No. 18-1437

In The
Supreme Court of the United States

WINSTON & STRAWN LLP,

Petitioner,

v.

CONSTANCE RAMOS; THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The arbitration provision in Winston & Strawn's Partnership Agreement prohibits the arbitrators from "overrid[ing] the determinations" of the firm's leadership—including the very determinations that led to the dispute—so long as those determinations don't violate the terms of the Partnership Agreement itself. App. 51a. The California Court of Appeal found this term in the arbitration agreement unconscionable as applied to Constance Ramos's state law claims for employment discrimination, because it prevented the arbitrators from awarding her any of the remedies available under those laws, and thus purported to waive nonwaivable substantive rights granted by the California legislature. Does this state court's application of a state rule against limiting statutory remedies "stand as an obstacle to the accomplishment of" the Federal Arbitration Act's objectives, such that this Court may review it?

2. Did the California Court of Appeal abuse its discretion when it concluded that it could not excise the provision prohibiting the arbitrators from overriding the decisions of Winston & Strawn's leadership "without fundamentally altering the parties' agreement," App. 43a, leading it to void the entire incurably unconscionable arbitration clause under California's generally applicable rule on severability of unconscionable contract terms?

RELATED CASES

Ramos v. Winston & Strawn LLP, CGC-17-561025, California Superior Court, County of San Francisco. Judgment entered Nov. 30, 2017.

Ramos v. Superior Ct., A153390, California Court of Appeal, First District. Judgment entered Nov. 2, 2018 (as modified Nov. 28, 2018).

Ramos v. Superior Ct., S253014, California Supreme Court. Judgment entered February 13, 2019.

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INTRODUCTION

Marybeth Armendariz's name does not appear on this caption. But a casual reader of the petition and its breathless chorus of amicus briefs might understandably conclude that it was her case, and not Constance Ramos's, that this Court was being asked to review. The petition spends twenty-four pages discussing the California Supreme Court's 19-year-old opinion in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), often misconstruing it in the process, Pet. 5-7, 12-34, while rushing through the facts of this case in less than two. Pet. 7-9.

But despite Winston & Strawn's desire to change the subject, the "overly harsh" terms of its own Partnership Agreement drove the lower court's opinion—and California is far from an outlier in finding terms like these unconscionable. App. 33a. Chief among these substantively unconscionable terms was the "firm always wins" clause, which prohibited the arbitral panel from "substitut[ing] its judgment" for or "overrid[ing] the determinations" of, the partnership, its Executive Committee or officers" with only one exception: where the partnership or its officers "violate[d] a provision of this Agreement." App. 51a.

The California Court of Appeal concluded that this "firm always wins" clause would make it impossible for the arbitrators to award Ramos back pay, front pay, reinstatement or punitive damages—essentially every form of relief she sought in her complaint for employment discrimination and retaliation. App. 28a-30a.

And it found such limitations on statutory remedies to be unconscionable, under a generally applicable California contract law principle that prohibits the waiver by private agreement of rights created for a public reason. Cal. Civ. Code § 3513. This generally applicable antiwaiver principle, as applied to this prospective bar on statutory remedies for workplace discrimination, does not conflict with the Federal Arbitration Act or any of this Court's precedents on FAA preemption. It neither disproportionately burdens agreements to arbitrate nor interferes with any of arbitration's fundamental attributes. Indeed, the supreme courts of numerous states have invalidated, on public policy or unconscionability grounds, agreements that purported to eliminate even one statutory remedy—clauses far less restrictive of the arbitrators' authority than Winston & Strawn's "firm always wins" clause.

And it was this same "firm always wins" clause—which the opinion below found could not be severed without "fundamentally altering the parties' agreement," App. 43a—that led the court to invalidate the entire arbitration agreement under California Civil Code § 1670.5(a). That statutory provision, which applies to unconscionable terms in arbitration and non-arbitration agreements alike, grants courts the discretion to remove unconscionable terms from contracts, or to refuse to enforce the entire contract if the unconscionability cannot be cured by severance. Because the lower court concluded it was "not permitted to cure" the unconscionability caused by the central firm-always-wins clause, App. 43a, it voided the

arbitration agreement entirely—a result consistent with this Court's precedent and the approach taken by other state high courts.

Because the opinion below found the taint from just one integral, unconscionable term to be incurable, it had no reason to apply any "two-strikes presumption." Petitioner invented this so-called presumption by misreading dicta in *Armendariz*; it has nothing to do with the lower court's opinion in this case, and it is not the law in California.

The court below did cite to *Armendariz* in reaching its conclusions that the "firm always wins" clause was unconscionable and could not be severed. But many of Petitioner's critiques of *Armendariz* are entirely unmoored from the opinion below, in that they relate to aspects of *Armendariz* with which the opinion below did not engage, or which it expressly declined to include in its unconscionability findings. Conversely, the opinion below found the firm's broad confidentiality provision to be unconscionable in that it would entirely prevent Ramos from gathering evidence to support her claims. But it did not rely on *Armendariz* at all in reaching this conclusion and distinguished other California state court opinions that had upheld confidentiality provisions against unconscionability challenges. App. 38a-40a. This fact-bound opinion, with its relatively minimal amount of overlap with *Armendariz*, presents an exceedingly poor vehicle for this Court to address any concerns it may have about that 20-year-old decision.

And despite Petitioner's and its amici's empassioned rhetoric, *Armendariz* should not concern this Court. California courts routinely enforce arbitration agreements, often deferring to this court's teachings in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) in doing so. *Armendariz* presents no bar to such enforcement. It simply outlines a framework for discriminating between conscionable and unconscionable agreements, which is a type of discrimination that the FAA's savings clause expressly permits.

