No. 24-1145

IN THE

Supreme Court of the United States

LIVE NATION ENTERTAINMENT, INC. AND TICKETMASTER L.L.C.,

Petitioners,

v.

SKOT HECKMAN, LUIS PONCE, JEANENE POPP, AND JACOB ROBERTS, on behalf of themselves and all those similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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June 12, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Federal Arbitration Act ("FAA") contains an express preemption clause that overrides state-law rules preventing the enforcement of agreements to arbitrate. 9 U.S.C. § 2. It also contains an express carveout to preemption—the "Saving Clause"—which leaves in place state-law "grounds as exist at law or in equity for the revocation of any contract." *Id*. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), the Court considered California's *Discover Bank* Rule, which holds that a clause purporting to bar class proceedings in a consumer contract is unenforceable. The Court acknowledged that the *Discover Bank* Rule was not expressly preempted due to the Saving Clause. It nonetheless held the *Discover Bank* Rule impliedly preempted because class or representative proceedings, even in an arbitral forum, are incompatible with the bilateral arbitrations Congress sought to protect.

In the decision below, the Ninth Circuit considered a novel agreement that did not call for bilateral arbitration but instead required a convoluted form of representative proceedings. The Ninth Circuit held that the agreement was unconscionable under California law for a host of factbound reasons, and that the impermissible provisions could not be severed. In an "alternate and independent" holding, the Ninth Circuit also found that application of the *Discover Bank* Rule was not preempted by the FAA because the agreement called for a representative proceeding, not the bilateral arbitration impliedly protected by the FAA.

To reverse, the Court would be required to decide five splitless, factbound questions:

1. Whether the Ninth Circuit erred in concluding that Petitioners' agreement failed California's sliding-scale unconscionability standard.

2. Whether the FAA protects any procedures for private dispute resolution, from representative proceedings to trial by combat (as no court has ever held), or instead protects only the sort of dispute-resolution agreements that would have counted as "arbitration" when the FAA was enacted.

3. Whether the FAA preempts the *Discover Bank* Rule as applied to a non-bilateral, representative arbitration.

4. Whether *Concepcion* should be overruled.

5. Whether the FAA preempts California's severability doctrine, which applies a general approach common to all contracts.

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INTRODUCTION

The Ninth Circuit invalidated a highly unusual agreement on two alternate and independent grounds. The petition focuses only on the second of those grounds, ignoring that the first is a fatal vehicle problem. In all events, the second ground presents a splitless and factbound question that does not meet this Court's normal standard for certiorari review. Sup. Ct. R. 10.

Before Respondents Skot Heckman, Luis Ponce, Jeanene Popp, and Jacob Roberts filed this putative antitrust class action against Petitioners Live Nation Entertainment, Inc. and Ticketmaster L.L.C., another group of consumers had done so. Petitioners filed a motion to compel that earlier case to arbitration under the FAA. While that motion was pending, Petitioners "foresaw that if their motion to compel in that case were granted, they would be faced with a large number of parallel individual claims by ticket purchasers." Pet.App.3a. So Petitioners set out to change their own arbitration agreement midstream, pushing a newfangled adhesion contract on members of the putative class. *See id*. "They turned to New Era, a newly formed arbitration company." Pet.App.4a.

Petitioners were New Era's first subscriber. *Id*. "[I]t is undisputed that New Era and [Petitioners'] attorneys, Latham & Watkins LLP, have shown a 'remarkable degree of coordination' in devising a set of procedures to be followed when large numbers of similar consumer claims are brought in arbitration." *Id*. (citation omitted). Petitioners' input was reflected in the resulting procedures, which "differ[ed] significantly from the rules of traditional arbitration fora." Pet.App.5a–6a. For example, they purported to bind consumers to the results of arbitrations they did not

participate in, gave New Era's administrators power to batch claims and select arbitrators, drastically curtailed discovery and presentation of evidence, and effectively gave only Petitioners the right to appeal adverse arbitral decisions on injunctive relief. Pet.App.5a–10a.

The Ninth Circuit affirmed the district court's denial of Petitioners' motion to compel Respondents to New Era arbitration. Pet.App.29a. The Ninth Circuit held first that the delegation clause, and the New Era arbitration agreement as a whole, were procedurally and substantively unconscionable under California law. Pet.App.11a–29a. The district court had not abused its discretion in applying California's severability standard and declining to enforce the New Era arbitration agreement, which reflected Petitioners' studied effort to bind Respondents to an unlawful contract. Pet.App.27a–29a.

The Ninth Circuit also held, as an "alternate and independent ground" for affirmance, that the "application of California unconscionability law to the arbitration agreement at issue here is not preempted by the FAA." Pet.App.29a. This Court has repeatedly observed that Congress, in enacting the FAA, sought to protect traditional, bilateral arbitration. Pet.App.30a–32a. But the New Era agreement proposed a class action waiver alongside a representative form of arbitration that was "not arbitration as envisioned by the FAA in 1925." Pet.App.31a–32a. So California's *Discover Bank* Rule forbidding class action waivers in consumer contracts, *see Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), was not impliedly preempted because it did not interfere with the form of arbitration the FAA envisioned, rendering the New Era arbitration agreement "independently unconscionable." Pet.App.32a.

