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 Writ of Certiorari to the California Court of Appeal First Appellate District

BRIEF OF AMICI CURIAE THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AND THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does this decision, dictated by the California Supreme Court's *Armendariz* opinion mandating specific conditions for the validity of employment arbitration agreements, violate the FAA's broad preemptive proscription against treating arbitration contracts differently from other contracts?

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INTEREST OF AMICI[1]

The Civil Justice Association of California ("CJAC") is a 40-year-old nonprofit organization whose members are businesses, professional associations and financial institutions. CJAC's principal purpose is to educate the public and its governing bodies on ways to make laws for determining who gets paid, how much, and by whom when the conduct of some occasions harm to others more fair, certain, and economical. Toward this end, CJAC regularly participates in the courts and the legislature to promote and protect voluntary arbitration as an alternative to judicial mechanisms for resolving liability disputes.

CJAC's members collectively employ many thousands of people in California and hundreds of thousands nationally to produce various products and services. Most of CJAC's members have elected, as have many employers throughout the country,[2] to resolve disputes with their employees over employment matters through binding arbitration.

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and have consented to the filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amici*, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief.

[2] According to one study, approximately 55 percent of the workforce, or 60 million employees, are covered by employment arbitration agreements. Alexander J.S. Colvin, *Economic Policy Institute* (Sept. 27, 2017), available at https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

The Association of Southern California Defense Counsel ("ASCDC") is the nation's largest regional organization of lawyers who specialize in defending civil actions. ASCDC counts as members over 1,000 attorneys in Southern and Central California, and is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous cases, including those that concern the scope and application of the FAA. ASDC and CJAC independently urged the California Supreme Court to review the decision in this case.

CJAC and ASCDC welcomed *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) ("*Concepcion*") and kindred Court opinions believing they would at long last assure that agreements to decide disputes by arbitration would be placed on an "equal footing" with other contracts and enforced accordingly. But our initial enthusiasm has been dampened by hostile judicial end-runs around the FAA by *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000) ("*Armendariz*") and similar decisions extrapolating the "unconscionability" doctrine to place endless obstacles in the way of contractual arbitration.[3] The decision in this case is a major roadblock to arbitration that deserves Court review.

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[3] "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion,* 563 U.S. at 342 (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)).

INTRODUCTION

The California Supreme Court held in *Armendariz* that an agreement to resolve future disputes between an employer and employee by arbitration must satisfy five specific requirements. These requirements, which supposedly stem from the employee's right to "vindicate his or her statutory rights" 6 P.3d at 674, include the following "minimum fairness" factors an arbitration agreement must provide for: (1) neutral arbitrators, (2) more than minimal discovery, (3) a written award, (4) all relief available in court, and (5) costs, fees, or expenses for arbitration that are reasonable for employees. *Id*. at 682. Moreover, if more than one such requirement is absent from the arbitration agreement, it may be deemed unsalvageable under a unique arbitration specific anti-severability rule.

But a decade after *Armendariz*, *Concepcion* substantially undercut its authority by holding that the Federal Arbitration Act ("FAA") requires state courts to place arbitration agreements on an "equal footing" with other contracts and enforce them according to their terms. *Id*. at 339. Although *Concepcion* involved the validity of a class action waiver, the Court interpreted the FAA as casting a broad preemptive sweep that trumped a state statute providing for a nonwaivable remedy. According to the Court, the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" or that "interfere[] with fundamental attributes of arbitration." *Id*. at 343.

The decision in this case, which involves an arbitration clause in a law firm partnership agreement, is the latest example of California flouting the FAA and this Court's opinions applying it by resort to *Armendariz*'s formulaic "fairness factors." Rather than comply with *Concepcion* and other pertinent opinions of this Court, the state court decision downplayed these authorities, trumpeting instead that "[s]ince *Concepcion* was decided, the California Supreme Court has reaffirmed the validity of *Armendariz* multiple times," an observation it sought to buttress by several accompanying citations. *Ramos v. Superior Court*, 28 Cal.App.5th 1042, 1055 (2018).

