No. 24-1145

In the Supreme Court of the United States

LIVE NATION ENTERTAINMENT, INC. ET AL.,
Petitioners,
v.
SKOT HECKMAN ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

On both questions presented, the Ninth Circuit violated the text of the Federal Arbitration Act (FAA), defied this Court's precedents, and undercut nascent efforts to address the challenges posed by mass arbitration filings. Both holdings warrant certiorari, as Live Nation has explained and its four amici confirm.

As for the first question, Plaintiffs offer no serious textual argument for why class arbitration or New Era's bellwether arbitration procedures do not qualify as "arbitration" under the FAA. Statutes cover everything their text fairly encompasses, not merely (as Plaintiffs insist) what their drafters subjectively had in mind. And while it is obviously true that trial by combat and ping-pong matches are not arbitration, non-traditional *arbitration* procedures clearly are, as this Court has repeatedly held. Five circuits accept that established interpretation. The Ninth Circuit alone rejects it.

As for the second question, Plaintiffs do not deny that this Court previously found it worthy of certiorari in *MHN Government Services, Inc. v. Zaborowski*, 576 U.S. 1095 (2015) (No. 14-1458), *dismissed*, 578 U.S. 917 (2016). Plaintiffs say that cert grant was a mistake, but offer no good reason why. And there is none: California's "interests of justice" test discriminates against arbitration on its face and in practice, in direct violation of the FAA.

On both questions presented, only this Court can right the ship. This case is a perfect vehicle for doing so. The petition should be granted.

ARGUMENT

I. THE FIRST QUESTION PRESENTED WARRANTS CERTIORARI

Plaintiffs do not dispute that the first question presented is critically important, particularly given the challenges posed by mass arbitration filings. Pet.23-26; *see* Atl. Legal Found. (ALF) Br. 12-20; Cal. Emp. Law Council (CELC) Br. 3-4; DRI Ctr. For Law & Pub. Pol'y (DRI) Br. 16-22. Their convoluted attempts to defend the decision below, downplay the circuit split, and manufacture vehicle problems fail.

A. The Decision Below Is Wrong

1. The Ninth Circuit stated in no uncertain terms that "the FAA simply does not apply to and protect" any form of arbitration that "did not exist in 1925," including "class-wide arbitration" and New Era's bellwether procedures. Pet.App.30a. For that reason, the decision below claimed that the rule established in *Discover Bank v. Superior Court*, 113 P.3d 1100, 1113 (Cal. 2005)—invalidating consumer arbitration contracts waiving the right to bring class proceedings—could force this case into court. It reached that conclusion even though *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) later held "that the FAA preempts any application of the *Discover Bank* rule that poses an 'obstacle' to objectives of the FAA." Pet.App.30a. Plaintiffs agree with Live Nation that the validity of that conclusion hinges on the original public meaning of the word "arbitration" as used in the FAA. Pet.14-15; BIO16. But any cleared-eyed textual analysis shows that the Ninth Circuit's holding is wrong.

As Live Nation explained, "arbitration" has always meant a "hearing and determination of a cause

between parties in controversy by a person or persons chosen by the parties," "instead of by the judicial tribunal provided by law." Arbitration, *Webster's New International Dictionary of the English Language* (1925); *see* Pet.15. That definition plainly encompasses class-wide arbitration and New Era's bellwether arbitration procedures: For both dispute-resolution methods, an adjudicator "chosen by the parties," rather than "the judicial tribunal provided by law," holds a "hearing" and makes a "determination" to resolve the "controversy." Arbitration*, Webster's New International Dictionary of the English Language.* Such procedures are simply different "*kind[s]* of arbitration proceeding[s]"; they are not categorically outside the FAA's scope just because they are not traditional, bilateral arbitration. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

Plaintiffs offer no serious textual or historical argument to the contrary. They do not dispute the settled definition of "arbitration." Nor do they explain how class-wide arbitration and New Era's bellwether procedures fall outside that definition. Instead, Plaintiffs claim that only traditional, bilateral arbitration constitutes "arbitration" under the FAA because that "'prototype'" was most commonly used in 1925—and thus must have been what the statute's drafters subjectively had in mind. BIO18. That is not how statutory interpretation works. Like other statutes, the FAA "'applie[s] in situations not expressly anticipated by Congress.'" *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). And even in 1925, arbitrations were often *not* purely bilateral anyway. CELC Br. 9-11.

