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 APPEALS FIRST APPELLATE DISTRICT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN
Counsel of Record
ATLANTIC LEGAL FOUNDATION
500 Mamaroneck Avenue
Suite 320
Harrison, NY 10528
(914) 834-3322
mskaufman@atlanticlegal.org
Counsel for Amicus Curiae

June 2019

QUESTION PRESENTED

The Petition presents two questions:

1. Whether the adherence of California state courts to Armendariz v. Foundation Health Psychare Services, Inc., 6 P.3d 669 (Cal. 2000) disproportionately disadvantages arbitration in contravention of and preempted by the Federal Arbitration Act (see Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017) (internal quotation marks omitted) because under Armendariz, an arbitration provision in an employment agreement cannot be enforced as written unless it meets five judge-made "minimum requirements" based on policy judgments about what would be necessary to vindicate state statutory rights in an arbitral forum, and also complies with arbitration-specific unconscionability rules.
2. *Armendariz* holds that when an arbitration provision has more than one invalid term, the whole provision is presumptively invalid. This presumption applies only to arbitration agreements. Is *Armendariz*'s requirement that courts apply a more rigid severability rule to arbitration agreements than to all other contracts preempted by the FAA?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

STATUTES AND RULES

Federal Statutes

Other

INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration

[1] The parties were given timely notice of our intent to file this brief. The parties have consented to the filing of this brief, which consents have been lodged with the Court

Pursuant to Rule 37.6, *amici* affirm that no counsel for any 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 than *amici curiae* or their counsel made a monetary or other contribution to the preparation or submission of this brief.

regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

Atlantic Legal Foundation has appeared before this Court frequently as *amicus* or as counsel for *amici* in numerous cases concerning arbitration and the preemptive effect of the FAA, including several cases cited in the petition and in this brief.

INTRODUCTORY STATEMENT

The petition should be granted to correct and, hopefully, deter the very "judicial hostility towards arbitration" *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *Concepcion*, 563 U.S. at 339; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) on the part of California appellate courts which the FAA was intended to foreclose. This Court has very recently promised that it would "be alert to new devices and formulas" used to effect "judicial antagonism toward arbitration." Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018). In AT&T Mobility LLC v. Concepcion, 131S.Ct.1740 (2011), the Court held that the Federal Arbitration Act (FAA) requires courts to "place arbitration agreements on an

equal footing with other contracts." 563 U.S. 333, 339 (2011). Courts may not apply "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017) (quoting Concepcion, 563 U.S. at 339). The California courts, including the state's supreme court, nevertheless reaffirm and apply a pre-Concepcion precedent, Armendariz v. Foundation Health Psychare Services, Inc., 6 P.3d 669 (Cal. 2000) to *Concepcion*.

Armendariz has been interpreted by California courts as setting forth three arbitration-specific rules, which were the basis of the decision of the California Court of Appeal in this case:

-- An arbitration clause in an employment agreement is invalid unless it satisfies numerous arbitration-specific "minimum requirements," that vindicate rights conferred by state law when a dispute is being arbitrated.

– a term in an employment agreement arbitration provision is unconscionable per se if it fails to satisfy one of those "minimum requirements" or otherwise fails to satisfy any number of ad hoc arbitration-specific rules designed to protect employees.

–,In contrast to a liberal policy toward severability in every other context, when an arbitration provision has more than one invalid term, the whole provision is presumptively invalid and the parties must litigate in court, rather than reforming the contract by severing the "offensive" provisions.

Four years ago, this Court granted in a case raising a similar Armendariz-based arbitration-specific severability rule., *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 462 (9th Cir. 2014), cert. granted, 136 S. Ct. 27 (2015), but that case was mooted by settlement, 136 S. Ct. 1539 (2016).

This Court has found it necessary to confront anti-arbitration obstructionism repeatedly and announce that "lower courts must follow this Court's holding in Concepcion." See, *e.g.*, DirecTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015). Apparently, the California courts must be reminded again that, simply put, *Armendariz* is no longer good law.

SUMMARY OF ARGUMENT

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (and consistently since) , this Court reiterated that the Federal Arbitration Act (FAA) requires courts to "place arbitration agreements on an equal

footing with other contracts.". That means that courts may not craft "legal rules that apply only to arbitration" or that disproportionately disadvantage arbitration compacts. See *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (internal quotation marks omitted).

