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

REPLY BRIEF FOR PETITIONER

Lynne C. Hermle
Jessica R. Perry
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025

E. Joshua Rosenkranz
Counsel of Record
Daniel A. Rubens
Ethan P. Fallon
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5380
jrosenkranz@orrick.com

Counsel for Petitioner

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INTRODUCTION

As the petition explained and numerous amici have now emphasized, the opinion below is emblematic of California courts' adherence to the overtly arbitration-disfavoring rules set forth in *Armendariz v. Foundation Health Psychcare Services*, 6 P.3d 669 (Cal. 2000). Respondent declines to defend *Armendariz*'s stated rationale for imposing "minimum requirements"—i.e., to ensure the effective vindication of state-law rights. Respondent also offers no reason why *Armendariz*'s arbitration-specific severability rule has become any less certworthy since this Court granted certiorari on the same question in *MHN Government Services, Inc. v. Zaborowski*, 136 S. Ct. 27 (2015). And she cannot deny that issues are tremendously consequential to employers with a California presence.

Instead, Respondent mainly rewrites the opinion below in hopes of persuading this Court that this case does not actually present either question. She insists that the opinion has little to do with *Armendariz*, when that case featured prominently in its analysis. And she maintains that the opinion revolved around the invalidation of a single sentence providing for deference to the partnership's business judgments, when the court found "four unconscionable terms," App. 44a-45a—not just the one.

The opinion speaks for itself. It squarely raises the same severability questions on which this Court previously granted certiorari. And it presents the first meaningful opportunity for the Court to address

whether *Armendariz* "minimum requirements" for arbitrating state statutory claims survive this Court's FAA jurisprudence. Those questions merit this Court's review.

ARGUMENT

I. This Court Should Review The Court Of Appeal's Application Of The *Armendariz* Prerequisites For Enforcing Agreements To Arbitrate State Statutory Claims.

Respondent does not dispute that *Armendariz* promulgated five rigid "minimum requirements" for enforcing arbitration agreements that cover employees' "unwaivable" rights, and additional ad hoc requirements under a demanding unconscionability rule. Respondent barely defends *Armendariz* in the face of an onslaught of criticisms that *Armendariz* is irreconcilable with this Court's precedents. *E.g.*, *Mercado v. Doctors Med. Ctr. of Modesto, Inc.*, No. F064478, 2013 WL 3892990, at *6 (Cal. Ct. App. July 26, 2013) (nonprecedential) (*Armendariz* "carve[s] out a class of claims … and applie[s] a special rule to agreements to arbitrate those claims"); *see also* Pet. 21 & n.1; CJAC Amicus Br. 9-13. And she does not dispute that there is an irreconcilable division of authority over *Armendariz*'s approach of overriding the FAA to vindicate state policies. Pet. 18-21. Instead, Respondent attempts to portray the opinion below as having "minimal … overlap with *Armendariz*," BIO 3, and recasts *Armendariz* and the opinion below into opinions about general contract-law doctrines in cases that just happened to involve arbitration. Both efforts fail.

A. To say "[t]he opinion below cited to *Armendariz*," BIO 13, is like saying *Moby-Dick* mentions a whale. *Armendariz* is a dominant presence in the opinion below. Three out of four of the substantive sections, encompassing 15 pages, name *Armendariz* in the heading: "***Armendariz* is Good Law**," App. 18a-19a; "***Armendariz* Governs Our Analysis**," App. 20a-26a; and "***Armendariz* Requirements**," App. 26a-33a. That first section confronts—and rejects—the core legal argument advanced here, holding that *Armendariz* is consistent with this Court's FAA jurisprudence. App. 18a-19a. The second concludes by saying: "we consider whether [the Partnership Agreement] … passes muster under *Armendariz*." App. 26a. And the third begins by reciting *Armendariz*'s five "minimum requirements which must be met to ensure the preservation of statutory rights in an arbitral forum," and analyzes how the Partnership Agreement fares under each. App. 26a-33a. Every time the court found a provision invalid, it declared, "Under *Armendariz*, this provision cannot stand," App. 33a, or cited *Armendariz* to the same effect, App. 30a, 36a.