Judge VanDyke concurred in the judgment, agreeing with the panel majority on the second ground. Pet.App.32a–33a. "Simply labeling something as 'arbitration' does not automatically bring it within the ambit of the FAA's protection." Pet.App.34a–35a. And because the New Era procedures crossed the outer boundary of the type of "arbitration" subject to implied conflict preemption, the *Discover Bank* Rule applied and invalidated the agreement. Pet.App.35a–37a. Judge VanDyke also agreed with the panel's conclusion on severability, Pet.App.38a–39a, and noted that enforcing the delegation clause would have generated a "conflict of interest" that "would be both sui generis and inevitable," Pet.App.43a.

Neither question presented by the petition warrants this Court's review.

As to the first question presented, the petition attacks language in the concurrence that not all methods of private dispute resolution qualify as "arbitration" under the FAA. There is no split of authority on that proposition of law, both because corporate efforts to draft such tendentious "arbitration" agreements are a new phenomenon and because the concurrence is plainly correct. Clearly the FAA's protection of contracts to "arbitrate" would not cover private agreements to resolve disputes through a "winner-take-all game of ping-pong," Pet.App.35a, even if that ludicrous provision was contained in a contract titled "Arbitration Agreement." The petition makes no argument to the contrary. At a minimum, setting the boundary between true, statutorily protected arbitration and ping-pong-like procedures that merely incant the word "arbitration" warrants further development in the lower courts before this Court takes up the question.

Regardless, this case has multiple vehicle problems that inhibit this Court's ability to answer the first question presented. Most notably, the Ninth Circuit's decision rests on two entirely independent and sufficient grounds. Pet.App.32a. The Court cannot reverse the judgment below, therefore, without finding that the Ninth Circuit erred on both grounds. Addressing only the first question presented is insufficient to award Petitioners the relief they seek, *and the petition does not argue otherwise*.

Even putting this glaring vehicular defect to one side, another obstacle emerges. Assuming an agreement to engage in representative dispute resolution before a conflicted forum qualifies as an agreement to "arbitrate" under the FAA, it does not follow that state regulation of that agreement would be subject to implied preemption. To establish that California's *Discover Bank* Rule was preempted *as applied* here, Petitioners must show a conflict between the application of the *Discover Bank* Rule and the FAA. But as *Concepcion* recognized, the *Discover Bank* Rule is a species of unconscionability doctrine, which is "normally thought to be generally applicable." 563 U.S. at 341. Under *Concepcion*, the *Discover Bank* Rule is subject to implied preemption only to the extent it interferes with the "purposes and objectives" of the FAA. *Id.* at 352. The only purpose or objective that this Court has recognized is the FAA's goal of protecting traditional, bilateral arbitration. Here, the New Era arbitration agreement did not implicate *that* goal, and any spurious argument to the contrary is highly factbound. To the extent Petitioners are asking this Court to expand *Concepcion*'s sweep, Respondents will ask the Court to overturn that erroneous decision for its atextual disregard of federalism and the Supremacy Clause.

As to the second question, the petition does not even attempt to assert a split of authority. And the issue is not broadly important. California's standard for severability does not evince any hostility towards arbitration; it is the same rule in both arbitral and non-arbitral contexts. This Court's review would therefore devolve into speculation about the motives of trial courts in applying California's severability standard. Perhaps for that reason, this Court has repeatedly denied review of whether the FAA pre-empts generally applicable state severability rules in the ten years since dismissing *MHN Government Services, Inc. v. Zaborowski*, 578 U.S. 917 (2016), which raised the question. The Court should deny review.

STATEMENT

A. Factual Background

Petitioners merged in 2010 and, ever since, have repeatedly flouted the antitrust laws. 2-ER-198–99. They have profound market power, violated a Department of Justice consent decree, and engaged in exclusive dealing. *E.g.*, 2-ER-203–05, 2-ER-236. These actions impacted thousands of ticket purchasers. 2-ER-258. Many filed putative antitrust class action lawsuits against Petitioners before Respondents did so. *E.g.*, First Am. Compl., *Oberstein v. Live Nation Ent., Inc.*, 2021 WL 4772885 (C.D. Cal. Sept. 20, 2021) (No. 2:20-cv-03888), *aff'd*, 60 F.4th 505 (9th Cir. 2023).

This case has its origins in Petitioners' motion to compel one such prior lawsuit, *Oberstein*, to arbitration under the then-operative arbitration agreement, which required traditional, bilateral arbitration and designated an established provider, JAMS. Pet.App.45a–48a. Defendants could once win such motions and be

done with litigation, as few plaintiffs would arbitrate small-dollar claims. More recently, however, many consumers have pursued simultaneous individual arbitrations on claims that "appear quite colorable," exposing defendants to high arbitral fees in what Petitioners' own authority described as a "monster of the defendants' own making." J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1349–50 (2022). Petitioners saw that monster on the horizon if their motion in *Oberstein* was granted. *See* Pet.App.3a. No longer willing to engage in traditional, bilateral arbitration at JAMS, they began exploring the possibility of using an unconventional form of "arbitration" at New Era. Pet.App.45a–47a.