Besides violating the FAA's text, Plaintiffs' position contravenes this Court's precedents. In their view, although "the FAA does not *prohibit* parties from adopting" class arbitration and other non-traditional procedures, such procedures do not "constitute 'arbitration' under the FAA"—and thus lack statutory protection. BIO19. But this Court has repeatedly recognized that parties can be "compelled *under the FAA* to submit to class arbitration" if "there is a contractual basis" for doing so. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (emphasis added); Pet.19; *see, e.g.*, *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 178-79 (2019); *Green Tree*, 539 U.S. at 452. That can be true only if class arbitration qualifies as "arbitration" under the FAA. *See* 9 U.S.C. § 4 (authorizing parties aggrieved by refusal "to arbitrate under a written agreement for arbitration" to seek "an order directing that such arbitration proceed").

Plaintiffs fall back on a silly effort to equate non-traditional arbitration procedures with resolving disputes though "trial by combat" or a "'winner-take-all game of ping-pong.'" BIO16 (quoting Pet.App.35a). That comparison makes no sense. With trial by combat or ping-pong, no adjudicator "chosen by the parties" stands in for a "judicial tribunal" to hold a "hearing" and make a "determination" about the "controversy." Arbitration, *Webster's New International Dictionary of the English Language*; *see* Pet.15. Adversaries just duke it out with swords or paddles to see who wins. Such contests obviously do not qualify as "arbitration" under the FAA's plain meaning. But class *arbitration* and bellwether proceedings before an *arbitrator* clearly do. Pet.14-16.

2. Plaintiffs fault Live Nation for supposedly ignoring the "second half" of the Ninth Circuit's holding, which they characterize as finding no "implied conflict preemption under *Concepcion* because applying the *Discover Bank* rule in *this case* would not interfere with the goals of the FAA." BIO21. That is incorrect. The Ninth Circuit rested its conclusion entirely on the notion that New Era's bellwether procedures are "not arbitration as envisioned by the FAA in 1925." Pet.App.31a-32a. "Because the FAA does not apply" to those procedures, the Ninth Circuit explained, the *Discover Bank* rule "governs the case before us," notwithstanding *Concepcion*. Pet.App.30a. There was no "second half" to the court's analysis on the first question presented. BIO21-22.

To the extent Plaintiffs suggest that *Concepcion* would not control here even if New Era's bellwether procedures qualified as "arbitration" under the FAA, BIO22-24, they are mistaken. FAA preemption applies to any state rule that "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Concepcion*, 563 U.S. at 352. The FAA's "two goals" are (1) "'ensur[ing] that private arbitration agreements are enforced according to their terms,'" and (2) "'promot[ing] the expeditious resolution of claims.'" *Id.* at 344-45.

Here, New Era's MDL-like bellwether procedures implicate both goals, as they were agreed upon by the parties and facilitate streamlined resolution of mass arbitration filings. The *Discover Bank* rule interferes with those objectives by empowering plaintiffs to bring formal class arbitrations requiring "slower" and "more costly" class certification, class discovery, and

opt-out proceedings. *Id.* at 348-49. That rule is preempted here, just as it was in *Concepcion*.

Plaintiffs are wrong to say *Concepcion* applies only when the parties contract for "bilateral arbitration." BIO 22-23. Rather, *Concepcion* applies *whenever* state law would unduly impede the parties' chosen arbitration procedures for streamlining dispute resolution. 563 U.S. at 343-48. That's precisely the case here, where invalidating the parties' class waiver under *Discover Bank* would undermine the parties' agreement to arbitrate using New Era's streamlined procedures. Plaintiffs' alternative rationale for the Ninth Circuit's ruling fails.[1]

B. The Split Is Real

The decision below creates a 5-1 circuit split. In contrast to the Second, Third, Fifth, Tenth, and Eleventh Circuits, the Ninth Circuit held that all non-traditional forms of arbitration, including class arbitration, do not qualify as "arbitration" under the FAA and are thus not protected by the statute. Pet.21-23. And because the Ninth Circuit declined to take this case en banc, district courts in the Nation's largest circuit—and nowhere else—will remain powerless to enforce non-traditional arbitration agreements until this Court intervenes. *Id.* That split makes out a textbook basis for certiorari.

Plaintiffs euphemistically concede the "tension" between the Ninth Circuit's cramped interpretation of

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[1] Plaintiffs' attempt to distinguish *Concepcion* also fails on its own terms. New Era's MDL-like procedures are a *type* of "bilateral arbitration." CA9 Live Nation Br. 32-33; New Era ADR, Inc. (New Era) Br. 12-14. They are thus protected by the FAA—and *Concepcion*—even if Plaintiffs are right that "class arbitration" is not.