On this basis the state court reversed the trial court and ruled the arbitration agreement unconscionable because it violated *Armendariz*'s "statutory vindication" rule and ensuing "minimal fairness" factors in three ways: it (1) impermissibly waived plaintiff's assertion of statutory employment rights and remedies under the state's Fair Employment and Housing Act (FEHA); (2) required each party to pay its own attorneys' fees while the FEHA entitles the prevailing party to an award of attorneys' fees; and (3) required the parties to share costs equally while *Armendariz* requires the employer to pay all costs unique to arbitration. In essence, the arbitration agreement was deemed void by that appellate decision because it "unconscionably" prevented the "effective vindication" of state law, undermining "unwaivable [state statutory] rights" and was thus unenforceable.

This decision presents a clear conflict between the supremacy of the FAA and a state law – *Armendariz* –

that imposes special requirements for arbitration agreements other than those that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Review by the Court is warranted to provide clarity and certainty about an issue of paramount importance to the public interest, namely — Can states, consistent with the FAA, require that employment arbitration contracts comply with specific requirements that do not apply to contracts generally and are contrary to the defining features of arbitration?

SUMMARY OF ARGUMENT

Ramos significantly interferes with and disfavors private contractual arbitration. *Ramos* is based on *Armendariz*, but conflicts with *Concepcion* and its progeny. The decision violates the FAA and this Court's opinions emphasizing that law's broad preemptive sweep to prevent states from impeding the enforcement of arbitration agreements according to their terms, from treating arbitration contracts differently from, or more hostilely than, contracts generally.

Ramos holds the employment arbitration contract here void because it runs afoul of *Armendariz*'s "statutory vindication" rule by not providing plaintiff all relief that would be available in court, requires her to pay half the costs of arbitration and to pay her own attorney fees. According to *Ramos*, these three provisions cannot be severed, rendering the entire agreement "unconscionable" and unenforceable, beyond the FAA's preemptive safety net.

But *Ramos* is mistaken and in conflict with this Court's teachings on the scope and application of the FAA. A number of federal and California courts, as well as legal scholars, have commented that *Armendariz*, the bedrock decision dictating *Ramos*, is "doomed," "condemned" and "preempted" by *Concepcion*. That opinion and others of the Court make clear arbitration permits parties to waive remedies that might otherwise be available to them in court. Indeed, the "fundamental attributes" of arbitration – speed, informality, efficiency and reduced costs – are achieved by agreeing to arbitrate according to specific rules that waive conventional litigation remedies and procedures or provide for alternate ones. Parties to arbitration can stipulate, for instance, to restrict or waive class action remedies, the amount or kind of recoverable damages, and define the scope of discovery, equitable relief and reasonable allocation of attorney fees and costs.

There cannot be, contrary to *Ramos* and *Armendariz,* an "effective vindication" rule entitling a party to all *state* statutory remedies available in court absent consent of the parties to the arbitration contract, express or implied. The FAA is only concerned with the "effective vindication" of federal, not state law; and it is state law that *Ramos,* following *Armendariz,* elevates over the FAA to impede the enforcement of arbitration agreements on their terms. This is an upside-down decision damaging to contractual arbitration and deserving of the Court's corrective guidance.

REASONS TO GRANT THE WRIT

I. THE DECISION OF THE CALIFORNIA APPELLATE COURT CONFLICTS WITH THE FAA AS LIMNED BY *CONCEPCION* AND ITS PROGENY.

A conflict between a decision of the highest state court and that of this Court on a matter of federal law is a strong reason to grant certiorari. See, e.g., *Hudson v. Louisiana*, 450 U.S. 40, 42 (1981). State court decisions involving the construction and application of federal statutes may also be reviewed on certiorari when the question presented is sufficiently important. E.g., *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961). Both criteria are met by this case.

While the decision challenged here is by an intermediate state appellate court, it is predicated upon *Armendariz*. Accordingly, certiorari is appropriate to resolve conflicts between the decision, dictated by *Armendariz*,[4] and the FAA as interpreted and applied by *Concepcion* and related opinions of the Court.

"The FAA preempts any state rule discriminating on its face against arbitration . . . , and also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1427 (2017) (per curiam).

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[4] "Because *Armendariz* remains controlling law, we are bound by it. . . *Armendariz* governs our analysis." *Ramos*, *supra*, 28 Cal.App.5th at 1055.