New Era had "launched its alternative dispute resolution ('ADR') services in April 2021," Pet.App.49a, with the "stated mission" of providing a "critical prophylactic measure for client's mass arbitration risk," Pet.App.4a. To that end, New Era "reached out to [Petitioners'] counsel . . . to pitch its services on May 4, 2021" while Petitioners' motion to compel arbitration in *Oberstein* was pending. Pet.App.49a. "At that time, New Era had not yet conducted any arbitrations and had not finalized its Rules governing mass arbitration procedures." *Id*. So New Era and Petitioners' counsel had several multi-hour Zoom calls. 3-SER-215–16. The calls generated no discoverable documents or notes and New Era's founder and corporate representative somehow could not remember what was discussed. *Id*. But after the calls, Petitioners signed on as New Era's first ever subscribers. Pet.App.49a. "Later that same day, New Era published procedures applicable to large-scale arbitrations in consumer cases." *Id.* Petitioners then quickly amended their consumer Terms of Use ("Terms") to incorporate New Era's new Rules applicable to

Expedited/Mass Arbitrations ("Rules"). Pet.App.49a. The "vast majority of New Era's annual revenue" for that year came from Petitioners' subscription fees. 4-SER-550; 3-SER-133–34. And New Era later coordinated with Petitioners' counsel during briefing in the district court, seeking to assist Petitioners in the very disputes that Petitioners were arguing should be decided at New Era. 2-ER-73–82; 2-ER-34–36; Pet.App.71a n.13.

Given the "remarkable degree of coordination" between Petitioners and New Era, Pet.App.49a, the Rules unsurprisingly reserved "many of the protections and advantages of a class action" for businesses while providing most consumers "virtually none of its protections and advantages," Pet.App.21a. The Rules were "internally inconsistent, poorly drafted, and riddled with typos." Pet.App.5a. They applied where "'more than five' cases involve[d] common issues of law or fact" and purported to delegate the decision of when and how to batch such cases to an arbitrator, but "a close reading of the Rules reveal[ed] that New Era, and only New Era, w[ould] unilaterally make a determination to group, or 'batch,' similar cases." Pet.App.6a. That was because arbitrator selection supposedly turned on input from plaintiffs' attorneys, but the Rules did not provide for identification of those attorneys until after the batching decisions were made. *Id*. What's more, New Era administrators retained authority to replace any arbitrator in their sole discretion, undermining the notion that plaintiffs would have input in arbitrator selection. *See* Pet.App.6a–7a.

After New Era selected the batch and the arbitrator who would preside over the batch, the arbitrator decided three bellwether cases that bound all other

claimants in the batch as to common issues, "as well as in any later-filed cases added to the batch." Pet.App.7a. "Though decisions in bellwether cases are precedential, the arbitration hearing and award in those cases proceed individually and are confidential, known only to the particular plaintiffs, to the defendant company, and to the arbitrator." *Id*. Thus, non-bellwether plaintiffs would be bound despite having "had no chance to participate in the arbitration" and despite being "ignorant of the decision until it is invoked against them." *Id*.

In the few bellwether cases that proceeded, plaintiffs had just 10 pages to set forth their allegations and 25 pages to present all initial argument and evidence, without any right to discovery. Pet.App.7a–8a. The arbitrator had no obligation to hold a hearing afterwards, but if he or she did, plaintiffs had just five pages to present final arguments. Pet.App.8a. And plaintiffs had no right to be heard on arbitrability issues despite the arbitrator's authority to decide them. *Id*.

After the arbitrator decided the bellwether cases, all plaintiffs in a batch had to participate in one settlement conference. *Id*. Only after that settlement conference could plaintiffs seek to remove themselves from the batch, and only if they could show no common issues of law and fact with the bellwether cases. Pet.App.9a. "It is unclear how a batched plaintiff who did not participate in the bellwether case could demonstrate this" because such plaintiffs (unlike the defendant company) lacked access to the bellwether record. *Id*. And these "hurdles [we]re even greater for later-filed cases that [we]re added to the batch" because the Rules "did not state when plaintiffs with later-filed cases w[ould] receive the bellwether decisions" and did

not provide claimants with briefing or discovery from those cases, which in any event were "permanently deleted 60 days after the end of the proceedings in those cases." *Id*.

Finally, the Terms allowed appeals of *awards* of injunctive relief, but not *denials* of requested injunctive relief, which "operate[d] asymmetrically" "given that injunctive relief will virtually always be sought by the plaintiff rather than by the defendant." *Id*.

B. District Court Proceedings

A few months after Petitioners implemented the Terms, the district court granted Petitioners' motion to compel the separate *Oberstein* case to arbitration under the previous agreement. *See Oberstein*, 2021 WL 4772885. Respondents then filed this action, similarly alleging that they purchased live event tickets at supra-competitive prices from Petitioners' online platforms, but also alleging that they did so after the Terms came into effect. Pet.App.44a–45a. Petitioners then moved to compel Respondents to arbitration pursuant to the Terms. Pet.App.45a.

Respondents sought and obtained discovery on the validity, unconscionability, and severability of the Terms' dispute-resolution provisions. Pet.App.47a. They then raised two independent theories for denial of Petitioners' motion to compel. First, they contended that the delegation clause in the Terms, and the Terms as a whole, were unenforceable under California's regular unconscionability framework. Pet.App.55a–56a. That required the district court to find both procedural and substantive unconscionability. Pet.App.54a–55a. Second, Respondents argued that because the FAA impliedly preempted California's *Discover Bank* Rule against class action waivers in

consumer contracts only when that rule interfered with traditional, bilateral arbitration, the Terms—which instead required representative arbitration—were independently unenforceable because they contained a class action waiver. Pet.App.89a–90a.

The district court held two hearings and reviewed multiple rounds of briefing on Petitioners' motion to compel. Pet.App.47a–48a. It did not adopt Respondents' second theory of unconscionability, reasoning that higher courts had not passed on the argument. Pet.App.89a–90a. But it did accept Respondents' first theory that the Terms were unenforceable under California's traditional framework.