"arbitration" under the FAA and the law in five other circuits. BIO18. They further acknowledge that if the FAA does not protect non-traditional kinds of arbitration, there would be no statutory basis for applying "the FAA's vacatur provisions to class arbitrations." *Id.* And they accept that the Second, Third, Fifth, Tenth, and Eleventh Circuits have applied the FAA in published decisions "address[ing] motions to vacate awards relating to class arbitrations." BIO17. So Plaintiffs cannot dispute that those cases would have come out differently under the Ninth Circuit's atextual rule. That is the essence of a circuit split.

Respondents downplay the split by insisting that only the decision below explicitly "addressed what forms of private dispute resolution constitute 'arbitration' under the FAA." BIO16. If so, that is because, before this case, it was so well settled that class arbitration *does* constitute "arbitration" under the FAA. *Supra* at 4; Pet.19. Indeed, Plaintiffs admit that in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), this Court held that the Third Circuit correctly applied the FAA's deferential standards for judicial review to motions to vacate class arbitration awards—and that the Fifth, Tenth, and Eleventh Circuits later "[f]ollowed" suit. BIO17. That is flatly inconsistent with the Ninth Circuit's rule, under which the FAA supposedly does not apply to class arbitration.

That this Court and others have long treated non-traditional arbitration methods as types of FAA "arbitration" underscores just how far the Ninth Circuit went astray here. It is no reason to deny review of the first question presented.

C. The Issue Is Important, And This Case Is A Suitable Vehicle

Plaintiffs do not dispute that the Ninth Circuit's holding will severely impede efforts to develop new rules for sensibly managing the rising tide of abusive mass arbitration filings. Pet.23-26. As Live Nation's amici explain, there must be "room under the umbrella of FAA protection" for "new or hybrid arbitration protocols" capable of addressing those challenges. DRI Br. 22. But the Ninth Circuit's new definition of arbitration threatens to "undo" ongoing and much-needed "efforts to combat the threats of mass arbitral blackmail." CELC Br. 17; *see* ALF Br. 12-20. That result is plainly at odds with the FAA and its core policy objectives.

Plaintiffs say this case is a poor vehicle for resolving the first question because the Ninth Circuit's decision below rested "on two alternate and independent grounds." BIO1. But Live Nation has challenged *both* grounds in its *two* questions presented—and it has strong arguments as to each. If Live Nation prevails on both issues, then this case must be arbitrated.

The reality is that this case is a perfect vehicle for resolving the circuit split. Plaintiffs do not dispute that the Ninth Circuit squarely addressed the first question presented or that Live Nation's arguments are fully preserved. Nor do they identify any jurisdictional problem or other impediment to review. The issue is cleanly teed up and should be resolved in this case.

II. THE SECOND QUESTION PRESENTED WARRANTS CERTIORARI

Live Nation's second question challenges California's anti-arbitration severability doctrine. Pet.27-37. This Court granted review on that exact issue in *Zaborowski*, which settled before oral argument. The Court should finally resolve the issue.

1. California's severability doctrine expressly "singles out arbitration [contracts] for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017); *see* Pet.30. It requires courts to weigh the "interests of justice" by examining whether the more powerful party: (1) "engaged in a systematic effort to impose *arbitration*" as "'an inferior forum'"; and (2) should be "deterre[d]" from "'draft[ing] a one-sided *arbitration* agreement.'" *Ramirez v. Charter Commc'ns, Inc.*, 551 P.3d 520, 546-47 (Cal. 2024) (emphasis added).

Plaintiffs dismiss this test as just a "fact-specific application[]" of "generally applicable and decades-old severance principles." BIO27. But this effort "to cast [California's] rule in broader terms cannot salvage" it. *Kindred Nursing*, 581 U.S. at 253. California's severability doctrine explicitly "target[s]" arbitration "by name." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 508 (2018).

2. California's severability doctrine also violates the FAA because it has a "disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. As Live Nation has shown, California appellate courts are 1.6 times as likely to reject severance in cases involving arbitration contracts than in cases involving other contracts. Pet.31 (70% for arbitration contracts, 44% for others). This empirical analysis is

confirmed by the qualitative observations of numerous judges and commentators. Pet.30-31, 33-35 & n.7.

