No. 18-1437

In the Supreme Court of the United States

WINSTON & STRAWN LLP, PETITIONER

v.

CONSTANCE RAMOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF ROPES & GRAY LLP IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Ropes & Gray LLP (Ropes & Gray) is a law firm with approximately 300 equity partners and 1,400 total lawyers in 11 offices across the globe. Ropes & Gray lawyers handle highly confidential attorney-client privileged information and highly confidential business information every day. The California Court of Appeal's decision impedes the firm's ability to rely on confidential arbitrations to protect this sensitive information from public disclosure.

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Congress recognized the vital role that arbitration plays in American dispute resolution in passing the Federal Arbitration Act (FAA), 9 U.S.C. 2. Consistent with express Congressional intent, this Court has long held that lower courts may not enact rules that disfavor arbitration. See *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 & n.6 (1985) (citing H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924)). Nevertheless, the California Court of Appeal's decision here—which relied heavily on an earlier California Supreme Court decision—reflects an ongoing effort by California courts to target and invalidate arbitration agreements. Without this Court's intervention, the *Ramos* decision will have far-reaching consequences for law firms and their clients.

More than thirty years ago, Chief Justice Rehnquist observed that "[p]artners in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them." William H. Rehnquist, *The Legal Profession Today*, 62 Ind. L.J. 151, 152 (1987). Today, it is common for law firms to experience regular fluctuations in their partnership ranks. As a result, it has become increasingly important for law firms to be able to quickly and efficiently resolve internal disputes in a way that protects confidential information and minimizes disruptions to client service.

Arbitration was designed for precisely this purpose. In passing the FAA, Congress touted the princi-

pal benefits of arbitration as eliminating "the costliness and delays of litigation," *Dean Witter Reynolds*, 470 U.S. at 220 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924)), and allowing for expert adjudicators to efficiently resolve specialized disputes. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344-345 (2011).

Those benefits are amplified in the context of law firm partnership disputes. Arbitration facilitates a much more timely and efficient resolution of these matters, which is particularly critical in a client services industry where protracted, time-consuming litigation of internal disputes can create either a real or perceived impediment to firms' ability to meet their clients' business needs. In addition, expert arbitrators familiar with the intricacies of law firm management and complex, often conflicting state partnership law and ethics requirements can be invaluable resources for resolving such disputes.

Even more importantly, public litigation of disputes between law firm partners also carries the unique and ever-present risk of disclosing client secrets, which lawyers have a paramount ethical obligation to protect. Litigating law firm partnership disputes in a public forum creates a substantial risk of disclosing client confidences as well as the firm's confidential information since partnership disputes often center on compensation decisions, services rendered, and related issues. Confidential arbitration offers a means of shielding client and firm confidential information, and avoiding the immeasurable harm that may flow from public disputes—particularly disputes that center on specific client relationships, like the complaint that respondent filed here.

Moreover, the Court of Appeal's decision to extend California's increasingly hostile arbitration jurisprudence to law firm partnership agreements is contrary to settled law and underscores the pressing need to abrogate the California Supreme Court's decision in *Armendariz* v. *Foundation Health Psychare Services, Inc.*, 6 P.3d 669 (2000). This Court has made clear that claims of unequal bargaining power do not provide a basis for invalidating arbitration agreements. The Court of Appeal ignored this clear guidance, notwithstanding that respondent is a sophisticated and experienced lawyer, who holds a J.D./Ph.D., has practiced complex intellectual property litigation for decades, and is more than capable of negotiating her employment and understanding her obligations under the partnership agreement.

By extending the California Supreme Court's decision in *Armendariz* to law firm partners and ultimately invalidating petitioner's arbitration agreement, the Court of Appeal has called into question arbitration provisions in the partnership agreements of every law firm in the country with an office in California. Law firms rely on partnership agreements to set uniform procedures for resolving disputes and to protect confidential information. The Court of Appeal's decision puts client confidences and confidential firm business information at risk.