In this case, the California Court of Appeal invalidated an arbitration agreement in light of its pre-*Concepcion* opinion, *Armendariz v. Foundation Health Psychare Services, Inc.*, 6 P.3d 669 (Cal. 2000), which the California Supreme Court has repeatedly insisted is "good law." More significant and troubling is the California judiciary's persistent and obdurate defiance of this Court's clear rulings on arbitration.

In *Concepcion* this Court held that courts (and state legislatures) may not craft "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (2017) (quoting *Concepcion*, 563 U.S. at 339). The California Supreme Court uniquely and openly has reaffirmined its pre-*Concepcion Armendariz* decision that does exactly that. After this Court's decision in *Concepcion*, no other jurisdiction of which we are aware has mandated that its pre-existing

arbitration-specific rules survive FAA preemption. Even the Ninth Circuit has vocally protested *Armendariz*'s arbitration-specific rules as being at odds with this Court' holding in *Concepcion*. See, *e.g.*, Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1159 (9th Cir. 2013) These protests have fallen on deaf ears in the California appellate courts.

This Court recognized this anomaly four years ago, when it granted a petition for certiorari directly addressing *Armendariz*'s - arbitration specific severability rule. See *Zaborowski v. MHN Gov't Servs., Inc.*,, *cert. granted*, 136 S. Ct. 27 (2015). That appeal was mooted by settlement before oral argument, depriving the Court of the opportunity to address the issue.. See 136 S. Ct. 1539 (2016).

This Court has found it necessary to repeat that "lower courts must follow this Court's holding in *Concepcion*." See *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).

California's *Armendariz* Rule for arbitration is at odds with the FAA. The California courts continue to invalidate an arbitration agreements in light of the pre-*Concepcion* opinion

It is quite clear the California courts need a stern reminder that state law that

circumvents the supremacy of federal law will not stand.

ARGUMENT

I. FEDERAL LAW REQUIRES THAT ARBITRATION AGREEMENTS BE TREATED ON AN EQUAL FOOTING WITH ALL OTHER CONTRACTS.

The "fundamental principle" that "arbitration is a matter of contract" has been repeatedly affirmed by this Court in numerous recent cases. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011) (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Volt Information Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). This Court has likewise held that "courts must 'rigorously enforce' arbitration agreements according to their terms..." *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; *Concepcion*, 131 S. Ct. at 1748.

The FAA was enacted to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991). The FAA reflects "a liberal federal policy favoring arbitration." *Concepcion*, 563

U.S. at 339 (internal quotation marks and citation omitted).

FAA § 2, the "primary substantive provision of the Act," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides that arbitration agreements are "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. "That provision creates substantive federal law regarding the enforceability of arbitration agreements," requiring courts "to place such agreements upon the same footing as other contracts." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (internal quotations omitted); see also *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). The last clause of section 2 (the "savings clause") preserves the ability of states to apply "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" to the enforcement of arbitration agreements, but it precludes application of any state law defenses "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

FAA §§3 and 4 implement the substantive pro-arbitration policy of §2. Section 3 requires courts to stay litigation of arbitrable claims so that arbitration may proceed "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. §§3 and 4 provide that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" unless "the making of the agreement for arbitration or the failure to comply therewith" are called into question. *Id*. §4.

9 U.S.C. §2. embodies a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and requires that both federal and state courts place arbitration agreements on an equal footing with other contracts and enforce arbitration agreements according to their terms. See *Concepcion*, 563 U.S. at 339; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Volt Info. Scis., Inc.*, 489 U.S. 468, 478 (1989). This Court has interpreted the savings clause of § 2 of the FAA to exempt from preemption generally applicable contract defenses under state law, as long as they are not "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcio*n, 563 U.S. at 339; see *Doctor's*

Assocs., Inc. v. Casarotto, supra at 6876); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987). Thus, FAA preemption applies not just "[w]hen state law prohibits outright the arbitration of a particular type of claim," *Concepcion*, 563 U.S. at 341, but also "when a doctrine normally thought to be generally applicable … is alleged to have been applied in a fashion that disfavors arbitration." *Id*.

II. CALIFORNIA LAW TREATS ARBITRATION AGREEMENTS (IN THE EMPLOYMENT CONTEXT) MUCH LESS FAVORABLY THAN OTHER CONTRACTS.

The law of California laid out by the court in *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) and the decision of the California Court of Appeal's below frustrates federal public policy principles and this Court's teaching that the FAA "embodies . . . [a] national policy favoring arbitration." *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); see also, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). *Armendariz* is the principal authority relied upon by California state trial and appellate courts to vitiate or nullify arbitration agreements.