Petitioner and its amici point out that *Armendariz* is often cited by California courts in cases involving arbitration agreements, but this proves nothing beyond the fact that arbitration agreements are a very common type of contract in today's economy. What is perhaps more telling is that California courts also cite *Armendariz* in cases having nothing whatsoever to do with arbitration, underscoring that it is not a case about arbitration but a case about nonwaivable rights and unconscionability that happened to arise in an arbitration context—just like this one.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. Winston & Strawn ("Winston") maintains two tiers of partners: higher-tier capital partners and lower-tier income partners. App. 5a n.1; Record on Appeal ("ROA") Exhibit 6. Constance Ramos joined Winston in May of 2014 as an income partner. App. 5a. She arrived at the firm with two male attorneys, with

whom she had previously worked at the Hogan Lovells firm. App. 6a-7a. While at Winston she continued to work closely with one of these attorneys, who joined the firm as a capital partner. ROA Exhibit 8 at 227.

Ramos had substantial experience as a patent attorney, including certification as a solicitor in the United Kingdom. But instead of recognizing Ramos for her own credentials or encouraging her efforts to develop new cases, managing partners at Winston tied Ramos's career at the firm to the male colleague who had come with her from Hogan Lovells—even though there had never been any agreement that any of the three attorneys would travel among firms as a unit. In January 2016, after both male partners had separately left the firm, the managing partner of Winston's San Francisco office ordered Ramos to leave as well, and to stop working immediately on any billable matters. App. 7a. When she did not comply, the Compensation Committee cut her salary by 33%. *Id.*

Throughout 2016, Ramos continued trying to develop business for Winston, but her efforts were thwarted, as she was left off cases in favor of less qualified, less experienced male attorneys. App. 7a-8a. Despite being the highest billing income partner (and second highest billing partner overall) in the San Francisco office in fiscal year 2016, and despite the fact that she achieved almost complete success on a case she had brought with her from Hogan Lovells that went to trial after she arrived at Winston, Ramos received no 2016 bonus. App. 7a; ROA Exhibit 5 at 74-75. In early 2017, the Compensation Committee cut her salary again; by that point, she had experienced a 56%

pay cut during her nearly three years with Winston. App. 8a.

In July 2017, Ramos sent a letter to Winston resigning under protest and attaching previous correspondence with managing partners at the firm. She explained that "[w]hen I came to Winston, I expected to be evaluated on my own merits, assessed on my own accomplishments, and treated as an individual, not as an appendage of a male superior." ROA Exhibit 5 at 77. After documenting her efforts to resolve the situation without success, she concluded that "no reasonable attorney would be able to remain at Winston under these hostile circumstances." ROA Exhibit 5 at 81.

2. On her second day at the firm, Ramos was given a copy of Winston's Partnership Agreement and told to sign it, which she did. App. 35a; ROA Exhibit 8 at 226. This agreement stated that all management decisions, including decisions about compensation, would be made by an Executive Committee, whose members would be elected from among the capital partners by a vote of the capital partners. App. 23a-24a; ROA Exhibit 6 at 108-115.[1] An income partner could be expelled from the partnership "for any reason" by a secret ballot vote of two-thirds of the capital partners. App. 23a. Similarly, any changes to the Partnership Agreement

[1] The Compensation Committee, which made the decisions to twice cut Ramos's pay, was also made up of capital partners and was authorized to act by the Executive Committee. ROA Exhibit 7 at 210.

could be made only by a two-thirds vote of the capital partners. App. 24a.

The section of the Partnership Agreement entitled "Arbitration" required that any disputes or controversies "arising under or related to this Agreement" first be referred to mandatory, nonbinding mediation and then to arbitration with a panel of three arbitrators, all of whom must be partners at U.S. law firms with more than five hundred lawyers. App. 50a-51a. The arbitration provision also stated that "[f]ees and other charges" associated with the arbitration "shall be shared equally by the Partnership and the other party" and that "[e]ach party shall bear its own legal fees." App. 51a. It mandated that "the parties and the arbitrators" maintain "all aspects of the arbitration" in "strict confidence." *Id.* And it ended with the following firm-always-wins clause imposed on the arbitrators:

> The panel of arbitrators shall have no authority to add to, detract from or otherwise modify this Agreement nor will the panel of arbitrators have authority to substitute its judgment for, or otherwise override the determinations of, the Partnership, or the Executive Committee or officers authorized to act in its behalf, with respect to any determination made or action committed to by such parties, unless such action or determination violates a provision of this Agreement.

Id.

3. Ramos filed a complaint against Winston with the Department of Fair Employment and Housing, and

later filed a complaint in San Francisco County Superior Court alleging sex discrimination and retaliation under the Fair Employment and Housing Act, California Government Code § 12900 *et seq.*, and the Fair Pay Act, California Labor Code § 1197.5, as well as wrongful termination in violation of public policy.[2] ROA Exhibit 5 at 81-87. She explicitly sought punitive damages under five of her claims. *Id.*

Winston moved to enforce the arbitration provision in its Partnership Agreement. Ramos opposed the motion, arguing that the "firm always wins" clause would prevent the arbitrators from ruling in her favor on the discrimination claims and that the broad confidentiality provision would prohibit Ramos from gathering information or engaging in informal discovery to support those claims. ROA Exhibit 7 at 223-24. Winston contested Ramos's interpretation of the "firm always wins" clause, suggesting that in addition to its explicit exception for determinations that violate the agreement, the clause also contained a second, unwritten exception for decisions that violated applicable law. ROA Exhibit 10 at 350.