This Court's intervention is necessary to put a stop to California's continuing efforts to circumvent the FAA, which, if left unchecked, will have far-reaching implications for arbitration in California.

ARGUMENT

I. ARBITRATION OF DISPUTES BETWEEN LAW FIRM PARTNERS IS MORE EFFICIENT AND COST-EFFECTIVE THAN LITIGATION, AND CAN BENEFIT FROM ADJUDICATORS WITH APPROPRIATE EXPERTISE

This Court has long recognized that arbitration is a desirable alternative to litigation. Private arbitration provides numerous benefits, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (citations omitted). Congress sought to promote these benefits when it passed the FAA, in order to "establish[] a 'liberal federal policy favoring arbitration.' " *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018) (citation omitted).

Arbitration consistently allows for faster and more efficient resolution of disputes.[2] This "prime objective" of arbitration, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 346 (2011), is essential for law firms, which need to be able to quickly transition time-sensitive client matters. See Keith M. Rabenold, *Lawyer-Versus-Lawyer Litigation: Is there an Alternative*, 5 Ohio St. J. on Disp. Resol. 421, 433 (1990). For example, a depart-

[2] See Roy Weinstein et al., *Efficiency and Economic Benefits of Dispute Resolution Through Arbitration Compared With U.S. District Court Proceedings* 2-3, Micronomics Econ. Research & Consulting (2017) (Weinstein) (noting that federal lawsuits took more than 12 months longer on average to be litigated to trial, and more than 21 months longer to be litigated through appeal, than cases adjudicated by arbitration).

ing partner may be working on numerous matters all at different stages and involving varying levels of activity at the time of his or her exit. If one or more of those matters becomes the subject of ancillary litigation over origination credit, services rendered, client retention, matter management, or a host of other issues, the client could be drawn into the litigation and adversely impacted. Protracted and contentious litigation between law firm partners often creates an enormous distraction for the parties involved, at the expense of clients. As Congress and this Court have recognized, one of the great benefits of arbitration is that it "normally minimizes hostility and is less disruptive of ongoing and future business dealings." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 542, 97th Congress, 2d Sess. 13 (1982)).

Arbitration also offers flexibility and streamlined procedures that make it much more cost-effective than litigation. One economics consulting firm estimated direct economic losses incurred as a result of litigation versus arbitration over a five-year period to be $20.0 - $22.9 billion.[3] These economic costs are borne by both litigants and the judicial system. See H.R. Rep. No. 542, 97th Congress, 2d Sess. 13 (1982) (reiterating that "arbitration could relieve some of the burdens on the overworked Federal courts").

Access to expert adjudicators is particularly important in the context of legal partnership disputes, given both the increasing frequency and complexity of such disputes. See Georgetown L. Ctr. for the Study of

[3] Weinstein at 4.

the Legal Profession, *2017 Report on the State of the Legal Market* 12-13 (2017) (observing that "since the Great Recession, lateral partner moves at big law firms have increased significantly").[4] Today it is common for large groups of lawyers and even entire practice groups to lateral together from one firm to another. See Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 Ky. L.J. 299, 301 (2002). All parties involved would benefit from the insight and experience of arbitrators who are past or present law firm partners familiar with differing state laws governing lawyers, law partnerships, and legal ethics requirements, and who understand and appreciate the intricacies of firm management.

[4] See also 2017 Law Firms in Transition: An Altman Weil Flash Survey 38, 41 (2017) (85% of firms reported lawyers who brought new business to their firms, while 47% of firms lost lawyers who took business with them); Robert W. Hillman & Allison Martin Rhodes, *Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups* § 1.1 (3d ed. 2017) (Hillman) (describing how the "revolving door" of partners moving throughout the legal industry has "become a modern day law firm fixture") (citation omitted).

II. CONFIDENTIAL ARBITRATIONS PROVIDE A VITAL MEANS OF SHIELDING CLIENT AND LAW FIRM SENSITIVE BUSINESS INFORMATION, WHICH IS AT THE HEART OF MOST PARTNERSHIP DISPUTES

A. Confidentiality Provisions Are Routinely Enforced And Are A Far Cry From "Substantively Unconscionable"

The lower court's conclusion that the confidentiality provision at issue here was unconscionable cuts against a vast body of case law enforcing these provisions and extolling the virtues of privately resolving disputes.