By Respondent's telling, the opinion below focused almost entirely on the validity of a single provision. She tendentiously calls it "the 'firm always wins' clause," *e.g.*, BIO 13, and mentions it 27 times. It is more appropriately called the "partnership judgment" provision, as it simply means that an arbitrator may not second-guess the partnership with respect to business matters. *See infra* 5 n.1. But labels aside, the important point here is that the court found four separate terms invalid. And as discussed below (at 9-13), if any specific provision were actually so essential

to the court's analysis, it can and should have been severed.

Relatedly, Respondent portrays the opinion as focusing on just one of the *Armendariz* requirements, regarding "remedy limitations." BIO 17. But that too is wrong. The court cranked through them sequentially—in the order in which *Armendariz* lists them—with a separate heading for each. It gave no primacy to the "Limitation of Remedies" category. Moreover, Respondent simply ignores that the court invalidated some provisions for reasons that have nothing to do with "remedy limitations." The court struck the provision requiring the parties to share the costs of arbitration, applying a different "minimum requirement," under the heading "***Employer to Pay All Costs Unique to Arbitration***." App. 33a. It also struck the confidentiality provision, finding it "substantively unconscionable." App. 40a.

The court's treatment of those two provisions—both specific to arbitration, and neither having anything to do with remedies—also defies this Court's precedent in ways that are exemplary of *Armendariz*'s flaws. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000) (under the FAA, the party resisting arbitration agreement bears the burden of proving that cost-sharing would render arbitration "prohibitively expensive"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010) (noting "'[t]he presumption of privacy and confidentiality' that applies in many bilateral arbitrations"). Yet, Respondent practically ignores them.

In short, the Court of Appeal's application of *Armendariz* to the one clause Respondent chooses to isolate does not detract from the suitability of this case as a vehicle for deciding the first question presented: whether state courts can apply arbitration-specific rules on the belief that such rules are necessary to vindicate state statutory rights.

B. Respondent changes nothing by focusing just on the partnership-judgment provision. Even accepting the Court of Appeal's highly questionable interpretation,[1] the court's treatment of that provision violates this Court's precedent. The court struck the provision because it overrides "unwaivable" state-law rights. Echoing *Armendariz*, it held that this is impermissible because the courts must allow participants in arbitration to "vindicate" those rights. App. 22a

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[1] Contrary to Respondent's suggestion (at 11-12 n.3), Winston has consistently disclaimed any such reading. *See* App. 29a-30a & nn.8-9. The provision does not explicitly "preclude[] the arbitrators from awarding [any partner] any of the remedies authorized under California law when [antidiscrimination] rights are violated," much less say "the firm always wins." BIO 12. Respondent offered no evidence that anyone in the history of the firm had ever read it that way—much less enforced it. Yet, the court below construed it as granting the arbitrators the meaningless power to "assess[]" the legality of decisions, while denying them the power to grant relief. App. 28a. A much more natural reading is the one the trial court adopted—that the provision is akin to the business judgment rule, under which courts defer to the judgment of corporate directors in the exercise of their broad discretion in making corporate policy decisions. *See* App. to Pet. for Writ of Mandate 35 (oral argument transcript) ("THE COURT: … They can't substitute their judgment for the partners' … but they can certainly evaluate whether the partners' decisions have violated the law.").

(citing 6 P.3d at 682). The question presented asks whether that rationale is permissible. Our position is that it is not, because when a "*state* law" is involved, the "effective-vindication rule" cannot "possibly [be] implicate[d]" in blunting the FAA's preemptive force. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting).

Respondent does not disagree that this "aspect[] of *Armendariz*," BIO 29, is squarely before the Court on this petition. But she argues it is unworthy for review because, in her view, *Armendariz*'s ban on remedy-limiting provisions does not implicate the effective-vindication rationale this Court rejected in *Italian Colors*. She claims this application of *Armendariz* rests an entirely distinct principle, which she calls a "rule against remedy-stripping." BIO 16. That just ignores what both *Armendariz* and the opinion below actually say. In any event, that reasoning is just a euphemism for the same problem. The reason California courts refuse to enforce remedial limitations in arbitration agreements is that doing so (in their view) prevents employees from "'vindicat[ing] [their] statutory cause of action in the arbitral forum.'" *Armendariz*, 6 P.3d at 682.