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[2] The Court of Appeal referred to Ramos's claims under California Labor Code § 1197.5 as "Equal Pay Act" claims consistent with the statute's original title. But in 2015 Governor Brown signed Senate Bill 358, the Fair Pay Act, which amended California Labor Code § 1197.5 to prohibit employers from paying men and women differently for "substantially similar work," instead of "the same work," as the statute had previously provided. Because of this 2015 bill, Ramos's complaint referred to her California Labor Code claims as "Fair Pay Act" claims.

The trial court granted Winston's motion to compel arbitration. App. 46a. However, it found provisions in the arbitration agreement regarding attorney's fees and costs, and the location of arbitration, to be unconscionable, and severed them. App. 47a.

4. The Court of Appeal saw things differently. It concluded that one of the provisions stricken by the trial court—requiring arbitration in Chicago—was not unconscionable because Ramos had failed to prove that she could not receive substantial justice arbitrating her claims in Chicago. App. 40a-41a. It also rejected Ramos's argument that selecting all three arbitrators from among partners at law firms with over 500 lawyers would prevent the arbitrators from being neutral, noting that the "ability to choose expert adjudicators to resolve specialized disputes is one of the fundamental benefits of arbitration." App. 27a (quoting *Concepcion*, 563 U.S. at 348).

But the Court of Appeal found that both the "firm always wins" clause and the provision requiring each party to pay its own attorney's fees deprived Ramos of statutory remedies provided by California law, rendering them unenforceable. App. 30a. With respect to the "firm always wins" clause, the court explained that Ramos sought back pay, punitive damages and reinstatement under her statutory discrimination and retaliation claims. App. 28a-29a. She also sought front pay, which California courts treat as a substitute for reinstatement in constructive discharge cases like Ramos's. App. 29a.

To award her any of these types of relief, the court concluded, the arbitrators would have to "substitute their judgment" for and "override" determinations made by the Executive Committee and its agents on the Compensation Committee, who had twice cut her pay, denied her bonuses, and demanded that she leave the firm. App. 29a. Under the terms of the "firm always wins" clause, the arbitrators could only do this if the actions being challenged "violate a provision of this [Partnership] Agreement." App. 51a. And as the court noted, "the alleged adverse employment actions and decisions by Winston do not violate the Partnership Agreement." App. 29a-30a.

After determining that the "firm always wins" clause and the provision denying statutory fee shifting both foreclosed remedies available under California law, App. 30a, the Court of Appeal considered five other challenges to the arbitration agreement: rejecting two (App. 31a-32a); finding merit in two (App. 33a, 38a-40a), and declining to reach one (App. 41a n.12). It also found that the circumstances of Ramos signing the arbitration agreement gave rise to a "relatively minimal" level of procedural unconscionability, because Ramos understood the agreement and none of its terms were hidden from her, but as an income partner she still had relatively little power at the firm and was unable to negotiate any of the contract's terms. App. 34a-36a.

Finally, the court found the "firm always wins" clause to be integral to the arbitration agreement, concluding that the court could not "strike that

provision without fundamentally altering the parties' agreement regarding the scope of arbitration and the powers of the arbitrators to provide relief in an arbitral forum." App. 43a. Because it was not allowed to "cure the deficiencies by reforming or augmenting the contract's terms," the Court of Appeal concluded that it "must void the entire agreement." *Id.*

REASONS FOR DENYING THE PETITION

I. The Opinion Below Violates None of This Court's Precedents, and Its Approach to Both Remedy Limitations and Severability Is Consistent with a Consensus of State Appellate Courts.

"[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 467, 474 (1989). The only basis this Court could conceivably have for scrutinizing the intermediate state appellate court's construction of particular contract language is if the lower court's construction is at odds with a federal statute. *See DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (state court's interpretation of the phrase "law of your state" in satellite TV provider's agreement with consumers created conflict with FAA). But there is no such conflict here.[3]

[3] Indeed, Winston does not appear to argue before this Court that the "firm always wins" clause means anything different, or

As construed by the lower court, the "firm always wins" clause is a contract provision that prospectively waives Ramos's statutory rights to be free from discrimination in the workplace, because it precludes the arbitrators from awarding her any of the remedies authorized under California law when those rights are violated. California courts have long forbidden such private waivers of rights established for a public purpose, and this generally applicable principle does not fall more harshly on arbitration agreements than any other type of contract. Nor does this anti-waiver principle, as applied to limitations on substantive statutory remedies, interfere with any fundamental attributes of arbitration, a conclusion espoused by this Court and a broad cross section of state supreme courts. In short, the state court's unconscionability finding as to the exculpatory "firm always wins" clause, and as to the closely related clauses on attorney's fees and arbitration costs, were not preempted by the FAA.

Nor is the lower court's finding on severability subject to review on preemption grounds. This Court has recognized that "there may be cases where a

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curtails Ramos's available statutory remedies any less severely, than the opinion below suggests. This is significant not just from a waiver perspective, but from a public policy perspective as well. By adopting the Court of Appeal's construction of the contract, Winston is essentially conceding that it drafted a clause intended to strip any partners bringing claims against the firm of their statutory remedies. Even if it had the authority to intervene in this state law matter (which it does not), this Court should not condone such oppressive and overreaching behavior which, if allowed to spread, would transform the nation's large law firms into law-free zones.

forbidden provision is so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an entirety." *N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, 78 (1953). The opinion below concluded that this was such a case, and that the "firm always wins" clause was such a forbidden provision so central to the agreement that severing it would have fundamentally altered the contract. This "fatal flaw" approach to severability, not the "two strikes presumption" invented by Petitioner, is the rule applied by California courts, both in cases involving arbitration agreements and those involving other types of contracts. *Armendariz*, 6 P.3d at 696 (severance is improper if "the central purpose of the contract is tainted with illegality"). And the lower court's application of that "fatal flaw rule" in this case, while recognizing that the presence of other unconscionable provisions "also weighs against severance," App. 45a n.14, does no violence to the FAA.