The district court first explained that the Terms and the delegation clause were "procedurally unconscionable to an extreme degree." Pet.App.58a. The Terms were a contract of adhesion between parties for whom it was "hard to imagine a relationship with a greater power imbalance . . . . Because Defendants are often in effect the only ticketing game in town, would-be concert goers are forced to accept [the Terms] in full, or else forego the opportunity to attend events altogether." Pet.App.59a. Petitioners' unilateral and mid-litigation adoption of the Rules, made retroactive and without notice to customers, "evince[d] an extreme amount of procedural unconscionability far above and beyond a run-of-the-mill contract-of-adhesion case." Pet.App.60a. And "even if ticket purchasers were to review the [Terms], it is doubtful that they would understand that they were agreeing to resolve their claims in a novel mass arbitration procedure" given that the Terms "make[] no mention of mass arbitration whatsoever" and that a ticket purchaser would have to "parse through New Era's separately posted Rules and comprehend their implications." Pet.App.67a.

The district court also explained that the Terms and incorporated Rules were substantively unconscionable for four reasons.

First, the Rules' potential application of precedent to non-bellwether plaintiffs raised "due process concerns associated with adjudicating thousands of claims on the basis of vague 'Precedent' at the sole discretion of the neutral." Pet.App.80a. Thus, the "mass arbitration protocol create[d] a process that pose[d] a serious risk of being fundamentally unfair to claimants, and therefore evince[d] elements of substantive unconscionability." Pet.App.81a–82a.

Second, the Rules provided "for no formal process of discovery as a right." Pet.App.82a. These and "other procedural limitations" including limits on the length of briefing and presentation of evidence, "further support[ed] a finding of substantive unconscionability." Pet.App.84a.

Third, the arbitrator selection process subverted California statute by giving New Era the power to override arbitrator selection, allowing one arbitrator to preside over multiple cases, and giving each side, rather than each party, a right to disqualify the arbitrator. *See id*. Because California's required procedures promoted arbitration, they were not preempted by the FAA. *See* Pet.App.86a.

Fourth, the "right to appeal a grant, but not a denial, of injunctive relief [was] unfair to claimants in this case." Pet.App.87a. Because "claimants would be the only parties pursuing any real form of injunctive relief (certainly in the context of a mass arbitration) . . . only Defendants w[ould] benefit in practice" from that provision. *Id*.

In all, the district court found that the Terms "contain[ed] several elements supporting a finding of substantive unconscionability . . . with respect to the delegation clause specifically" and "when viewed together and alongside the extremely high degree of procedural unconscionability present here" the agreement was severely unconscionable overall. Pet.App.90a–91a.

Finally, the district court addressed severability. It first recognized its wide latitude under California law to "refuse to enforce the contract." Pet.App.91a (quoting Cal. Civ. Code § 1670.5(a)). It acknowledged that the Terms contained a severability provision. Pet.App.92a. But it declined to sever the unconscionable provisions of the agreement because the record reflected an agreement permeated with unconscionability and because Petitioners had not offered any evidence showing that proceeding through an alternative provider would remedy that unconscionability. *See* Pet.App.92a–93a.

C. Ninth Circuit Proceedings

Petitioners appealed the district court's decision. Respondents again advanced two theories for why the Terms were unenforceable: (1) they offended California's traditional unconscionability framework, and (2) they contained a class waiver that was unconscionable under the *Discover Bank* Rule, which invalidated the Terms because the FAA did not impliedly preempt that rule to the extent it did not interfere with traditional, bilateral arbitration.

Like the district court, the Ninth Circuit adopted Respondents' first theory and held that the delegation clause and the Terms were "procedurally and substantively unconscionable." Pet.App.13a.

The Ninth Circuit agreed that the delegation clause was "procedurally unconscionable to an extreme degree." *Id*. (citation omitted). The Terms were "much more than a mere garden variety contract of adhesion." Pet.App.14a. They were oppressive because the power imbalance tilted far in favor of Petitioners, who dominated markets in the ticket services industries. Pet.App.14a–15a. The Terms were surprising because Respondents implemented them unilaterally to apply retroactively, binding past ticket purchasers who needed to use Petitioners' website to access old tickets. Pet.App.15a–16a. The Terms were "affirmatively misleading" in claiming to provide for individual arbitration, which was "flatly inconsistent with New Era's Rules." Pet.App.16a. And those Rules were "so dense, convoluted and internally contradictory to be borderline unintelligible" such that no "reasonable consumer would have any hope of understanding them." Pet.App.17a.

The delegation clause was also "substantively unconscionable to a substantial degree." Pet.App.26a. The batching and bellwether protocols in the Rules violated "basic principles of due process" by binding non-bellwether plaintiffs "to the rulings of cases in which they have no right to participate," "no knowledge," "no guarantee of adequate representation," and "no right to opt out of the batched cases that will be bound by the results in the bellwether cases." Pet.App.19a. The Rules were "inadequate vehicles for the vindication of plaintiffs' claims" because of the lack of discovery or full opportunities to present evidence and argument. Pet.App.21a–22a. The asymmetric appellate provision meant that although denial of injunctive relief was final for plaintiffs, Petitioners could "arbitrate thousands of claims in a single go, and if they lose, simply . . . take an appeal."

Pet.App.24a (citation omitted). And the arbitrator selection procedures in the Rules were inconsistent with California law and were not preempted by the FAA. Pet.App.25a–26a.