This Court has repeatedly recognized that parties have good reason to design arbitration procedures in a way that maintains confidentiality. See, *e.g.*, *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010) (underscoring "'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations" (citation omitted)); accord *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 345 (2011) (noting the benefit of using confidential arbitrations to protect trade secrets). As a result, many lower courts have respected the privacy of arbitrations and routinely enforced confidentiality provisions in arbitration agreements.[5] Indeed, because "confidentiality is a paradig-

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[5] See, *e.g.*, *Damato* v. *Time Warner Cable, Inc.*, No. 13-cv-994 (ARR)(RML), 2013 WL 3968765, at *12 (E.D.N.Y. July 31, 2013) (concluding in light of *Concepcion* that "the writing is on the wall: the confidentiality of proceedings does not, by itself, render an agreement to arbitrate unconscionable"); accord *Parilla* v. *IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 280 (3d Cir. 2004); *Iberia*

matic aspect of arbitration," 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) (quoting *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004)).

Nonetheless, the California Court of Appeal struck down the confidentiality provision at issue here as unconscionable, because it could potentially "impair [plaintiff's] ability to engage in informal discovery in pursuit of her litigation claims." Pet. App. 38a. The *Ramos* court relied primarily on *Davis* v. *O'Melveny & Myers*, 485 F.3d 1066, 1073 (9th Cir. 2007), but that decision has been overruled as "clearly irreconcilable" with this Court's subsequent FAA decisions. *Ferguson* v. *Corinthian Colleges, Inc.*, 733 F.3d 928, 934 (9th Cir. 2013) (recognizing overruling of California doctrine prohibiting arbitration of actions seeking certain types of injunctive relief). Moreover, the provision at issue here includes standard confidentiality language, providing simply that "all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence." Pet. App. 6a. It does not target the respondent's discovery efforts or otherwise impose any unusual restrictions on the parties. Any confidentiality provision could impair a party's ability to engage in informal discovery, insofar as he or she desires to disclose confidential information to third parties during the course of such discovery. Despite that inherent limita-

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Credit Bureau, Inc. v. *Cingular Wireless LLC*, 379 F.3d 159, 175-176 (5th Cir. 2004); *Carmax Auto Superstores Cal. LLC* v. *Hernandez*, 94 F. Supp. 3d 1078, 1122 (C.D. Cal. 2015).

tion, this Court has recognized that confidentiality remains a core element of many arbitrations, not grounds for invalidation. See pp. 8-9, *supra*.

The Court of Appeal's refusal to enforce the confidentiality provision here illustrates the continued, far-reaching impact of *Armendariz* v. *Foundation Health Psychare Services, Inc.*, 6 P.3d 669 (Cal. 2000). For example, rather than simply modifying the provision to permit whatever "informal discovery" the lower court deemed necessary to make the provision enforceable, as expressly provided by the partnership agreement, Pet. App. 49a, the Court of Appeal applied the arbitration-specific severability rule from *Armendariz* to strike down the entire provision. See *id.* 43a-44a. Much like the California Supreme Court's decision in *Armendariz*, the Court of Appeal's attack on the confidentiality provision here is a thinly disguised "attack on the character of arbitration itself." *Guyden*, 544 F.3d at 385; *Iberia Credit Bureau*, 379 F.3d at 175.[6]

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[6] This point is underscored by the Court of Appeal's secondary, public policy rationale for striking the confidentiality provision—that such provisions "favor[] the employer to the detriment of employees seeking to vindicate unwaivable statutory rights" because employers are repeat players that benefit from the knowledge and experience of past arbitrations. Pet. App. 40a. That argument too is not unique to the facts of this case, but rather strikes at the heart of confidential arbitrations, in direct contravention of Supreme Court precedent. See *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 236 (2013) (rejecting application of "effective vindication rule" to invalidate contractual waiver of class arbitration and holding that even if an arbitration clause creates challenges to "*proving* a statutory remedy," it "does not constitute the elimination of the *right to pursue* that remedy"); accord *Concepcion*, 563 U.S. at 351; see also *American Express Co.*, 570