A. No Conflict With the FAA Prevented the Lower Court from Refusing to Enforce Contractual Provisions That Prospectively Waived Substantive State Statutory Remedies.

The opinion below cited to *Armendariz* for the proposition that the Partnership Agreement's restrictions on non-waivable statutory remedies, including the restrictions embedded in the "firm always wins" clause, were unenforceable. App. 30a. *Armendariz*, in turn, derived this anti-remedy-stripping rule from

California's general contract law principle that "a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513. *See also Armendariz*, 6 P.3d at 680-81 (explaining that FEHA rights were established for a public purpose and may not be waived).

This rule in no way "derive[s its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. To the contrary, California's prohibition on waiving certain statutory rights has been applied by California courts in numerous contexts other than arbitration, in opinions dating back over a century. *See*, *e.g.*, *County of Riverside v. Superior Ct.*, 42 P.3d 1034, 1042 (Cal. 2002) (invalidating, under California Civil Code § 3513, police officer's waiver of statutory rights as condition of employment); *Benane v. Int'l Harvester Co.*, 299 P.2d 750, 753 (Cal. Ct. App. 1956) (invalidating provision in collective bargaining agreement that prohibited employees from taking time off work to vote); *Cal. Powder Works v. Atl. & Pac. R.R. Co.*, 45 P. 691, 693 (Cal. 1896) (applying § 3513 to construe a common carrier's contractual exemption from liability narrowly).

California courts have a similarly long history of applying public policy considerations, or principles of unconscionability, to invalidate contractual limitations on liability and damages in contracts having nothing to do with arbitration. *See*, *e.g.*, *City of Santa Barbara v. Superior Ct.*, 161 P.3d 1095, 1097 (Cal. 2007) (release for children's summer camp unenforceable, on public policy grounds, as to future liability for

gross negligence); *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 441-42 (Cal. 1963) (exculpatory provision in agreement between hospital and patient unenforceable because it affects the public interest); *Health Net of California, Inc. v. Dept. of Health Servs.*, 3 Cal. Rptr. 3d 235, 238 (Ct. App. 2003) (declaring unenforceable as against public policy a provision in a health insurance contract prohibiting recovery of damages for any violation of law "not expressly incorporated into the contract"); *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 126 (Ct. App. 1982) (consequential damages limitation in form contract for sale of farm machinery was unconscionable).

Of course, this Court has instructed that facially neutral rules can be preempted by the FAA if they would "have a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. For example, California's "*Discover Bank* rule," which held class action waivers in adhesive consumer agreements to be unconscionable, "created a scheme inconsistent with the FAA" by requiring that class action procedures be available in the arbitral forum, even though this would "sacrifice[] the principal advantage of arbitration—its informality." *Id.* at 348. Likewise, because streamlined, efficient procedures are a fundamental attribute of arbitration, the California Supreme Court, applying *Concepcion*'s preemption analysis, reversed its earlier opinion and held that wage claims may proceed immediately in arbitration, without first requiring an administrative hearing before the Labor Commissioner

as provided under the California Labor Code. *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 198-200 (Cal. 2013).

Thus, while both the *Discover Bank* rule and the *Sonic-Calabasas* rule involved important state statutory rights, they had to bow to the superior federal law with whose objectives they interfered. By contrast, a state rule that certain statutory rights are unwaivable and that all substantive remedies associated with those statutes must be available in the arbitral as well as the judicial forum does not interfere with the speed, efficiency or informality of arbitration, or otherwise "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (citations and internal quotations omitted).

The state rule against remedy-stripping that the lower court applied is not the same as the federal "effective vindication" doctrine discussed in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234-37 (2013), despite Winston's efforts to conflate them. Pet. 17-18. The effective vindication doctrine is a "judge-made exception" to the FAA intended to "harmonize competing federal policies," 570 U.S. at 235, while the rule in *Armendariz* applies a state contract law principle that does not conflict with the FAA and is protected under its savings clause. That rule, derived from California's generally applicable antiwaiver principle codified at California Civil Code § 3513, "disallows forms of arbitration that [would] compel claimants to forfeit" altogether their unwaivable state

statutory rights. *Armendariz*, 6 P.3d at 680. *See also id.* at 681 ("an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA.").[4] But this is exactly what the "firm always wins" clause, and the clause in Winston's arbitration agreement requiring each party to pay its own attorneys's fees notwithstanding FEHA's fee-shifting provision, attempted to do.

And while the petition seeks to paint California as an outlier, *Armendariz*'s rejection of remedy limitations in arbitration agreements is widely shared throughout the country, and has been the basis of findings of unconscionability from many state high courts both before and after *Concepcion*. *See*, *e.g.*, *Sloan Southern Homes, LLC v. McQueen*, 955 So.2d 401, 403 (Ala. 2006) ("a provision restricting the arbitrator's power to award punitive damages violates public policy, and its enforcement would be unconscionable") (citations and internal quotations omitted); *Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456, 474-75 (Fla. 2011) (remedy-limiting provisions in arbitration agreements

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[4] Petitioner and its amici also take out of context language in the *Italian Colors* dissent that this Court "has no earthly interest" in the effective vindication of state statutory rights. *Italian Colors*, 570 U.S. at 252 (Kagan, J., dissenting). The origin of the effective vindication doctrine is a dictum from *Mitsubishi Motors Corp. v. Soler–Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985), that a party does not forego statutory rights by pursuing them in the arbitral forum. And this Court has applied that dictum in the context of state statutory rights as well. *See Preston v. Ferrer*, 552 U.S. 346, 359 (2008). What the dissent in *Italian Colors* had no "earthly interest in vindicating," meanwhile, was a state law that conflicted with and was preempted by the FAA. *Italian Colors*, 570 U.S. at 252 (Kagan, J., dissenting). There is no such conflict here.

