. Eighth Jud. Dist. Ct.* held that "*Concepcion* does not permit a state court to invalidate a class arbitration wavier ... on the basis that individual arbitration hampers effective vindication of an employee's state-law-based overtime and minimum wage claims." 359 P.3d 113, 122 (Nev. 2015); *see also Schnuerle v. Insight Commc'ns, Co., L.P.*, 376 S.W.3d 561, 569 (Ky. 2012) ("federal policy favoring arbitration preempts any state law or policy invalidating the class action waiver as unconscionable based solely upon the ground that the dispute involves many *de minimis* claims which are, individually, unlikely to be litigated"); *Ex parte McNaughton*, 728 So.2d 592, 598 (Ala. 1998) (declining to apply the Alabama

doctrine of mutuality of remedy or the doctrine of unconscionability because both approaches would rely on "the uniqueness of the concept of arbitration [and would assign] a suspect status to arbitration agreements [thereby flying] in the face of *Doctor's Associates*").

And the list does not end there. In *McKenzie Check Advance of Florida, LLC v. Betts*, the Florida Supreme Court upheld an arbitration agreement with a class waiver, reasoning that "the FAA preempts invalidating the class action waiver in this case on the basis of the waiver being void as against public policy." 112 So.3d 1176, 1178 (Fla. 2013). More recently, the Pennsylvania Supreme Court also recognized that this Court had "directed in *Concepcion* that state courts may not rely upon principles of general law when reviewing an arbitration agreement if that law undermines the enforcement of arbitration agreements." *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 510 (Pa. 2016).

The point is clear: while other state supreme courts have properly understood *Concepcion* as requiring that arbitration agreements be set "on an equal footing with other contracts," 563 U.S. at 339 (citation omitted), California pays lip service to this Court's message, while ignoring its force by continuing to apply the arbitration-specific *Armendariz* doctrine.

II. *ARMENDARIZ* CALLS INTO QUESTION THE LONG-TERM VIABILTY OF EMPLOYMENT ARBITRATION PROGRAMS OF CALIFORNIA EMPLOYERS WITH MULTI-STATE OPERATIONS

A. *Armendariz* Makes It Harder For California Employers With Arbitration Programs To Maintain And Uniformly Enforce Such Agreements, Disadvantaging Employers And Employees Alike

Despite the many well-recognized benefits of arbitration, including "'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes,'" *Concepcion*, 563 U.S. at 348 (citation omitted), California's arbitration-specific rules create real, practical implications for multi-state employers, among them making it virtually impossible to implement and uniformly apply an arbitration program across the employer's entire enterprise.

1. Data show that California has the most employers in the country, with the majority maintaining workplace arbitration programs

California is the home to more employers than any other state in the Union. U.S. Census Bureau, *QuickFacts United States*, *Total employer establishments* (2016).[2] Indeed, census data show that in 2016, almost 12% of the nation's employers resided in California, earning California the top spot in the country, followed by Texas and Florida. *Id.* And the

[2] *Available at* https://www.census.gov/quickfacts/geo/chart/US/BZA010216 (last visited June 17, 2019).

number of employers with business operations in California continues to increase. In 2016, for example, California reported having a total of 1,498,017 employer establishments, and that number increased to 1,538,815 in 2017 and to 1,551,834 through the second quarter of 2018. Cal. Emp't Dev. Dep't, *Size of Business Data for California (Quarterly)* (Table 1).[3] In addition, a large proportion of those employers is likely to have operations in multiple states. While there is a lack of data on the exact number of employers implementing arbitration agreements in the country, a recent study conducted by the Economic Policy Institute shows that in 2018, at least 53.9% of employers nationwide maintained arbitration programs, with 67.4% of California employers doing the same. Alexander J.S. Colvin, Economic Policy Inst., *The growing use of mandatory arbitration* 7 (Table 2) (Apr. 6, 2018).[4]

2. Arbitration programs provide many well-known benefits, including the relatively quick and efficient resolution of employment disputes

There is a reason why more than half of employers nationwide, and over two thirds in California, reportedly have implemented workplace arbitration procedures. As this Court best described it in *Concepcion*, "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute ... [a]nd the informality of arbitral proceedings is itself desira-

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[3] *Available at* https://www.labormarketinfo.edd.ca.gov/LMID/Size_of_Business_Data_for_CA.html (last visited June 17, 2019).

[4] *Available at* https://www.epi.org/files/pdf/144131.pdf (last visited June 17, 2019).

ble, reducing the cost and increasing the speed of dispute resolution. 563 U.S. at 344-45 (citations omitted). And "for parties to employment contracts ... there are real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

One of those benefits is the opportunity to resolve disputes in arbitration significantly faster than in court. Griffin Toronjo Pivateau, *Mandating Individual Arbitration: The Legality of Class Action Waivers in Employment Arbitration Agreements*, 52 Gonz. L. Rev. 541, 583 (2017). Indeed, a recent study by Micronomics showed that "cases going to award at arbitration are fully adjudicated in less time than it takes district court cases to get to trial." Roy Weinstein *et al.*, Micronomics, *Efficiency and Economic Benefits of Dispute Resolution Through Arbitration Campared with U.S. District Court Proceedings* 10 (2017).[5] The study found:

> U.S. district court cases took more than 12 months *longer* to get to *trial* than cases adjudicated in arbitration (24.2 months v. 11.6 months); when the comparison involved time through *appeal*, U.S. district and circuit cases required at least 21 months *longer* than arbitration to resolve (33.6 months v. 11.6 months).