The California Supreme Court in *Armendariz* held that a mandatory arbitration agreement with multiple provisions that were unconscionable violated public policy; since the agreement could not be reformed and offending provisions could not be severed; thus the whole agreement was unenforceable. *Armendariz* outlines several factors that can render an arbitration

agreement either procedurally or substantively "unconscionable." See *Armendariz*, 6 P.3d at 682).

Typically, procedural unconscionability arises because the employee was required to sign the agreement as a condition of employment or the employee had no power in negotiating the agreement before signing. See *Armendariz*, 6 P.3d 669,682 (2000). Substantive unconscionability refers to the unconscionability in the terms of a contract and means that the terms are unfair. Substantive unconscionability results when contract terms are excessively oppressive or harsh. The doctrine of unconscionability permits the court to refuse to enforce a contract simply when it feels the contract to be unfair.

Relying on *Armendariz*, the California courts treat the enforcement of these arbitration agreements in a different manner than other contracts. Under *Armendariz*, an arbitration agreement is valid only if the agreement (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the 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. See *Armendariz,* 6 P.3d at 682. Factors that neglect any of the five aspects above are considered unconscionable.

The court in *Armendariz* began this subversion by laying out ways in which they can invalidate an arbitration agreement. First, agreements are not arbitrable unless "the arbitration permits an employee to vindicate his or her "statutory rights" under state law. 6 P.3d. at 674. Second, the *Armendariz* court crafted special rules for assessing whether provisions of employment arbitration agreements are unconscionable. The court was concerned that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." The court applied these special rules they created to strike provisions they found "unfairly one-sided" and "lack[ing] mutuality." *Id*. at 692-93. Additionally, the *Armendariz* court decided whether the arbitration agreement could be enforced without the offending provisions. It held that the terms were not severable. Thus the *Armendariz* court voided the whole arbitration agreement simply because it "contain[ed] more than one unlawful provision," and the court discerned a "systematic effort to impose arbitration on an

employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Id*. at 697.

The majority in *Armendariz* took an approach that places arbitration on a lower footing than other contracts. This approach mandates that when an employer "imposes" mandatory arbitration and the employee asserts a statutory claim, the employer must bear all costs "unique to arbitration."*Armendariz*, 6 P.3d at 689. Judge Chin, in his dissent in *Armendariz* explained that the possible imposition of arbitration forum costs automatically undermines an employee's statutory rights. *Id*. at 700, but he saw no reason to adopt the majority's approach and felt that the issue of apportionment was better left to the arbitrator, and that any problems with the arbitrator's decision should be resolved at the judicial review stage. *Id*. at 700.

If the Court of Appeal had applied California's general contract severability rules in this case, it would have severed the offending provisions but enforced the agreement to arbitrate, as did the Superior Court. The trial court had no problem crafting an order striking down the provisions it found to be unconscionable and ordering the parties

to proceed to arbitration without the "offending" terms. App. 47a. But because the Court of Appeal instead applied California's arbitration-specific *Armendariz* severability rule, the arbitration provision was voided entirely, because it "contain[ed] four unconscionable terms." App. 42a-46a.

California courts appear to be unusually hostile toward arbitration agreements. See, *e.g., Preston v. Ferrer*, 552 U.S. 346 (2008) (reversing the California Court of Appeal and holding that the FAA preempts a state law displacing arbitration as the appropriate forum when the parties have contracted to settle all disputes in arbitration); *Perry v. Thomas*, 482 U.S. 483 (1987) (reversing the California Court of Appeal and holding that the FAA preempted a state law requirement that an action for wage collection is maintained despite a private arbitration agreement); and *Concepcion*, 563 U.S. at 333 (holding that a California Court of Appeal rule regarding the unconscionability of class arbitration waiver is preempted by the FAA).

Indeed, California's non-enforcement of the FAA has acarids often that even a trial judge from California's has stated "Trial courts continue to receive very inconsistent direction from the U.S. Supreme Court, the

California appellate courts and the National Labor Relations Board regarding the proper interpretation and application of the Federal Arbitration Act, 9 U.S.C. § 1 et seq., to state trial court cases. Because the arbitration alternative has so much impact on case value and because it is also intimately tied up with whether or not a case can proceed on a class or 'representative' basis, this is a highly important topic." See William F. Highberger, *Compelling Arbitration: Who Knows the Rules to Apply?* (Dec. 6, 2012), available at http://apps.americanbar.org/Basle/committees/CL150000pub/newsletters/201208/compelling_arbitration.pdf. (last accessed June 14, 2019).