between nursing homes and their residents violate Florida public policy and are unenforceable); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 670-71 (S.C. 2007) (provision prohibiting arbitrator from awarding double or treble damages available under state consumer statutes was unenforceable because it "runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest"); *In re Poly-America, L.P.*, 262 S.W.3d 337, 351-53 (Tex. 2008) (anti-retaliation provisions of Texas Workers' Compensation Act were nonwaivable, so provisions preventing arbitrators from awarding remedies under that act were unenforceable); *Hill v. Garda CL Northwest, Inc.*, 308 P.3d 635, 638-39 (Wash. 2013) (finding substantively unconscionable provisions in an arbitration agreement shortening limitations period for state wage claims from three years to two weeks and "significantly curbing" what employees could recover in back pay).[5]

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[5] The state supreme court opinions cited at page 20 of the petition all involved arbitration provisions with class action waivers, and thus directly implicated the conflict between arbitral efficiency and class procedures discussed in *Concepcion*. *See Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 120-22 (Nev. 2015) (class action waiver in employment-based arbitration agreement); *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So.3d 1176, 1178 (Fla. 2013) ("the FAA preempts invalidating the class action waiver in this case on the basis of it being void as against public policy."). Here too, California's high court is in accord with those of other states. *See Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 757-58 (Cal. 2015) (California's Consumer Legal Remedies Act creates unwaivable right to a class action, but this statutory right is preempted by the FAA, citing *Concepcion*); *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 135-36 (Cal. 2014) (rule against class waivers in employment-based arbitration agreements also preempted by the FAA, citing *Concepcion*).

A post-*Concepcion* opinion from the Massachusetts Supreme Judicial Court neatly encapsulates why the *Discover Bank* rule was preempted by the FAA while *Armendariz*'s rule against remedy limitations is not. In *Machado v. System4 LLC*, 989 N.E.2d 464 (Mass. 2013), the Massachusetts high court considered an arbitration provision with both a class action ban and a ban on multiple damages. The court enforced the former, citing *Concepcion*, while invalidating and severing the prohibition on multiple damages, citing to state law that made such remedies nonwaivable. *Id.* at 470-72. It explained these diverging results as follows:

> *Stolt–Nielsen [S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662 (2010)] and *Concepcion* declared the existence of an inherent conflict between class proceedings and "arbitration as envisioned by the FAA." *Concepcion*, supra at 1753. . . . In contrast, the availability of statutorily mandated multiple damages does not impinge on any fundamental characteristic of arbitration, nor does it frustrate the purpose of the arbitral forum. The mandatory award of treble damages to a prevailing plaintiff under the [state] Wage Act simply affects the clerical task of calculating damages. The enforcement of the mandatory multiple damages and anti-waiver provisions of the Wage Act thus in no way "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, supra at 1748. Therefore, the FAA does not preempt this court's holding that the waiver of multiple damages is void as contrary to public policy.

Id. at 473.

And the provision here goes even further than barring a particular form of damages. The "firm always wins" clause would tie the arbitrators' hands and render them incapable of reversing or reconsidering the decisions of firm management. This handicapping of the arbitrators transforms a fair dispute resolution forum into one tilted sharply in favor of one of the disputants. Such perversions of the arbitral process to advantage one party are unconscionable. Many courts outside of California have said so. *See Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 673-74 (4th Cir. 2016) (describing as a "farce" an arbitration provision that "[w]ith one hand offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other, . . . takes those very claims away"); *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 204 (3d Cir. 2010) ("By agreeing to arbitration in lieu of litigation, the parties agree to trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration, but they do not accede to procedures utterly lacking in the rudiments of even-handedness." (citations and internal quotations omitted)); *Davis v. Global Client Solutions, LLC*, 765 F. Supp. 2d 937, 942 (W.D. Ky. 2011) (finding unconscionable a limitation on arbitrator authority that "prevent[ed plaintiffs] from pursuing all available remedies").[6]

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[6] These opinions reflect the notion that because neutrality is a fundamental attribute of arbitration, outlawing unfair and one-sided terms in arbitration agreements actually helps to preserve arbitration as the FAA's drafters intended it. The same principle animated the lower court's finding that the cost splitting

The lower court's opinion is far from hostile to arbitration. It resolved a dispute over the arbitration agreement's scope in favor of coverage, App. 11a-18a, and it rejected four separate unconscionability challenges that Ramos raised, including one the trial court had accepted. But it concluded that in preventing the arbitrators from granting Ramos the remedies to which she was entitled by law, the "firm always wins" clause sought to waive her unwaivable statutory rights rendering it unconscionable. This Court should not disturb that conclusion, which was based on neutral principles of state contract law that pose no conflict with the FAA.[7]

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provision in Winston's arbitration agreement was unconscionable, as it would have made arbitration far more expensive for Ramos than litigating her claims in court. App. 33a, 50a-51a (requiring that Ramos pay half the costs associated with arbitrating her claims before a three-arbitrator panel). Enforcing this provision under these circumstances would have frustrated Congress's objectives in enacting the FAA. *Stolt-Nielsen*, 559 U.S. at 685 (describing "lower costs" as one of the advantages of arbitration compared to the judicial forum); *Murphy v. Mid-West Nat. Life Ins. Co. of Tennessee*, 78 P.3d 766, 768 (Idaho 2003) (arbitration . . . is supposed to be an inexpensive and rapid alternative to prolonged litigation" but the particular agreement at issue, which required the parties to split the costs of a three-arbitrator panel, "is an expensive alternative to litigation that turned the purposes of arbitration upside down"). This Court need not separately analyze this unconscionability finding, however, because the opinion below concluded that the "firm always wins" clause alone was fatal to severance.