B. Litigating Law Firm Partnership Disputes Risks Disclosure Of Confidential Client Information

Disputes between a law firm and its former partners are particularly ill-suited for public litigation because they often implicate—or center on—confidential client information, which lawyers have an ethical obligation not to disclose. The ABA's Model Rules provide that lawyers "shall not reveal information relating to the representation of a client" absent client consent or other limited exceptions. ABA Model Rules of Prof'l Conduct R. 1.6(a), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/. The vast majority of states have adopted similar rules. See ABA CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct R. 1.6 (Nov. 26, 2018) (ABA CPR Policy) (listing states that have adopted Model Rule 1.6 or similar rules). In California, lawyers have a statutory duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6068(e)(1); Cal. R. Prof. Conduct 1.6 (2018). Preserving the confidentiality of client information involves "public policies of paramount importance" and "is the hallmark of the client-lawyer relationship." Cal. Standing Comm. on Prof'l Responsibility & Conduct Form. Op. No. 2016-195 (citations omitted). Even the client's

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U.S. at 252 (Kagan, J., dissenting) ("Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here.").

identity is protected under the Model Rules and various state bar opinions. See, *e.g.*, ABA Formal Op. 480, 2 & n.7 (Mar. 6, 2018).[7]

But confidential client information is often central to a departing partner's claims against his or her law firm. Disputes over compensation may implicate how much work was performed on certain client matters by different lawyers, as well as the nature of the services performed. Resolving these disputes generally requires reviewing detailed records describing the work and advice provided to clients. Likewise, disputes over transitioning matters from one firm to another, or accessing client files, may require a discussion of their contents, and claims by lawyers for retaliation and discrimination may also implicate services rendered and other confidential client information. See, *e.g.*, *Fox Searchlight Pictures, Inc.* v. *Paladino*, 89 Cal. App. 4th 294, 314 (2001) (holding that in-house counsel may disclose client confidences obtained during her prior employment if relevant to her claim for wrongful termination); *Verdrager* v. *Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 474 Mass. 382, 414-415 (2016) (holding that associate engaged in protected activity when she used privileged and confidential information from law firm's file server in order to advance a claim for discrimination against her former employer). Given the nature of the information involved in disputes between partners, "[e]thical duties of confidentiality regarding

[7] These obligations extend well beyond attorney-client privileged communications, and prohibit disclosure of information "that might cause a client or a former client public embarrassment." Cal. Op. 2016-195.

client matters" can make public lawsuits "untenable." Hillman § 2.1.4.

Arbitration is therefore critical to ensuring that confidential client information does not inadvertently become part of the public record in court—a significant risk when such information is central to the plaintiff's claims. Shielding this information in public litigation is difficult and, at best, uncertain because court proceedings are "presumptively open," and "[t]he public has a First Amendment right of access to civil litigation documents" that are "used at trial or submitted as a basis for adjudication." *Savaglio* v. *Wal-Mart Stores, Inc.*, 149 Cal. App. 4th 588, 596 (2007).[8] Sealing requires narrow tailoring and a "compelling interest sufficient to overcome the strong First Amendment presumptive right of public access." *Doe* v. *Public Citizen*, 749 F.3d 246, 270 (4th Cir. 2014). Even where First Amendment interests are not implicated, the common law presumptive right of access—which applies to all judicial documents and records—"can be rebutted only by showing that countervailing interests heavily outweigh the public interests in access." *Id.* at 266. Thus, this presumptive public right of access creates a high bar for lawyers and law firms to overcome, which increases the risk that client confidential information will be disclosed. See, *e.g.*, *Bernstein* v. *Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 145 (2d Cir. 2016) (unsealing complaint against plaintiff's former law firm