The Ninth Circuit also found that the district court's severability decision was not an abuse of discretion. It too noted that "California law grants broad leeway to trial courts to remedy unconscionable contracts" and that part of that leeway is the option to decline enforcement. Pet.App.27a. It recognized that where, as here, the "central purpose of the contract is tainted with illegality," severance may not be appropriate. Pet.App.28a (citation omitted). It credited the district court's findings that Petitioners had sought to impose arbitration as an inferior forum and had promulgated a contract permeated with unconscionability. *See id*. And it acknowledged that severance on facts like these would invite companies to push the boundaries of unconscionability in drafting their contracts. Pet.App.28a–29a. And the Ninth Circuit explained that California unconscionability law was not preempted by the FAA because the Saving Clause preserved that doctrine and because the application of that doctrine "neither disfavor[ed] arbitration nor interfere[d] with the objectives of the FAA." Pet.App.29a.

The Ninth Circuit also adopted Respondents' second theory of unconscionability as an "alternate and independent ground" for the Terms' invalidation. Pet.App.29a. That holding was a nuanced analysis of the scope of implied conflict preemption under *Concepcion*, not just a statement that the "FAA protects . . . only a subset of traditional bilateral arbitration agreements." Pet.i. Specifically, the *Discover Bank* Rule applied in this case because

Concepcion turned on that rule's status as an "'obstacle' to the objectives of the FAA" and because, "[a]s applied to the Expedited/Mass Arbitration procedures set forth in Ticketmaster's Terms and New Era's Rules, the *Discover Bank* [R]ule poses no such obstacle." Pet.App.30a (citation omitted). Given the class action waiver, "Ticketmaster's Terms and New Era's Rules [were] therefore independently unconscionable under *Discover Bank*." Pet.App.32a.

REASONS FOR DENYING THE PETITION

Petitioners oversimplify the issues this Court would have to wade through to reach the questions presented, neither of which are subject to splits of authority in the courts of appeals. The Court should deny review.

I. THE FIRST QUESTION PRESENTED IS MISGUIDED, IMPLICATES NO SPLIT, AND OVERSIMPLIFIES THE ISSUES

The first question presented isolates language in one of two alternate and independent grounds for the Ninth Circuit's decision. But there is no split of authority as to the Ninth Circuit's correct conclusion that not every form of private dispute resolution qualifies as FAA "arbitration." Reaching the first question presented would also require this Court to decide the factbound question of whether the Terms violate California's sliding-scale unconscionability standard, expand the scope of implied conflict preemption described in *Concepcion*, and agree that *Concepcion* should not be overturned. None of those questions implicate any split or warrant review either.

A. The Ninth Circuit Was Correct And Its Conclusion Is Not Subject To Any Split

The FAA provides that contracts to resolve disputes "by arbitration" are "valid, irrevocable, and enforceable." 9 U.S.C. § 2. But it does not follow that *all* forms of private dispute resolution are automatically "arbitration." Courts surely would not, for example, use the FAA to enforce private agreements to resolve disputes through trial by combat or, as the panel concurrence put it, through a "vigorous, winner-take-all game of ping-pong." Pet.App.35a. Nor do Petitioners argue otherwise, as such enforcement would require an impermissible expansion of the term "arbitration."

The proper inquiry, then, is whether an agreement provides for "arbitration" as that term was ordinarily understood when Congress enacted the FAA. *See Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021) ("When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them."). Conducting this inquiry, the Ninth Circuit concluded that the "method of dispute resolution contemplated by New Era's Rules [wa]s 'unworthy even of the name of arbitration.'" Pet.App.31a (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999)). Although Petitioners now attack this *conclusion* in isolation without addressing the Ninth Circuit's resulting implied preemption *holding*, *see* I.C, *infra*, the conclusion is not subject to any split, and is plainly correct.

No other court of appeals has addressed what forms of private dispute resolution constitute "arbitration" under the FAA.

Petitioners' cases in which courts of appeals addressed motions to vacate awards relating to class arbitrations are far afield. Pet.21–23. In *Jock v. Sterling Jewelers Inc.*, for example, the distinct issue was whether "absent class members [who] did not affirmatively opt in to the arbitration proceeding . . . consent[ed] to the arbitrator's authority to decide whether the [arbitration agreement] permits class procedures." 942 F.3d 617, 622 (2d Cir. 2019). The Second Circuit held that the arbitrator acted within her authority in deciding class arbitrability because the absent class members had each signed an employment agreement allowing the arbitrator to do so. *See id*. at 623. No party raised, and the court never addressed, what forms of dispute resolution constitute "arbitration" under the FAA.

In *Sutter v. Oxford Health Plans LLC*, the arbitrator decided that the parties' contract allowed class arbitration and the Third Circuit rejected the defendant's attempt to vacate that decision. 675 F.3d 215, 219, 224 (3d Cir. 2012). This Court affirmed because the parties had jointly asked the arbitrator to decide class arbitrability and the "arbitrator did what the parties requested." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013). Following this Court's decision, the Fifth, Tenth, and Eleventh Circuits all affirmed denials of motions to vacate on similar grounds. *See Sun Coast Res., Inc. v. Conrad*, 956 F.3d 335, 337 (5th Cir. 2020); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1248 (10th Cir. 2018); *S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1359–60 (11th Cir. 2013). Once again, no party in these cases raised, and the courts in them never addressed, what forms of dispute resolution constitute "arbitration" under the FAA.