The "defining features" or "fundamental attributes" of arbitration include "informality, efficiency, reduced costs and speed," (*American Exp. Co. v. Italian Colors Restaurant*, 570 U.S. 228, 238 (2013) ("*Amex*")) all of which can be achieved by contractual stipulations "limiting . . . issues subject to arbitration," agreeing to "arbitrate according to specific rules and to limit with whom a party will arbitrate its disputes." *Concepcion*, 563 U.S. at 343.

After *Concepcion*, lower courts cannot "rely on the uniqueness of an agreement to arbitrate" as a ground to invalidate it for "unconscionability;" and the FAA can preempt a state rule of general applicability that has a "disproportionate impact" on arbitration or "disfavors" it. *Id*. at 341.

A. The Decision's Reliance on *Armendariz* Treats Arbitration Agreements More Harshly than Contracts Generally in Violation of the FAA.

Concepcion holds that states may not enforce rules that place burdens on arbitration agreements different from or more hostile to those imposed on other types of contracts. 563 U.S. at 352. The decision here, however, does just that — it endorses a rule requiring private employment arbitration agreements to meet a higher standard for enforceability than that applicable to other private contracts, in direct contravention of the FAA. This Court has held that such a state law, whether statutorily or judicially created, is incompatible with, and therefore preempted by, the FAA. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1

(1984); *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996).

1. *Federal Courts Finding Armendariz in Conflict with the FAA and Concepcion.*

A federal court explained the basic conflict between *Armendariz* and the FAA soon after *Concepcion* was decided. *Lucas v. Hertz Corp*., 875 F.Supp.2d 991 (N.D. Cal. 2012) describes how, before *Concepcion*, courts "at both the state and federal level" invalidated arbitration agreements because they contained "limited discovery" provisions. After presenting several examples of appellate opinions invalidating arbitration agreements because they did not provide for minimal discovery, *Lucas* opined that "*Concepcion* . . . suggests that limitations on arbitral discovery no longer support a finding of substantive unconscionability." *Id*. at 1007.

Lucas quoted extensively from *Concepcion* in support of the proposition that a doctrine such as "unconscionability" cannot be "applied in a fashion that disfavors arbitration":

> In *Perry v. Thomas,* 482 U.S. 483 (1987) [holding FAA preempts state law requirement that litigants be provided a judicial forum for wage disputes] . . . we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "at law or in equity for the revocation of any contract." *Id.* at 492, n. 9 . . . We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable

> the court to effect what . . . the state legislature cannot."

Lucas, 875 F. Supp.2d at 1007.

Moreover, *Lucas* listed examples *Concepcion* gave for various "'devices and formulas' declaring arbitration against public policy" contrary to the FAA. These disapproved contrivances for what arbitration agreements must include to achieve "fairness" ranged from "judicially monitored discovery," to compliance with the "Federal Rules of Evidence," and "disposition by a jury." All of these illustrative features were not "fanciful" and could be rationalized, *Concepcion* explains, by the "exculpatory" nature of the agreements, i.e., the fact that their absence is "of greater benefit to the company than the consumer," or the employer than the employee. 875 F. Supp.2d at 1008. *Lucas* followed *Concepcion* and upheld the validity of the challenged arbitration agreement even though it barred any pre-arbitration discovery, stating that to do otherwise and comply with the *Armendariz* rule for "minimal discovery" "would have a disproportionate impact on arbitration agreements." *Id.* See also *Ruhe v. Masimo Corp.*, 2011 WL 4442790, at *2 (C.D. Cal. Sept. 16, 2011) ("Although the Northern District of California has indicated that some portion of *Armendariz* has been abrogated by *Concepcion,* it did not clarify what portion of *Armendariz* was abrogated.").

James v. Conceptus, Inc., 851 F.Supp.2d 1020 (S.D. Tex. 2012), a whistleblower-retaliation lawsuit under the federal False Claims Act against a former employer, agreed with *Lucas* that the *Armendariz*

fairness factor approach was "in serious doubt following *Concepcion*." *Id.* at 1033. According to *Conceptus,*

> *Armendariz* sets categorical, *per se* requirements specific to arbitration clauses. The[se] . . . requirements, though couched in terms of unconscionability, cannot be described as grounds that "exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, because they "apply only to arbitration [and] derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion,* 131 S.Ct. at 1746; *see also Kilgore,* 673 F.3d at 963-64. "[T]he policy arguments justifying the [*Armendariz*] rule, however worthy they may be, can no longer invalidate an otherwise enforceable arbitration agreement."