[8] "Every circuit to consider the issue has concluded that the qualified First Amendment right of public access applies to civil * * * proceedings." *Dhiab* v. *Trump*, 852 F.3d 1087, 1099 (D.C. Cir. 2017) (citing cases from the Second, Third, Fourth, Seventh, Eighth, Ninth, and Eleventh circuits).

over parties' joint objection, and expressing skepticism that confidential client information should supersede public's First Amendment right of access); *Kamakana* v. *City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (affirming district court's decision to unseal deposition testimony and exhibits, and observing that defendant failed to meet "the high threshold of showing that 'compelling reasons' support secrecy").[9] Moreover, the fact that each sealing decision requires balancing countervailing policy considerations and entails a significant exercise of discretion virtually guarantees a lack of uniformity in how courts apply the standard, heightening the risk of disclosure further.

Conflicting state ethics rules create an additional complication. For example, the Virginia Supreme Court has held that a lawyer has a First Amendment right to publicize negative information *about his or her own client* if that information was previously disclosed in open court. See *Hunter* v. *Virginia State Bar ex rel. Third Dist. Committee*, 285 Va. 485, 503 (2013). The ABA sharply criticized this decision, noted that its own ethics rule differs from Virginia's, and pointed to a decision from the Colorado Supreme Court that reached the opposite conclusion. See ABA Formal Op. 480, 5

[9] In contrast, courts have inverted this test when parties seek to compel the production of confidential arbitration materials, as courts place the burden on the moving party. See, *e.g.*, *Fireman's Fund Ins. Co.* v. *Cunningham Lindsey Claims Mgmt., Inc.*, Nos. 03-cv-0531, 03-cv-1625 (DLI)(MLO), 2005 WL 1522783, at *4 (E.D.N.Y. June 28, 2005) (requiring party seeking disclosure of information from confidential arbitration to show "that the need for the information sought is compelling enough to outweigh the privacy interests that are involved").

n.20 (Mar. 6, 2018) (citing *People* v. *Isaac*, No. 15PDJ099, 2016 WL 6124510, at *3 n.14 (Colo. O.P.D.J. Sept. 22, 2016)); see also ABA CPR Policy R. 1.6 (listing different amendments to client confidentiality rule adopted by each state). Law firms that have offices in several states could be subject to multiple, potentially conflicting ethics requirements depending on which state or states the former partner worked in, which client matters are at issue, and where the litigation ultimately proceeds.

This case presents a prime example of the risks inherent in public litigation. Respondent's unsealed complaint—which was disseminated by numerous media outlets—disclosed the identity of her primary client, the type of work she performed for the client, the amount of time she billed, and how much the firm ultimately collected from the client for her work. See Compl. ¶¶ 12, 18, 24, 29. In fact, a core component of respondent's case hinges on the nature and extent of the services rendered to this particular client. *Ibid.* The complaint also alleges that respondent did not receive credit for her role in originating a matter from another client whom she does not name in her complaint, *id.* ¶ 29, but resolving this claim would require disclosure of the nature of the relationships she and others at her firm had with this client, and the type of work and advice they provided. Discovery and motion practice undoubtedly would supplement these disclosures with more detailed and potentially more sensitive information.

As this case well illustrates, public litigation all but assures the disclosure of client confidential information, which is often central to claims brought by departing

law firm partners. Arbitration, on the other hand, presents a vital means of protecting such information from disclosure, whether purposeful or inadvertent.

C. Litigation Also Places Law Firms' Confidential Information at Risk of Disclosure

Public litigation creates significant risks not only for law firm clients, but also for the lawyers and firms themselves. For decades, courts and commentators have criticized partnership disputes as "unseemly," "hasty," "bitter," "petty," "irresponsible," and "close to combat conditions." John Feerick, Avoiding and Resolving Lawyer Disputes, in *Withdrawal, Retirement & Disputes* 7 (E. Berger ed. 1986). Apart from the substantial reputational costs and broader fallout, these disputes create a serious risk that law firm confidential information will be disclosed.