[7] In addition, because this case arose in state court, there is cause to question whether the FAA applies at all. *See Imburgia*, 136 S. Ct. at 471 (Thomas, J., dissenting).

B. The Lower Court Applied an Approach to Severability That Is Consistent with this Court's Precedents and the Laws of Other States, and Does Not Target Arbitration Agreements for Different Treatment.

Petitioner charges the court below with applying a "two-strikes" rule that makes arbitration provisions with more than one unconscionable term presumptively unenforceable in California even in the presence of severability clauses. Pet. 30-31.[8] No such rule exists. Instead, California's statute regarding unconscionable contract provisions gives courts three options once they find "as a matter of law that the contract or any clause of the contract [was] unconscionable at the time it was made": 1) "refuse to enforce the contract," 2) "enforce the remainder of the contract without the unconscionable clause," or 3) "so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a).[9] In choosing among

[8] Petitioner invokes this "two-strikes" rule in its eagerness to relitigate *Zaborowski v. MHN Government Services*, 601 Fed. Appx. 461 (9th Cir. 2014), in which this Court granted a petition for certiorari four years ago. Pet. 3 ("a settlement deprived this Court of the opportunity" to decide *Zaborowski*). But this case is a poor *Zaborowski* imitation. While the panel majority in *Zaborowski* spoke of "refus[ing] to sever when multiple provisions of the contract permeate the entire agreement with unconscionability," 601 Fed. Appx. at 464, the opinion below found just one unconscionable term fatal to Winston's attempt at severance, because to sever it would "fundamentally alter[ ]" the terms of the parties' bargain. App. 43a.

[9] Petitioner points to a supposed "liberal, pro-enforcement approach to severability" that is codified in a different statute, California Civil Code § 1599, which applies to illegal—as opposed

these three options, courts look to whether "the central purpose of the contract is tainted with illegality," rendering the entire contract unenforceable, or whether the "illegality is collateral to the main purpose of the contract," in which case the unlawful provisions may be severed. *GreenLake Capital, LLC v. Bingo Investments, LLC*, 111 Cal. Rptr. 3d 82, 88 (Ct. App. 2010).

In this case, the Court of Appeal began by noting without criticism that the trial court had severed multiple provisions it found unconscionable. App. 43a. This lack of criticism undercuts the notion that there is a rigid "two-strikes" rule in California regarding arbitration agreements. But the opinion below then noted that the "firm always wins" clause was not one of the provisions the trial court had already severed, and was different in character from those the trial court had easily removed:

> [T]hat unique provision establishes an important limitation on the arbitrators' power to second-guess decisions by Winston's management, not only with respect to employment decisions like those at issue here, but any other claim that might be brought against the firm. We cannot strike that provision without fundamentally altering the parties' agreement

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to unconscionable—contract provisions. Pet. 29-30. Although California courts have drawn on the older statutory scheme for illegal contract terms in interpreting the more recent statute regarding unconscionability, *see Armendariz*, 6 P.3d at 695-96, the two schemes are not co-extensive. *See Marriage of Facter*, 152 Cal. Rptr. 3d 79, 96 (Ct. App. 2013) (finding Cal. Civ. Code § 1670.5 inapplicable to a case about a prenuptial agreement).

> regarding the scope of arbitration and the powers of the arbitrators to provide relief in an arbitral forum. (*See*, *e.g.*, *Suh v. Superior Court* (2010) 181 Cal. App. 4th 1504, 1516-1517 [court could not excise limitations on remedies in arbitration clause because they were "significant elements of the contract"].) Because we are not permitted to cure the deficiencies by reforming or augmenting the contract's terms, we must void the entire agreement.

App. 43a.

The court dismissed Winston's suggestion that the severability provision in the Partnership Agreement could be used to excise any problematic terms, quoting *Armendariz* for the proposition that "[n]o existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it." App. 44a. The Court of Appeal also held that Winston had waived its argument about the severability clause by raising it "perfunctorily and exclusively in a footnote." App. 44a (quoting *Lueras v. BAC Home Loans Serv.*, 221 Cal. App. 4th 49, 71 (2013)).[10]

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[10] Because the Court of Appeal correctly concluded that Winston waived any argument based on the Partnership Agreement's severability clause, App. 44a, that argument has also been waived before this Court. But if this Court were to consider the terms of the severability clause, it would find them entirely consistent with the lower court's conclusion that it could not sever the "firm always wins" clause without fundamentally altering the nature of the Partnership Agreement. The severability provision instructs that a court finding a provision of the agreement unenforceable must "modify such provision to the minimum extent necessary" to cure the unenforceability, but only if "such

And then, in a footnote, the Court of Appeal made its only reference to the so-called presumption that Winston spends pages of its petition talking about: noting, also with a citation to *Armendariz*, that "[t]he fact that the arbitration agreement contains four unlawful provisions also weighs against severance." App. 45 n.14.

But this footnote was hardly the linchpin of the court's severability analysis; it was more of a "by the way" parenthetical, or at most, an emphatic exclamation point. The court had already reached its conclusion on severance two pages earlier, in discussing the "firm always wins" clause. The decisive factor for the opinion below, as with many California courts considering severability, was not the number of unconscionable terms, but whether unconscionability infects the "central purpose" of the agreement or is merely collateral to it. In other words, is the contract's flaw curable, or fatal?