California's failure to place arbitration agreements "on equal footing with all other contracts," *Kindred Nursing Ctrs, supra*, is evident from the California Supreme Court's objective applying the unconscionability doctrine. *Armendariz* itself treated arbitration agreements much less favorably than other contracts, declaring that "ordinary principles of unconscionability may manifest themselves in forms *peculiar* to the *arbitration* context." *Armendariz*, 6 P.3d at 693 (emphasis added

This case provides an excellent vehicle to address the severability issue in the context of an arbitration agreement in an employment contract. The record is well developed.)[2]

III. THIS COURT SHOULD ONCE AGAIN REMIND THE CALIFORNIA STATE COURTS THAT ARBITRATION IS A MATTER OF FEDERAL LAW AND THE SUPREMACY CLAUSE APPLIES.

Amicus urges this Court to review the California Court of Appeal's decision and to end definitively the State of California's use of a singularly incompatible legal regime with respect to arbitration, while confirming its holdings in *Concepcion, Stolt-Nielsen*) and the even more recently decided *Epic Sys. Corp. v.*

---

[2]

[1] This Court has recently recognized that the severability issue itself is significant, and "cert worthy, having granted certiorari in *MHN Gov't Servvs., Inc. v Zaborowski,* 136 Ct. 27 (2015)(No. 14-1458), 2015 WL 2637766. This Court recognized this anomaly when it granted a petition for certiorari directly addressing *Armendariz*'s -arbitration specific severability rule. That appeal was mooted by settlement before oral argument, depriving the Court of the opportunity to address the issue.. See 136 S. Ct. 1539 (2016).

Lewis, 138 S.Ct. 162 (2018), and *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019). These cases, and others, recognize the overriding Congressional policy favoring arbitration. This Court should make clear that federal policy cannot be circumvented by contorted readings of contractual arbitration provisions.

The California Supreme Court has repeatedly reaffirmed key aspects of the *Armendariz* rule in the years since this Court decided *Concepcion*. See, *e.g.*, *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013); *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 753 (Cal. 2015). Thus, the California courts have come to conclude that each feature of *Armendariz* remains "good law." App. 18a-19a

California's *Armendariz* rule should never have survived this Court's decision in *Concepcion*. Under these circumstances, forceful invalidation of this reckless state rule, which is a clear obstacle to the FAA, is even more pressing for review than it was four years ago. Not only have the California courts refused to make such reforms, they have reaffirmed numerous aspects of *Armendariz* in the cases since *Concepcion* was decided. See, *e.g.*, *McGill v. Citibank*, N.A.,

232 Cal. App. 4th 753, 181 Cal. Rptr. 3d 494 (2014)) confirming that in California "*Armendariz* is Good Law" in every respect. App. 18a-19a; see . *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912, 937 (N.D. Cal. 2018) ("In the wake of *Concepcion*, California courts, including the California Supreme Court, have found that *Armendariz* is still good law ....").

The California Supreme Court uniquely has openly reaffirmed its pre-*Concepcion Armendariz* decision. No other jurisdiction of which we are aware has, after this Court's decision in *Concepcion*, mandated that its pre-existing arbitration-specific rules survive FAA preemption. Even the Ninth Circuit has vocally protested *Armendariz*'s arbitration-specific rules as being at odds with this Court' holding in *Concepcion*. See, *e.g.*, Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1159 (9th Cir. 2013) These protests have fallen on deaf ears in the California appellate courts.

The California Supreme Court has had ample time to correct its obdurate refusal conform its laws to *Concepcion*, but has refused to do so. This Court should send a clear and direct message that open defiance of the Supremacy Clauise will not be tolerated.

CONCLUSION

The petition for a writ of certiorari should be granted and, on the merits, the judgment of the California Court of Appeals should be vacated.

Respectfully submitted,

Martin S. Kaufman
Atlantic Legal Foundation
500 Mamaroneck Avenue
Suite 320
Harrison, New York 10528
(914) 834-3322
mskaufman@atlanticlegal.org
Attorneys for *Amicus Curiae*
Atlantic Legal Foundation

June 17, 2019