Departing partners have continuing duties to their former firms, including a duty not to disclose or otherwise misuse the firm's sensitive business information. While "*[s]ome* disclosures of information" may be justified as necessary when a lawyer changes firms, any such disclosures should be "limited" and "reasonable steps should be taken to ensure that third parties maintain the confidentiality of information provided to them." Hillman § 4.8.6.1.

Public litigation risks disclosure of highly sensitive firm information such as details about billing and collections, hourly rates, client lists, business development strategies, recruitment and retention of new partners and associates, and case staffing practices. Courts have recognized that information like this can constitute protectable trade secrets. See, *e.g.*, *Fred Siegel Co., L.P.A.*

v. *Arter & Hadden*, 707 N.E.2d 853, 862-863 (Ohio 1999) (holding that client list contained protectable trade secrets); *Reeves* v. *Hanlon*, 95 P.3d 513, 522 (Cal. 2004) (lawyers violated Uniform Trade Secret Act by misusing prior firm's client list). However, the bar for obtaining trade secret protection is high, and it would be challenging to obtain across-the-board protection for these various categories of highly confidential firm information. See Douglas R. Richmond, *Yours, Mine, and Ours: Law Firm Property Disputes*, 30 N. Ill. U. L. Rev. 1, 5-6, 18 (2009) (observing that the question of whether valuable firm information such as fee structures, hourly billing rates, billing cycles, payment information, and fee-realization rates constitutes protected trade secrets remains largely unsettled).

Several of these categories of confidential information are plainly implicated in the present action. Respondent challenges how origination credit is awarded, certain policies and practices of the firm's compensation committee, how collection work is assigned and executed, allocation of office operating costs among partners, how matters are staffed, and the firm's strategies for developing new business. Pet. App. 7a-8a. Protecting sensitive information becomes extremely difficult—and, in many cases, impossible—when arbitration clauses are invalidated and the litigation proceeds in open court.

Moreover, partnership disputes also put at risk law firm compensation practices that are often considered highly sensitive and confidential. At some firms, compensation for partners is determined by management committees and is not shared with other partners at the firm. One purpose of these confidential compensation

systems is to promote collaboration, minimize conflict over partner pay, and keep lawyers focused on client service above all else. A firm's compensation system is not simply a method for dividing profits—it "plays a crucial role in shaping its culture." Milton C. Regan & Lisa H. Rohrer, *Money and Meaning: The Moral Economy of Law Firm Compensation*, 10 U. St. Thomas L.J. 74, 79, 83, 93 (2012).

Litigating partnership compensation disputes in a public arena runs the risk of completely eviscerating the confidential compensation systems of many law firms. A lawsuit brought by three former partners of now-defunct law firm Chadbourne & Parke LLP illustrates the risks inherent in public litigation of these issues. See Christine Simmons, *Chadbourne Turns Over Sensitive Firm Documents In Sex Bias Case*, N.Y.L.J. (Oct. 23, 2017) (observing that the firm "is handing over some of its most sensitive and confidential documents, including partner compensation information [related to Chadbourne's "black box" structure] and the internal communications of the firm's management committee," totaling 2.5 terabytes and more than 4 million records, but "[t]he plaintiffs say it's still not enough"). In contrast, proceeding through confidential arbitration allows lawyers to engage in streamlined discovery and provide the factfinder with the necessary information to reach a decision while avoiding public battles over highly confidential documents and information.

Public litigation of partnership disputes virtually guarantees the disclosure of confidential information about the lawyers, their firms, and their clients—information that the parties have ethical duties to protect. It degrades the profession and burdens already

overworked courts. Law firms are able to substantially mitigate these risks by including confidential arbitration provisions in their partnership agreements. But the benefits of confidential arbitration are illusory if courts refuse to enforce the agreements as written.