The first California court to articulate this "fatal flaw" notion of severability in the unconscionability context was *Armendariz*, and it derived that principle from a long line of California cases on illegal contracts—none of which involved arbitration agreements. *Armendariz*, 6 P.3d at 695-96. For example, in *Teachout v. Bogy*, 166 P. 319 (Cal. 1917), the California Supreme Court refused to sever a provision for the purchase of alcoholic beverages from a contract transferring a lease to operate a tavern and a liquor license

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modification does not **alter the purpose or intent** of such provision." App. 49a (emphasis added).

that the law did not allow to be transferred, because "this performance of the covenant [to purchase alcohol] was a part of the benefit which the defendants were to render to the other parties in consideration of the transfer of the lease and license," and so "[i]t cannot be successfully claimed that the covenant to buy the beer and liquors . . . was a separable part of the contract, free from the taint of the illegality arising from the contemplated violation of law." *Id.* at 322. By contrast in *Keene v. Harling*, 392 P.2d 273, 276 (Cal. 1964), the court found that discounting the sale price for a business that operated some illegal bingo-type machines, instead of voiding the sale altogether, was permissible because the illegal machines "were not an integral part of the consideration received" and "were of such minor importance that they did not taint the otherwise legal consideration."

The rule *Armendariz* announced was likewise non-arbitration-focused: "If the central purpose of the contract is tainted with illegality," the court should not enforce it, but "[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." *Armendariz*, 6 P.3d at 696.

The opinion in *Armendariz* did go on to find that the presence of multiple unconscionable terms in the agreement at issue, which happened to involve arbitration, was a "factor" that "weigh[ed] against severance," because it tended to suggest that the central purpose of the contract was not merely to arbitrate future disputes but rather to skew the rules of arbitration so as

to make it "an inferior forum that works to the employer's advantage." *Id.* at 697. But *Armendariz* did not establish a rule that arbitration agreements with more than one unconscionable provision are presumptively unenforceable. It simply applied the "fatal flaw" rule to an arbitration clause with multiple unconscionable terms, and found the resulting changes to the arbitral forum so severe as to fatally taint the contract.

Since *Armendariz* was decided, state and federal courts in California have used its severability framework to evaluate thousands of unconscionable provisions in dozens if not hundreds of contracts: some involving arbitration, others not. And their decisions adhere to no mathematical formula. Whatever the contract's subject matter, the courts' focus is on whether each unconscionable provision is central to the contract's purpose, such that severing it would fundamentally alter the contracting parties' bargain. The approach is about quality, not quantity.

Contracts not involving arbitration have been declared unenforceable in their entirety based on a single unconscionable provision, while arbitration agreements with more than one unconscionable provision have been saved through severance. *Compare Summit Media LLC v. City of Los Angeles*, 150 Cal. Rptr. 3d 574, 588 (Ct. App. 2012) ("the central purpose of the settlement agreement . . . is illegal, so the contract as a whole cannot stand." (internal quotations omitted)) *with Bolter v. Superior Ct.*, 104 Cal. Rptr. 2d 888, 895 (Ct. App. 2001) ("It is not necessary to throw the baby out with the bath water, i.e., the unconscionable provisions can be severed and the rest of the [arbitration]

agreement enforced."). *See also Lang v. Skytap, Inc.*, 347 F. Supp. 3d 420, 431-34 (N.D. Cal. 2018) (severing three unconscionable provisions from arbitration clause and surveying federal and state caselaw on severance). California simply has no "two-strikes" rule against severance in arbitration agreements.

Moreover, California's "fatal flaw" approach to severability is consistent with the approaches taken by federal and state courts alike. *See Macdonald v. CashCall, Inc.*, 883 F.3d 220, 230 (3d Cir. 2018) (under New Jersey law, forum selection clause in arbitration agreement would not be severed despite severability clause because it was "an integral, not ancillary, part of the parties' agreement"); *Gabriel v. Island Pac. Acad., Inc.*, 400 P.3d 526, 542 (Hawaii 2017) ("severance of an illegal provision of a contract is warranted and the lawful portion of the agreement is enforceable when the illegal provision is not central to the parties' agreement"); *Summers v. Crestview Apartments*, 236 P.3d 586, 592-93 (Mont. 2010) (refusing to sever unconscionable provisions from lease agreement).

The "fatal flaw" approach to severability that the lower court applied here is neither hostile to arbitration nor inconsistent with the approach taken by other state supreme courts. This Court should not disturb this aspect of the opinion below.

II. *Armendariz* Presents No Crisis Requiring This Court's Intervention, and This Case Presents an Exceptionally Poor Vehicle Even If Such Intervention Were Warranted.

The Court of Appeal would have reached the same result independent of *Armendariz*, consistent with a broad consensus on the unconscionability of remedy limitations in adhesive contracts, and the integrality—and consequent unseverability—of the "firm always wins" clause. Accordingly, this case affords no opportunity for this Court to consider the many aspects of *Armendariz* to which Petitioner takes exception. To the extent that *Armendariz*'s analytical framework is nonetheless relevant, in that the opinion below used it to reach its conclusions, neither the framework or the conclusions to which it led are hostile to arbitration.

Petitioner attacks the five procedural safeguards discussed in *Armendariz* because they "single out arbitration." Pet. 15. But the five procedural fairness factors described in *Armendariz* no more single out arbitration for disfavor than the analysis in *Steven v. Fidelity & Cas. Co. of N.Y.*, 377 P.2d 274, 298 (Cal. 1962), which held unconscionable a form contract dispensed by a vending machine, singled out vending machine contracts for disfavor. *Armendariz* arose in the context of mandatory arbitration agreements, and so it is hardly surprising that the opinion discusses arbitration and arbitrators, just as the opinion in *Steven* discussed the particular setting in which that unconscionable form contract arose.