At most, Petitioners might argue that the decisions they invoke *assumed* the applicability of the FAA's vacatur provisions to class arbitrations before declining to order vacatur of those decisions. But unconsidered assumptions are not holdings. And even if they were, the class proceedings in those cases differ markedly from the unique and highly problematic procedures at issue in this case, which reserved for Live Nation all the "protections and advantages" of the class mechanism while denying due process to non-bellwether plaintiffs. Pet.App.21a. This Court does not typically grant review where only one court of appeals has addressed an issue and other courts—without briefing, reasoning, or analysis—have adopted an assumption that is in tension with the sole holding on the question.

The Ninth Circuit's analysis not only is splitless, but also is correct. The court's analysis flowed directly from this Court's precedents, which explain that some procedures promote the FAA's objective of encouraging efficient and informal private dispute resolution better than others. For instance, "bilateral arbitration [i]s the prototype of the individualized and informal form of arbitration protected from undue state interference by the FAA." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 640–41 (2022). The FAA thus protects such individualized arbitration procedures "pretty absolutely." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018) (collecting cases). Conversely, class arbitration "fundamentally changes the nature of the 'traditional, individualized arbitration' envisioned by the FAA." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 178 (2019) (quoting *Epic Sys. Corp.*, 584 U.S. at 509). The switch "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate

procedural morass than final judgment." *Concepcion*, 563 U.S. at 348–49. Naturally then, even more unusual procedures—like trial by combat, ping-pong, or the procedures in this case—may not promote the FAA's objectives at all. If so, they are not FAA "arbitration" and states may properly regulate such contracts without interfering with the FAA's purposes and objectives.

Petitioners' authorities do not change this conclusion. True, parties have sometimes agreed to arbitrate on a class-wide basis. But while parties can "agree to aggregation," or to "arbitrate pursuant to the Federal Rules of Civil Procedure," "what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA." *Concepcion*, 563 U.S. at 351. Likewise, the fact that the FAA does not *prohibit* parties from adopting non-FAA procedural rules, *see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995), does not mean that all forms of procedure constitute "arbitration" under the FAA. The Ninth Circuit was correct to conclude that the FAA does not cover all forms of private dispute resolution and specifically that the FAA does not cover these Terms.

In truth, Petitioners do not really dispute the Ninth Circuit's core conclusion that at least some forms of private dispute resolution, like Judge VanDyke's game of ping-pong, are not FAA "arbitration." Pet.13. But once that concession is acknowledged, the narrow and splitless nature of the first question presented becomes clear: in determining what constitutes "arbitration" under the FAA, where should courts draw the line between a game of ping-pong and traditional, bilateral arbitration? The Ninth Circuit justifiably concluded that the unique and deeply

unfair procedures at issue in this case were on the wrong side of the line. No other court has engaged in a similar line-drawing exercise, let alone disagreed with the Ninth Circuit on its conclusion.

This Court should accordingly deny review.

B. To Reach The Question, The Court Would Have To Reject All Four Judges' Conclusion That The Terms Are Unenforceable Under California Law

Even if the Court was inclined to take up the splitless question of which agreements are agreements to "arbitrate" under the FAA, this case is an exceptionally poor vehicle in which to do so. The Ninth Circuit analyzed the issue as an "alternate and independent ground" for invalidating the Terms. Pet.App.29a–32a. To reverse, this Court would need to first reject the Ninth Circuit's primary unconscionability holding. That task is highly factbound and does not implicate any split. And the Ninth Circuit was plainly correct.

The Ninth Circuit's primary unconscionability analysis turned on California's traditional unconscionability framework. That framework looks to both procedural and substantive unconscionability. *See OTO, L.L.C. v. Kho*, 447 P.3d 680, 693 (Cal. 2019). If there is "substantial procedural unconscionability . . ., even a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable." *Id*.

Applying that framework, both the district court and the Ninth Circuit held that the Terms were "procedurally unconscionable to an extreme degree." Pet.App.13a; Pet.App.58a. There was a profound power imbalance between the dominant market par-

ticipant Petitioners and the ticket purchaser plaintiffs. *See* Pet.App.14a–15a; Pet.App.59a. The Terms were affirmatively misleading in that they promised individual arbitration but then incorporated the contrary Rules, which were themselves internally inconsistent and difficult to understand. *See* Pet.App.16a; Pet.App.67a. Petitioners' counsel exhibited a "remarkable degree of coordination" with New Era in crafting the Rules. Pet.App.4a; Pet.App.71a n.13. And the Terms bound customers retroactively. *See* Pet.App.15a–16a; Pet.App.60a.

Likewise, both courts held that the Terms were substantively unconscionable. The batching and bellwether protocols in the Rules violated "basic principles of due process." Pet.App.19a; *see also* Pet.App.80a. There was no right to discovery or presentation of evidence. Pet.App.21a–22a; Pet.App.82a–84a. Appeals of injunctions were effectively reserved to Petitioners. Pet.App.87a–89a. And the arbitrator selection procedures were inconsistent with California law. Pet.App.25a–26a; *see also* Pet.App.86a.

All these findings were correct and do not implicate any split of authority. Strikingly, Petitioner does not argue otherwise. Yet, to issue a holding on the first question presented, the Court would first have to wade into the highly factbound analysis and adopt a conclusion that the petition does not even defend—that the Ninth Circuit erred in its primary unconscionability analysis.