III. THE CALIFORNIA COURT OF APPEAL'S APPLICATION OF *ARMENDARIZ* TO LAW FIRM PARTNERS ILLUSTRATES THE SWEEPING REACH OF THAT DECISION AND THREATENS TO DESTABILIZE LAW FIRM DISPUTE RESOLUTION

The California Court of Appeal wrongly extended the California Supreme Court's decision in *Armendariz* v. *Foundation Health Psychare Services, Inc.*, 6 P.3d 669 (2000)[10] to disputes between law firm partners. The court tethered its decision to a finding that petitioner was in a superior bargaining position vis-à-vis respondent, akin to that of an employer-employee relationship, combined with a lack of evidence in the record that respondent had an opportunity to negotiate the arbitration provision. Pet. App. 21a. This application of *Armendariz* is both legally unsound and fraught with unintended consequences.

As an initial matter, the Court of Appeal's decision flies in the face of well-established law holding that arbitration clauses are enforceable even when parties do not have equal bargaining power. Indeed, this Court has "explicitly rejected" attempts to limit arbitration agreements based on the lack of "roughly equivalent bargaining power," and has noted that such restrictions

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[10] This brief does not undertake to address the legal infirmity of *Armendariz* itself, which is well covered by petitioner's brief.

"appear[] nowhere in the text of the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 345 n.5 (2011); see also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held * * * that agreements to arbitrate in that context are enforceable." (citation omitted)). The California Court of Appeal plainly erred when it invalidated the arbitration clause at issue here based on the law firm's purportedly superior bargaining position.

Moreover, setting aside the obvious tension with this Court's precedent, the Court of Appeal's conclusion that even a law firm partner cannot enter into an enforceable arbitration agreement illustrates the need to abrogate *Armendariz*. Respondent is a highly educated lawyer, holding a J.D. and Ph.D. (a doctorate in biophysics) from prestigious institutions, and has practiced law for nearly twenty years. Pet. App. 5a. She also is a registered patent practitioner; has been admitted as a solicitor in the United Kingdom; has worked in the intellectual property practice groups of three major U.S. law firms; and brought portable business to the bargaining table. *Ibid.* Simply put, respondent is a textbook example of a sophisticated counter-party entirely capable of appreciating the significance of the contract and negotiating what she deemed an acceptable bargain. Cf. *Moncharsh* v. *Heily & Blase*, 3 Cal. 4th 1, 40 (1992) (Kennard, J., concurring and dissenting) (observing that the "agreement [between law firm and associate] was negotiated between sophisticated parties" and "the disparity in bargaining power between the parties was not substantial"); *Dotson* v. *Amgen, Inc.*, 181 Cal.

App. 4th 975, 981 (2010) (enforcing arbitration clause where plaintiff was "a highly educated attorney, who knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package"). To say that even respondent lacked adequate bargaining power, triggering application of *Armendariz*'s "minimum requirements" test, is to create an exception that swallows the rule.[11]

The California Supreme Court recently underscored the importance of "encouraging labor mobility while minimizing firm instability" when deciding law firm partnership disputes. *Heller Ehrman LLP* v. *Davis Wright Tremaine LLP*, 411 P.3d 548, 552 (2018). Yet, by creating an abiding uncertainty over whether law firms will be able to enforce arbitration clauses, the lower court's decision frustrates these important policy considerations.

In calling into question a key pillar of law firm governance, the Court of Appeal's decision will have far-reaching consequences for the legal industry. By granting review and providing guidance on the enforceability of arbitration clauses among law firm part-

[11] This analysis applies with equal force to equity partners and income partners, like respondent. In either instance, there may be unequal bargaining power between the law firm and the new partner. However, this Court, among others, has enforced arbitration agreements despite far greater disparities in bargaining power. See, *e.g.*, *Concepcion*, 563 U.S. at 345 (enforcing mandatory arbitration clause as to AT&T consumers); *Poublon* v. *C.H. Robinson Co.*, 846 F.3d 1251, 1257 (9th Cir. 2017) (holding that account manager for Fortune 500 transportation management company must arbitrate claims against employer).

ners, this Court can provide much-needed clarity on this significant issue.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Court should grant the writ.

Respectfully submitted.

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