Id. at 1023.

Conceptus holds that *Concepcion* bars courts from applying *Armendariz* to "categorically" strike down cost-splitting fee provisions in arbitration agreements. And though it found the forum selection clause in the agreement to not be "unconsicionable," clarified that "[t]o the extent . . . California law on such provisions treats them differently in contracts calling for arbitration than in other contracts and is applied to 'disfavor' arbitration, that law is preempted under § 2 of the FAA." *Id.* at 1038. See also the dissenting opinion in *Zaborowski v. MHN Government Services, Inc.*, 601 Fed.Appx. 461, 464 (9th Cir. 2014) stating "[t]he reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration

agreement's purpose unlawful has 'a disproportionate impact on arbitration agreements' and should have been preempted by the FAA." This Court granted certiorari in that case on this very issue but it settled and was dismissed. *MHN Government Services, Inc v. Zaborowski*, 136 S. Ct. 1539 (2016).

2. *California Courts Finding Armendariz in Conflict with the FAA and Concepcion.*

California appellate courts have also found that the *Armendariz* fairness requirements for arbitration agreements do not square with the FAA and *Concepcion*, though their views about the abrogation of *Armendariz* unsurprisingly resulted in these opinions being depublished. For instance, *Mercado v. Doctors Medical Center of Modesto, Inc*., 2013 WL 3892990 (Cal. Ct. App. July 26, 2013) reversed the challenge to an employment arbitration agreement the trial court ruled was unconscionable and unenforceable under *Armendariz* because, similar to the agreement here, it "provided the employee was entitled to legal representation at her own expense, contrary to the statutory provision for an award of attorney fees to a successful employee under the FEHA." *Id*. at *6.

Mercado recognized that *Concepcion* and other opinions of this Court "cast doubt on the continued validity of *Armendariz*." *Id*. at *7. *Mercado* explained that, under *Concepcion*, a court cannot "rely on the uniqueness of an agreement to arbitrate" to invalidate an agreement as unconscionable, describing *Armendariz's* special minimum requirements for arbitration agreements "to be the type of state rule *Concepcion* condemned." *Id*.

Other California appellate courts have acknowledged the uncertainty and confusion posited by *Armendariz* when measured against *Concepcion*'s holding and reasoning. See also dissenting opinion in *Elijahjuan v. Superior Court*, 210 Cal.App.4th 15, 33 (2012) ("There have been inconsistent appellate opinions in California about the scope of *Concepcion* as it may affect the unconscionability defense to enforcement of arbitration . . .."); and *Flannery v. Law Offices of Burch & Couldston, LLP*, 2016 WL 7494876 (Cal. Ct. of Appeal) *7 (after observing that "one of the primary advantages of arbitration . . . is that it can resolve disputes faster and cheaper than judicial proceedings," cites *Armendariz* followed by "overruled on other grounds by" *Concepcion*.).

3. *Law Reviews Finding Armendariz in Conflict with the FAA and Concepcion.*

Scholarly legal commentaries concur with federal and state court opinions underscoring the fundamental contradiction between the *Armendariz* "fairness factors" essential for the validity of arbitration agreements and *Concepcion*'s broad preemptive sweep favoring arbitration: "State-specific standards developed specifically for arbitration agreements – like the *Discover Bank* rule in *Concepcion* and the *Armendariz* fairness factors for employment arbitration – seem doomed under *Concepcion*'s broad preemption analysis." Imre Stephen Szalai, *More than Class Action Killers: the Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 48 (2014).

"*Armendariz* increases the costs of employment arbitration by requiring a certain level of discovery and a reasoned opinion by the arbitrator. *Armendariz* then mandates that the employer bear any of these costs and any other costs that an employee incurs in arbitration that she would not have incurred had she litigated her claim against the employer in court. Thus, together and separately, each of these *Armendariz* requirements disadvantages arbitration." 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, 24 (2015).