C. The Court Would Also Have To Expand The Scope Of Implied Conflict Preemption Described In *Concepcion*

The first question presented also ignores the second half of the Ninth Circuit's "alternate and independent

ground" for invalidating the Terms. The Ninth Circuit did not simply conclude that Petitioners' arbitration process was not "arbitration" under the FAA; rather, it went on to explain that Petitioners could not invoke implied conflict preemption under *Concepcion* because applying the *Discover Bank* Rule in *this case* would not interfere with the goals of the FAA. Pet.App.30a; *see also* Pet.App.36a. The petition fails entirely to grapple with this reasoning, but the Court would need to address it in order to reverse.

In *Concepcion*, this Court considered the *Discover Bank* Rule, which had its "origins in California's unconscionability doctrine and California's policy against exculpation." 563 U.S. at 341. It is a "doctrine normally thought to be generally applicable," *id*., and therefore protected from preemption by the Saving Clause. *See* 9 U.S.C. § 2 (agreements to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract."). Nonetheless, the Court stated that a state-law rule could also be preempted if it "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. The Court reasoned that the *Discover Bank* Rule was impliedly preempted because, as applied in *Concepcion*, it conflicted with the FAA's objective of preserving "bilateral arbitration" in which parties would gain "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id*. at 348 (citation omitted).

The rationale for finding the *Discover Bank* Rule preempted in *Concepcion* does not apply in this case. Rather, to reverse in this case, the Court would have to *materially expand* the scope of FAA preemption beyond *Concepcion* and create some new objective of

the FAA that has not yet been recognized by any court. As the Court recognized in *Concepcion*, the *Discover Bank* Rule is generally applicable and therefore excluded from express preemption under the Saving Clause. Moreover, *Concepcion* did not preempt the *Discover Bank* Rule in all its applications. To take an obvious example, the FAA cannot preempt the application of the *Discover Bank* Rule to a contract waiving class actions and requiring individual proceedings *in court*. That application would not interfere with bilateral arbitration, as such a contract would not call for bilateral arbitration. Here, too, the contract in question does not call for bilateral arbitration, but rather imposes a form of representative dispute resolution. Therefore, application of the *Discover Bank* Rule in this case would not interfere with the FAA's objective, as recognized in *Concepcion*, of protecting bilateral arbitration.

Petitioner cannot fill this hole by claiming that application of the *Discover Bank* Rule would conflict with the FAA's other acknowledged purpose of enforcing private contracts. To be sure, this Court has noted that the FAA serves the purpose of enforcing private contracts. But this purpose cannot give rise to implied conflict preemption without entirely swallowing the Saving Clause. If *any* state-law rule that interfered with the enforcement of a contract involving arbitration interfered with and was preempted by the FAA, then even "such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, would be preempted, in direct contravention of the statutory text.

If the Court were to grant review, it could not reverse without rejecting this argument. Yet the Petition does not even engage with this argument,

which Respondents briefed at length below and which was adopted by the Ninth Circuit. The Court should not grant review where reversal would require taking a position that Petitioners do not even attempt to support.

D. The Court Would Then Have To Decide That *Concepcion* Should Not Be Overturned

If *Concepcion* truly holds that the FAA impliedly preempts all generally applicable state rules regulating private dispute resolution procedures, then the decision is incoherent and must be overturned. The decision was already irreconcilable with the FAA's text. *See Concepcion*, 563 U.S. at 359 (Breyer, J., dissenting) ("Linguistically speaking, [the *Discover Bank* Rule] falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist 'for the revocation of *any* contract.'" (quoting 9 U.S.C. § 2)). But reading *Concepcion* to invalidate all state regulation of any agreement that bears the label "arbitration," no matter how convoluted, reads the Saving Clause out of the FAA and makes a mockery of the FAA's goals as this Court has described them.

"The reason that mass arbitration has created a problem for corporate defendants is because they never intended to individually arbitrate every claim by an injured plaintiff." Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act*, 78 Vand. L. Rev. 133, 209 (2025). "The bellwether and batching models that corporations have devised merely reinforce that individualized, speedy arbitration is not their goal. The entire aim of the bellwether process is to avoid

individual arbitration." *Id*. at 210. To the extent "[m]ass arbitration cannot be both bilateral and speedy with respect to claims of widespread misconduct," "*Concepcion* contains such flawed and inconsistent reasoning that it should be overruled." *Id*. at 211. To reach the first question presented, the Court would have to grapple fully with these arguments and with the implications of corporate responses to mass arbitration on its FAA jurisprudence, all to protect Petitioners' highly unusual agreement. Review is not warranted.

II. THE SECOND QUESTION PRESENTED IS HIGHLY FACTBOUND AND HAS BEEN RECENTLY AND REPEATEDLY DENIED

The second question presented relates to FAA preemption of California's generally applicable severability doctrine. But that question also does not implicate any split and is highly factbound. Petitions presenting the same or similar questions have been recently and oft-denied. And in all events, the Ninth Circuit rightly decided that the district court did not abuse its discretion in declining severance.

A. The Ninth Circuit Correctly Applied California's Generally Applicable Severability Standard

California's severability doctrine applies a general approach to all contracts that does not "derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. No court of appeals has held otherwise. And the decision below faithfully applied that general approach to the complex facts of this case. Those are all reasons to deny review.