Weinstein at 2 (footnote omitted). And in California, cases in district court take nearly 15 months longer than in arbitration to resolve (28.1 months v. 13.2 months). *Id.* (Table 2.5). While this study only focused on the adjudication of federal district court cases,

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[5] *Available at* http://www.micronomics.com/articles/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf (last visited June 17, 2019).

"the situation in state courts is likely to be even worse." *Id.* at 3.

In addition, "the relative informality of arbitration is one of the chief reasons that parties select arbitration," *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), as it "reduc[es] the cost and increase[es] the speed of dispute resolution." *Concepcion*, 563 U.S. at 345 (citations omitted). Indeed, "[p]arties generally favor arbitration precisely because of the economics of dispute resolution," *14 Penn Plaza*, 556 U.S. at 257, as it provides the "'essential virtue of resolving disputes straightaway.'" *Oxford Health*, 569 U.S. at 568 (citation omitted). Arbitration allows employees to prosecute their claims without incurring substantial fees in filing suit and conducting lengthy discovery. As one commentator observed, "'the costs of American discovery have risen to such a high level that many Americans with real disputes requiring resolution are simply excluded from the courts and, thus, from any real chance of obtaining justice in a peaceable manner.'" Robert Hardaway *et al.*, *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 Rutgers L. Rev. 521, 529 (2011) (footnote omitted).

Furthermore, arbitration provides both employees and employers with greater flexibility in how to conduct the proceeding than is available in the courts. Arbitrations typically are conducted in conference rooms, not courtrooms, and schedules can also be modified to accommodate all parties – something not readily available in court. Pivateau, 52 Gonz. L. Rev. at 583. Also, the parties in arbitration can shape the manner of the proceeding by limiting evidentiary rules, for instance to allow for the introduction of otherwise inadmissible evidence. *Id.* at 583-84. Most

distinguishable, the parties in arbitration can select the arbitrator of their choosing with an expertise in the subject matter, reducing the time spent educating the arbitrator, compared to the jury. *Id.*

Moreover, the confidential nature of arbitration is beneficial for both employers and employees. On the one hand, confidentiality allows employers to resolve claims without causing disruption to the workplace. *Id.* at 584. On the other, confidentiality allows employees to protect the details of the complaint from other coworkers, especially with respect to sensitive matters. *Id.* Lastly, arbitration provides the parties with a sense of finality, which ensures that disputes do not linger for years to follow. *Id.* at 584-85.

Despite all the tangible benefits of employment arbitration, decisions like the one below (and many others before and after) only make it less likely that employers will retain arbitration programs in California and beyond. California courts continue to exhibit a deep skepticism of (if not outright hostility towards) arbitration. Indeed:

> Today, courts in California translate their judicial hostility into seemingly innocuous pronouncements of 'unconscionability' ... Beginning with the California Supreme Court's seminal decision in *Armendariz* ... (and perhaps before), California courts—and the Ninth Circuit—have taken the FAA's 'savings clause' where no court has gone before.

Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 61-62 (2005) (footnote omitted). In

fact, *Armendariz* remains a particularly potent means of invalidating arbitration agreements in California, despite its "dubious validity from a preemption standpoint." E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 Harv. Negot. L. Rev. 1, 5 (2015) (footnote omitted).

B. *Armendariz* Reinforces The Long-Discredited Notion That Arbitration Is An Inferior Means Of Resolving Employment Disputes, Increasing The Risk California Employers Will Abandon Such Procedures Entirely

Armendariz poses a significant impediment to alternative dispute resolution in California among the 67.4% of employers with arbitration agreements,[6] especially those with multi-state operations. If, for example, an employer's companywide arbitration agreement is held unenforceable (and inseverable) by a California court applying *Armendariz*, that action invariably will send a wave of disruption to the employer's operations across states.

In that situation, does the employer modify its arbitration procedures completely to conform to California's *Armendariz* rules? Or, are employers required to litigate every time the agreement gets invalidated hoping the next California court gets it right, if at all? What if another state court has upheld the validity of the employer's arbitration agreement in accordance with *Concepcion*, but California finds it unenforceable based on *Armendariz*? The answer is not simple. But, what is clear is that California's

[6] Colvin at 7 (Table 2).

adherence to *Armendariz* creates significant practical issues for employers in California with multi-state operations that utilize arbitration procedures to resolve employment disputes.

If *Armendariz* is allowed to stand, multi-state employers are all but assured that their pre-dispute agreements to arbitrate, which as noted are often part of a larger alternative dispute resolution program, will be deemed unenforceable in California, contrary to this Court's holding and rationale in *Concepcion*. Consequently, employees and employers would lose the well-recognized benefits of arbitration, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348 (citation omitted). Such an outcome would significantly undercut the strong federal policy, as embodied in the FAA and repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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