Plaintiffs do not deny that California appellate courts disproportionately deny severance in arbitration cases. But in a footnote, they assert that analyzing only appellate decisions—as opposed to trial-court rulings—is "methodologically flawed" and creates a "selection bias," supposedly because California allows immediate interlocutory appeals of denials (but not grants) of arbitration, whereas "severability disputes in other contracts arise as one of many issues on more complex and full records." BIO28 n.1.

Plaintiffs' critique is baseless. It does not even try to explain why appellate courts would be more likely than trial courts to apply California severability rules in ways that disfavor arbitration contracts as compared to other kinds of contracts.

In any event, looking at trial-court rulings *confirms* that California's severability rules disfavor arbitration: From January 1, 2023 to June 30, 2025, California trial courts were *1.8* times as likely to reject severance in cases involving arbitration agreements than in cases involving other contracts. Add.1a-11a (39% for arbitration contracts, 22% for others). Although the overall rate at which trial courts refuse to sever is lower than in appellate courts, the disproportionate treatment of arbitration agreements is even *worse*. *Supra* at 9-10.

Under *Concepcion*, that "disproportionate impact" triggers preemption. 563 U.S. at 342. California's severability rules cannot stand.[2]

3. This Court previously granted certiorari to address this serious problem in *Zaborowski*, only for a late-breaking settlement to thwart review. Pet.32. Plaintiffs now claim that certiorari in *Zaborowski* was a mistake. *See* BIO25-28. As support, they cite the denials of two later petitions purportedly raising the same issue. BIO28-29. Neither supports them.

The first petition is irrelevant: It concerned Hawaii law, not California law. *See* Cert. Pet. i, *Ritz-Carlton Dev. Co., v. Narayan*, 583 U.S. 1115 (2018) (No. 17-694).

The second petition is also irrelevant. In *Winston & Strawn LLP v. Ramos*, 140 S. Ct. 108 (2019), the petitioner claimed the case presented "the exact same question" as *Zaborowski* and argued that "California courts apply a harsher severability rule" to arbitration agreements "than to other contracts." *Winston* Pet. 29 (No. 18-1437). But in reality, the case did not implicate that issue: The California Court of Appeal had rejected severance on the separate and distinct ground that the only way to cure deficiencies in the agreement would have been "by reforming or augmenting the contract's terms," rather than

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[2] Plaintiffs' selection-bias argument also ignores that California appellate courts are much more likely to refuse to sever unconscionable provisions in arbitration agreements when they invoke California's facially anti-arbitration interests-of-justice test. Pet.31-32. This apples-to-apples comparison controls for any purported selection bias by looking only at arbitration appeals—and confirms that California's interests-of-justice test disfavors arbitration.

severing them. *Ramos v. Superior Court*, 239 Cal. Rptr. 3d 679, 703 (Ct. App. 2018). That basis for denying severance does not disfavor arbitration, is not preempted, and was not at issue in *Zaborowski*. As the *Winston* respondent told this Court, the petitioner's reliance on *Zaborowski* was "entirely unmoored from the opinion below." *Winston* BIO 3. This case, by contrast, cleanly presents the same FAA preemption issue as *Zaborowski*.

4. Plaintiffs ultimately try to scare the Court away from review by arguing that Live Nation's severability argument will turn on factbound determinations about New Era's rules and the trial court's case-specific reasons for denying severability. BIO20-21. The Court should not be fooled.

Plaintiffs bizarrely claim that Live Nation is asking the Court to review the Ninth Circuit's underlying "unconscionability holding[s]" as to various aspects of New Era's rules and Live Nation's terms of service. BIO20. That is false. Yes, the Ninth Circuit's unconscionability analysis of those provisions was deeply flawed. New Era Br. 8-17; CA9 Live Nation Br. 39-55. But Live Nation will not challenge that analysis in this Court. Pet.12 n.2. Instead, Live Nation's second question focuses on whether the FAA preempts California's anti-arbitration *severability* doctrine. Pet.i. Nothing about that pure legal question turns on the particular contract terms or unconscionability holdings disputed below.

Plaintiffs also suggest that addressing the second question will "devolve" into "a case-specific analysis of whether the trial court applied California's severability standard in a way that was hostile to arbitration." BIO28. Wrong again. Live Nation's

point is that California's severability standard *itself* "discriminat[es] on its face against arbitration," in direct violation of the FAA. *Kindred Nursing*, 581 U.S.at 251. Nothing about that argument depends on "speculation about the motives of the trial court." BIO28.