Whatever the label, any California public policy against waiver of public rights is beside the point. An equally problematic feature of the *Armendariz* minimum requirements is that they "apply only to arbitration [and] derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Respondent rewrites *Armendariz* in asserting that the case "happened to arise in an arbitration context," but

its holdings rest on arbitration-agnostic, "generally applicable … principle[s]." BIO 2, 4. The *Armendariz* requirements for "lawful arbitration" are of course arbitration-specific: They reflect the California Supreme Court's express judgment that special protections are needed to ensure the vindication of statutory claims "'in the arbitral forum.'" 6 P.3d at 681, 693.

C. Respondent has little to say in defense of the Court of Appeal's unconscionability holding. *See* BIO 31-33. She does not contest, for example, that "confidentiality is a paradigmatic aspect of arbitration," such that an "attack on the confidentiality provision is, in part, an attack on the character of arbitration itself." *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008); *see* Pet. 26-27.

Instead, Respondent's main approach is to unconvincingly downplay the ruling. Respondent dismisses it as "fact-bound" because it turned on the particular language of the confidentiality provision. BIO 31. Far from being "very broad," BIO 32, the provision is standard and unremarkable: It simply requires that "all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence." App. 6a; *see* Ropes Amicus Br. 13-14.

Respondent also insists that the ruling here "is not emblematic of any larger trend under California law," urging the Court to take comfort because she can cite three instances in which an unconscionability challenge to an arbitration provision failed. BIO 33. But she ignores an unbroken line of California Supreme Court decisions sustaining such challenges to

provisions that courts in other jurisdictions would not strike. *See* DRI Amicus Br. 16-22.

D. The petition demonstrated that California is an outlier in applying categorical arbitration-specific prerequisites for the enforcement of agreements to arbitrate statutory claims and with regard to its demanding unconscionability standard. Pet. 18-21. Respondent gives less than half an answer—again, focusing only on one of *Armendariz*'s five requirements—and asserting that other courts also have rejected certain "remedy limitations" contained in arbitration agreements. BIO 17-20. Respondent does not meaningfully dispute that California is an outlier in invalidating the two other provisions the court struck here—on cost-sharing and confidentiality.

In any event, the remedial-limitation cases Respondent discusses do not place *Armendariz* in the mainstream. Most of those cases either were decided before *Concepcion* or do not involve a preemption challenge. The few that remain are distinguishable from *Armendariz* in that they perform a case-specific analysis, rather than applying rigid rule that arbitration agreements must "'provide[] for all of the types of relief that would otherwise be available in court.'" *Armendariz*, 6 P.3d at 682.[2]

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[2] *See, e.g.*, *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635, 639 (Wash. 2013) (applying general unconscionability doctrine); *Machado v. System4 LLC*, 989 N.E.2d 464, 473 (Mass. 2013) (severing waiver of multiple damages upon finding that it violated public policy and did not "impinge on any fundamental characteristic of arbitration").

II. This Court Should Review The Court Of Appeal's Severability Holding, Which Applied The Same Arbitration-Disfavoring Rule This Court Was Set To Review In *Zaborowski*.

In opposing review of the second question presented, Respondent toggles between two approaches. One rewrites history and the other rewrites the opinion below.

A. The critical historical fact is that this Court, in *Zaborowski*, granted certiorari on the very same question we present here. It did so in the face of the very same arguments Respondent makes here. The cert. petitions in both cases explained two basic points. First, California courts follow a rule, which they attribute to *Armendariz*, that the presence of more than one invalid clause means that an arbitration agreement is "permeated by an unlawful purpose." *Compare* Pet. 29-30 *with* Cert. Pet., *Zaborowski*, No. 14-1458, 2015 WL 3637766, at *12-14. Second, that is a different rule than California courts apply outside the arbitration context. *Compare* Pet. 30-31 *with* Cert. Pet., *Zaborowski*, 2015 WL 3637766, at *14-16. Respondent's argument against both points practically cribs from the *Zaborowski* brief in opposition.

As to the first, Respondent asserts that "[n]o such rule exists," BIO 22—that "*Armendariz* did not establish a rule that arbitration agreements with more than one unconscionable provision are presumptively unenforceable," BIO 27. That is what Zaborowski unsuccessfully argued. *See* BIO, 2015 WL 5071991, at

*19. This Court was evidently not sufficiently persuaded to deny certiorari. And for good reason. As the petition (both here and *Zaborowski*) explained more fully, the California Supreme Court has announced that "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." Pet. 30-31 (quoting *Armendariz*, 6 P.3d at 697). And the lower courts consistently treat that as determinative. Pet. 31 n.4 (collecting and quoting cases).