In 1979, California's legislature enacted "Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000). That same section provides that if "the court as a matter of law finds . . . any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract." *Id*. "Though the 'statute appears to give a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement,' it 'also appears to contemplate the latter course only when an agreement is 'permeated' by unconscionability.'" *Ramirez v. Charter Commc'ns, Inc.*, 551 P.3d 520, 544 (Cal. 2024) (quoting *Armendariz*, 6 P.3d at 695).

The last principle is also codified in a California statute. "Civil Code section 1598 states that '[w]here a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.'" *Armendariz*, 6 P.3d at 695 (alteration in original).

The severability rules the California Supreme Court announced in *Armendariz* and confirmed in *Ramirez* reflect that court's review of state unconscionability doctrine *outside* of the arbitration context. Indeed, *Armendariz* started with analysis of cases decided decades *before* Congress enacted the FAA, at which time California courts had already started declining to sever invalid contractual provisions where the "very essence and mainspring of the agreement" was an "illegal object" and the "good cannot be separated from

the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good." *Id*. at 696 (quoting *Mill & Lumber Co. v. Hayes*, 18 P. 391, 393 (Cal. 1888)).

In the modern day, California courts assessing severance—regardless of whether arbitration is involved—"look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." *Marathon Ent., Inc. v. Blasi*, 174 P.3d 741, 743 (Cal. 2008) (quoting *Armendariz*, 6 P.3d at 696) (concerning severance of unconscionable provision of personal services contract). "Civil Code section 1670.5 follows this basic model." *Armendariz*, 6 P.3d at 696. It was in this context that the California Supreme Court advised courts to look to the "interests of justice" in deciding whether "severance of the unconscionable terms would function to condone an illegal scheme" and to "consider the deterrent effect of each option." *Ramirez*, 551 P.3d at 547.

In *Ramirez*, *Armendariz*, and this case, all of which involved arbitration contracts, fact-specific applications of these generally applicable and decades-old severance principles led the courts to consider whether "the stronger party engaged in a systematic effort to impose arbitration on the weaker party not simply as an alternative to litigation, but to secure a forum that works to the stronger party's advantage." *Ramirez*, 551 P.3d at 547; *see also Armendariz*, 6 P.3d at 696–97; Pet.App.91a–93a; Pet.App.28a. They similarly led the courts to consider the "deterrent effect" of refusing to sever. *Ramirez*, 551 P.3d at 547.

There was nothing about this that was hostile towards arbitration. "*Because unconscionability is a reason for refusing to enforce contracts generally*, it is

also a valid reason for refusing to enforce an arbitration agreement" under the FAA's Saving Clause. *Armendariz*, 6 P.3d at 689–90 (emphasis added); *see also Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements"). This Court's review would therefore turn on a case-specific analysis of whether the trial court applied California's severability standard in a way that was hostile to arbitration. It did not, and review would entail one-off error correction where no error is apparent.[1]

B. The Court Has Denied Review On FAA Preemption Of State Severability Doctrines Twice Since *Zaborowski*

That this Court's review would likely devolve into speculation about the motives of the trial court in applying California's severability standard is likely a reason why this Court has repeatedly and recently declined to review similar questions presented. *See* Pet. for Writ of Cert. at i, *Ritz-Carlton Dev. Co. v.*

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[1] Petitioners' assertion that California courts are more likely to invalidate arbitration contracts when applying the generally applicable severability doctrine, Pet.30–32, has little to do with the decision below. Petitioners' analysis is also methodologically flawed. California law allows interlocutory appeals of denials but not grants of motions to compel arbitration. *See Zembsch v. Superior Ct.*, 53 Cal. Rptr. 3d 69, 74–75 (Cal. Ct. App. 2006), *as modified* (Jan. 11, 2007). This creates a selection bias. Trial courts that sever unconscionable provisions from arbitration agreements still compel arbitration, meaning appellate courts disproportionately encounter the worst arbitration agreements (and in straightforward postures). By contrast, severability disputes in other contracts arise as one of many issues on more complex and full records. The result of these asymmetries is the false signal on which Petitioners rely.

Narayan, 583 U.S. 1115 (2018) (No. 17-694), 2017 WL 5256231, at *i; Pet. for Writ of Cert. at i, *Winston & Strawn LLP v. Ramos*, 140 S. Ct. 108 (2019) (No. 18-1437), 2019 WL 2140500, at *i.

In *Ritz-Carlton*, the petitioner presented a question suggesting FAA preemption of the Hawaii Supreme Court's application of that state's generally applicable severability doctrine in the arbitration context, relying like Petitioners on this Court's grant of certiorari in *Zaborowski* and subsequent dismissal before decision. Pet. for Writ of Cert. at i, *Ritz-Carlton*, 583 U.S. at 1115 (No. 17-694), 2017 WL 5256231, at *27 n.6. The Court denied review. *Ritz-Carlton*, 583 U.S. at 1115. In *Winston & Strawn*, the petitioner presented two questions suggesting FAA preemption of the purportedly arbitration-specific severability rules that the California Supreme Court prescribed. Pet. for Writ of Cert. at i, *Winston & Strawn*, 140 S. Ct. at 108 (No. 18-1437), 2019 WL 2140500, at *i. Like Petitioners here and the petitioners in *Ritz-Carlton*, the *Winston & Strawn* petitioners argued that this Court's grant of certiorari in *Zaborowski* favored review. *Id*. at *28–34. The Court again denied review. *Winston & Strawn*, 140 S. Ct. at 108. The Court should do the same here and deny review of the second question presented.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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June 12, 2025