"[A]spects of the *per se* rule in *Armendariz* likely do not stand up to *Concepcion*'s underlying reasoning . . .." Arpan A. Sura &, Robert A. DeRise, *Conceptualizing Concepcion: the Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 450 (2013).

B. The Decision Improperly Incorporates and Misapplies this Court's "Effective Vindication" Principle to Void the Arbitration Agreement.

According to *Armendariz*, for an arbitration clause to be valid it must permit "an employee to *vindicate* his or her statutory rights." 24 Cal.4th at 90, 98-103; italics added. *Armendariz* borrowed and applied to the assertion of California's FEHA claim the "effective vindication" rationale from dicta in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985) concerning the arbitrability of a federal Sherman Act claim. The appellate opinion here held that because "effective vindication" of plaintiff's state

FEHA could not, due to *Armendariz*, occur under the arbitration agreement, it was void for unconscionability. But *Amex* teaches that a class-action waiver is enforceable even though it violates an "unconscionability" rule based on a "vindication rationale" originating in *state* policy. 570 U.S. at 235-239. "*Amex* . . . explained that the effective vindication doctrine was mere dictum, and the *Armendariz* fairness factors arose out of this effective vindication doctrine. Thus, *Amex* undermines the foundation of *Armendariz*." Szalai, *supra*, 35 BERKELEY J. EMP. & LAB. L at 47.

Moreover, as the dissent in *Amex* clarifies, the effective vindication doctrine is confined to *federal*, not state law, claims. The dissent stated that an arbitration agreement "may not thwart *federal* law, irrespective of exactly how it does so," and highlighted the importance of reconciling the effective vindication principle with the FAA and "all the rest of *federal* law." 570 U.S. at 240. "Our effective-vindication rule comes into play *only* when the FAA is alleged to conflict with another *federal* law. . .." *Id.* at 252; italics added. "We have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA, so the state law must "automatically bow" to federal law; any effective-vindication exception that might possibly exist would "come[] into play only when the FAA is alleged to conflict with another *federal* law." *Ibid.*

Nor does the "effective vindication" of a state asserted claim under arbitration require that claimant must be able to obtain all the relief available through

court litigation. The decision here finds "effective vindication" lacking because the arbitration agreement precludes "the arbitrators from providing remedies that would otherwise be available in a court of law," including "punitive damages." *Ramos*, 28 Cal.App.5th at 1060. But a "fundamental attribute" of arbitration can and does include stipulations by the parties to waive certain remedies; it's just that states may not prohibit arbitrators from imposing remedies like injunctive relief and punitive damages if the parties agree arbitrators may do so. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (New York rule prohibiting arbitrators from awarding punitive damages was preempted under the FAA "in the absence of an agreement that incorporated it.").

Further, *Amex*'s rejection of the specific assertion made by plaintiffs challenging the arbitration agreement there gives no comfort to the decision's claim here that the arbitration clause violates *Armendariz* because it does not require the law firm/employer to pay *all* costs of arbitration. *Amex* arose when merchants sued a credit card issuer on a class action basis for antitrust violations. The claim was brought as a class action because the maximum recovery for each individual case was $38,549, while the cost of proving the case would be hundreds of thousands or more. 570 U.S. at 231-32. Nevertheless, *Amex* enforced the class action waiver, reasoning that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." *Id.* at 233. Absent clear language in the statute to that effect, class actions are not critical to the "vindication of statutory rights." *Id.* at 234. "[T]he 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." *Id.* at 236.

Splitting the costs of arbitration between the parties, as the arbitration agreement at issue in the decision here provides, does not eliminate the right to pursue the FEHA remedy, and the plaintiff below and the decision made no showing that it did. See also *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79 (2000), holding that "the party seeking to avoid arbitration on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." *Id.* at 92.

The Court's resolution of conflicts between the *Ramos* decision's reliance on *Armendariz* as opposed to the foregoing authorities from this Court, lower federal and state courts, and legal scholars, is sorely needed. Without it, lower courts and the public will continue to be confused and confounded over what is permitted in arbitration agreements given the FAA and state unconscionability law.

CONCLUSION

"States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. 351. For this and the aforementioned reasons, amici urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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