* * *

Both of Live Nation's questions implicate the FAA's core protections, with far-reaching consequences for arbitration's future as a viable dispute-resolution method in the face of mass arbitration filings. The Court should resolve them both in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Rodriguez v. Richard Barton Enters., No. 22STCV33925, 2023 Cal. Super. LEXIS 12555 (Feb. 10, 2023)	Yes
Romero v. D-Link Sys., No. 30-2022-01262801-CU-WT-CJC, 2023 Cal. Super. LEXIS 41454 (June 6, 2023)	No
Samini v. Scott M. Watanabe, DDS, Inc., No. 30-2024-01435514-CU-WT-CJC, 2025 Cal. Super. LEXIS 15726 (May 19, 2025)	Yes
Sanguino v. Copart, Inc., No. 22STCV32453, 2023 Cal. Super. LEXIS 34285 (May 23, 2023)	Yes

Case	Severance
Sullivan v. Strathspey Crown Holdings Grp., LLC, No. 30-2024-01401374-CU-PO-NJC, 2024 Cal. Super. LEXIS 62722 (Dec. 10, 2024)	No
Thompson v. D & K Eng'g, No. 37-2022-00026832-CU-OE-CTL, 2023 Cal. Super. LEXIS 6072 (Jan. 27, 2023)	No
Tirado v. S. Park Stakeholders Grp., No. 23STCV00244, 2024 Cal. Super. LEXIS 53671, *10 (Feb. 1, 2024)	No
Tucker v. Zeus Networks, LLC, No. 22CHCV00692, 2023 Cal. Super. LEXIS 41092 (June 16, 2023)	Yes
Valenzuela v. Clearfreight, Inc., No. 24STCV14114, 2025 Cal. Super. LEXIS 6421, *8 (Mar. 25, 2025)	No
Weaver v. Santa Ana Creek Dev. Co., No. 30-2024-01376314-CU-WT-CJC, 2024 Cal. Super. LEXIS 30362 (June 14, 2024)	Yes
Wheeler v. Baldwin & Sons LLC, No. 37-2023-00016392-CU-WT-CT, 2023 Cal. Super. LEXIS 60684 (Aug. 11, 2023)	No
Xing v. Winn, Inc., No. 30-2023-01336762-CU-OE-CXC, 2024 Cal. Super. LEXIS 9414 (Feb. 2, 2024)	No

Case	Severance
Yi v. Gori Co., No. 23STCV22167, 2024 Cal. Super. LEXIS 54245 (Jan. 31, 2024)	Yes
Young v. Refrigeration Supplies Distrib., No. 30-2024-01389982-CU-OE-CXC, 2024 Cal. Super. LEXIS 62688 (Oct. 28, 2024)	No

NON-ARBITRATION CASES

Case	Severance
Bostanian v. Abby Rao, No. 24STCP01643, 2025 Cal. Super. LEXIS 6300 (Mar. 14, 2025)	No
Chui v. Nelson Bros. Pro. Real Est. LLC, No. 30-2022-01264763-CU-CO-WJC, 2024 Cal. Super. LEXIS 40408 (Sept. 25, 2024)	Yes
Cobb v. Thor Motor Coach, No. 23CHCV01261, 2023 Cal. Super. LEXIS 74882 (Sept. 14, 2023)	Yes
Hovde v. Penhall Co., No. 30-2022-01287414-CU-OE-NJC, 2023 Cal. Super. LEXIS 8599 (Mar. 1, 2023)	Yes
Loskot v. Grishin, No. 30-2023-01354211-CU-FR-CJC, 2024 Cal. Super. LEXIS 40839 (Sept. 16, 2024)	Yes

Case	Severance
Noble v. Dorcy, Inc., No. 23STCV02687, 2024 Cal. Super. LEXIS 53420 (Feb. 29, 2024)	No
Rueda v. Pacquiao, No. BC611486, 2023 Cal. Super. LEXIS 52439 (July 13, 2023)	Yes
Shingle Hill LLC v. Palomar Works Inc., No. 37-2021-00044093-CU-BC-CTL, 2023 Cal. Super. LEXIS 91703 (Oct. 13, 2023)	Yes
Truconnect Commc'ns, Inc. v. Sanchez, No. 22STCV14590, 2023 Cal. Super. LEXIS 26083 (Apr. 13, 2023)	Yes