But simply mentioning arbitration is not inimical to the FAA, and the five *Armendariz* factors do not run afoul of this Court's FAA preemption precedents. They do not bar outright the arbitration of a certain type of claim, *see Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 533 (2012), although the employees in *Armendariz* had sought just such a rule. *Armendariz*, 6 P.3d at 676-80. Nor do they place burdens on arbitration provisions that other types of contracts do not have to meet. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). And they do not "create a scheme inconsistent with the FAA" by "interfer[ing] with fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. Instead, the five *Armendariz* factors were the California Supreme Court's attempt at applying general legal principles against contractual waiver of unwaivable statutory rights in the context of employment-based mandatory arbitration agreements.

Even if this Court were inclined to question whether the five procedural fairness factors outlined in *Armendariz* are preempted by the FAA, this case offers an incomplete opportunity for doing so. The lower court relied on only two of the five factors—remedy limitations and excessive costs—in invalidating Winston's arbitration agreement. Because this Court "do[es] not sit to decide hypothetical issues or give advisory opinions about issues as to which there are not adverse parties" before it, *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982), it may not consider any of the *Armendariz* factors that did not form the basis of the lower court's unconscionability findings.

Winston also charges that *Armendariz* violates the FAA by applying "arbitration-specific unconscionability rules" that "impose ad hoc, policy-driven rules designed to protect employees." Pet. 14. But the section of the petition that purports to discuss these "arbitration-specific unconscionability rules" never says what they are; it simply reiterates this Court's standards for FAA preemption. Pet. 22-28. It suggests that California courts have ignored *Concepcion* and refused to enforce arbitration agreements, but this is demonstrably not true. *See*, *e.g.*, *Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 16 (Cal. 2016) (enforcing arbitration agreement against unconscionability challenge); *OTO, LLC v. Kho*, 222 Cal. Rptr. 3d 506, 520 (Ct. App. 2017) (same); *Aanderud v. Superior Ct.*, 221 Cal. Rptr. 3d 225, 229 (Ct. App. 2017) (same). It also takes exception to how the California Supreme Court reconciled *Concepcion* in an opinion from six years ago, Pet. 23-24 (describing *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013)), but this Court already had an opportunity to review that decision, and declined. *Sonic-Calabasas A, Inc. v. Moreno*, 573 U.S. 904 (2014) (denying petition for certiorari).

And the one example the petition gives of unconscionability principles supposedly being applied more harshly in the arbitration context than to other types of contracts—the opinion below's finding as to the confidentiality provision in Winston's own arbitration agreement, Pet. 26-27—is not emblematic of any larger trend under California law. Instead, it was a fact-bound decision based on the particular language of Winston's arbitration agreement.

Specifically, the opinion below perceived unconscionability in Winston's "very broad" confidentiality provision, which required "all aspects of the arbitration" to be maintained in "strict confidence." App. 38a-39a. The extreme breadth of this provision made it "hard [for the court] to see how [Ramos] could engage in informal discovery or contact witnesses without violating the prohibition against revealing an 'aspect of the arbitration.' " App. 39a. In reaching this conclusion about Winston's contractual language, the court below distinguished two previous California state appellate court opinions that had upheld confidentiality provisions in arbitration agreements against unconscionability challenges. App. 38a-39a (discussing *Sanchez v. Carmax Auto Superstores California, LLC*, 224 Cal. App. 4th 398 (2014) and *Woodside Homes of Cal. v. Superior Ct.*, 107 Cal. App. 4th 723, 732 (2003)).

As a threshold matter, this unconscionability finding regarding confidentiality is dicta, because the Court of Appeal found the entire arbitration agreement unenforceable due to a different unconscionable provision, the "firm always wins" clause. App. 43a. And the opinion itself confirms that there is no uniform California rule that confidentiality provisions in arbitration agreements are always, or often, unconscionable. Indeed, Winston points to no California court that has so held. The most glaring omission from this list is *Armendariz*, which never mentioned confidentiality in its unconscionability analysis. So whether or not this Court agrees with the opinion below's finding about confidentiality, it provides no path for reviewing *Armendariz*.

Armendariz described principles of unconscionability law in California, such as the sliding scale of procedural and substantive unconscionability, that are generally applicable, not arbitration-specific. Courts in California often deploy these general principles in cases, like *Armendariz* itself, that involve arbitration. This reveals no sinister pattern of flouting this Court's instructions; it merely demonstrates, as Winston's own petition attests, that arbitration agreements are increasingly common. Pet. 36-37.

But *Armendariz*'s principles are invoked frequently outside the arbitration context as well, which would not make sense if they were truly arbitration-specific. *See*, *e.g.*, *De la Torre v. CashCall, Inc.*, 422 P.3d 1004, 1014-15 (Cal. 2018) (unconscionability of interest rate); *Orcilla v. Big Sur, Inc.*, 198 Cal. Rptr. 3d 715, 727-28 (Ct. App. 2016) (unconscionability of loan agreements); *Perez v. Uline*, 68 Cal. Rptr. 3d 872, 877 (Ct. App. 2007) (unconscionability of release in severance agreement).

Petitioner ends by invoking California's size as a reason this Court should intervene, observing that California is "home to 12% of the U.S. workforce." Pet. 36. But presumably most of the California-based workforce was not required to sign agreements mandating arbitration of future claims related to their employment but forbidding the arbitrators from concluding that the employer did anything wrong. Winston chose to include that highly unusual "firm always wins" clause in its Partnership Agreement, and it is that decision—not anything the California Supreme Court

said 20 years ago in *Armendariz*—that placed Winston in the position in which it now finds itself. This Court should not step in to rescue Winston from the consequences of the contract it drafted.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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