As to the second point, Respondent contends that "[t]he rule *Armendariz* announced was … non-arbitration-focused." BIO 26. That, too, is what Zaborowski said. *See* BIO, 2015 WL 5071991, at *16 (U.S. Aug. 24, 2015) ("The standard is not 'arbitration-only,' because it applies to contracts of all kinds."). This Court had good reason to be unpersuaded by that argument too. As the petition explains, with no dispute from Respondent, there is not a single opinion outside the arbitration context that has ever applied severability rules that look anything like the "two-strikes" rule California courts apply to arbitration clauses. Pet. 31. Rather, "'California cases take a very liberal view of severability.'" *In re Marriage of Facter*, 152 Cal. Rptr. 3d 79, 95 (Ct. App. 2013). And Respondent also does not dispute that California courts do not treat a contract's explicit severability clause as an irrelevancy—as they do in the arbitration context. Pet. 30. Respondent contends Winston has waived any reliance on the severability clause, BIO 24, but that is incorrect: The Court of Appeal addressed the argument on the merits, *see* App. 44a, so no waiver rule prevents us from raising it in this Court.

B. Respondent's second approach is to argue that that the issue this Court granted in *Zaborowski* is not presented here. Respondent asserts that "the opinion below found just one unconscionable term fatal to Winston's attempt at severance." BIO 22 n.8. Thus, Respondent treats that portion of the opinion as revolving entirely around a "'fatal flaw' notion of severability," BIO 25, and asserts that *Armendariz*'s two-strikes rule "has nothing to do" with the opinion below, BIO 3. That is a rewriting of the opinion.

The section on severance begins by cataloging all four "clauses [that] are unconscionable." App. 41a. It then recites the reasons *Armendariz* gave for finding the provisions before it non-severable. The first one was "(1) the fact that the arbitration agreement contained more than one unlawful provision." App. 42a. Neither of these points is in a "footnote," much less "a 'by the way' parenthetical." BIO 25. They are the preface to the analysis that ensues.

The section ends ("In sum") with the observation that "the arbitration agreement … contains four unconscionable terms," which it then, again, catalogs. App. 44a. It concludes, "Because we are unable to cure the unconscionability simply by striking *these clauses*, … we must find the agreement void as a matter of law." App. 45a (emphasis added). None of that was in a footnote either. The only thing the court put in the footnote was the legal support for the principle it was applying in the text: "The fact that the arbitration agreement contains four unlawful provisions also weighs against severance"—citing *Armendariz* and another Court of Appeal case upholding severance

"where there were multiple unconscionable terms." App. 45a n.14.

Between those two bookends are a few cryptic sentences—about the partnership-judgment provision—that Respondent cites in support of her view that the severance analysis was driven entirely by one provision, and not the other three that the court repeatedly mentioned. But it makes no sense to cite these sentences in support of an assertion that the "the opinion below … had no reason to apply any 'two-strikes presumption,'" BIO 3, when it is evident on the face of the opinion that the opinion below *did* apply it.

The most that might be said of the very brief passage is that there is a scenario under which the Court of Appeal *might* end up reaching the same severability conclusion even after this Court declares that the *Armendariz* two-strikes rule is preempted. But that scenario would not prevent this Court from answering the question presented and then remanding for the lower courts to assess severability under the rules they apply to all other contexts.

Finally, even if the Court of Appeal had stricken the arbitration agreement *solely* based on the partnership-judgment provision, that would still have been a blatant departure from California's liberal approach to severability—which would itself warrant this Court's review. The purpose of the arbitration provision is to arbitrate partnership-related disputes. There is no plausible basis to treat this provision as so central to that purpose that excising it would defeat that purpose.

For these reasons and those in our petition, the opinion provides an excellent vehicle for the Court to resolve the same severability question it already decided was worthy of certiorari.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Lynne C. Hermle
Jessica R. Perry
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025

E. Joshua Rosenkranz
Counsel of Record
Daniel A. Rubens
Ethan P. Fallon
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5380
jrosenkranz@orrick.com

Counsel for Petitioner

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