No. 18-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *AT&T Mobility LLC v. Concepcion*, this Court reiterated that the Federal Arbitration Act (FAA) requires courts to "place arbitration agreements on an equal footing with other contracts." 563 U.S. 333, 339 (2011). That means that courts may not craft "legal rules that apply only to arbitration" or that disproportionately disadvantage arbitration. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (internal quotation marks omitted). In this case, the California Court of Appeal invalidated an arbitration agreement in light of a pre-*Concepcion* opinion, *Armendariz v. Foundation Health Psychare Services, Inc.*, 6 P.3d 669 (Cal. 2000), which the California Supreme Court has continued to endorse.

The questions presented are:

1. Under *Armendariz*, an arbitration provision in an employment agreement cannot be enforced as written unless it meets five judge-made "minimum requirements" based on policy judgments about what would be necessary to vindicate state statutory rights in an arbitral forum, and also complies with arbitration-specific unconscionability rules. Are those arbitration-specific requirements and rules preempted by the FAA?

2. *Armendariz* requires courts to apply a more rigid severability rule to arbitration agreements than to all other contracts: When an arbitration provision has more than one invalid term, the whole provision is presumptively invalid. Is this arbitration-only severability rule preempted by the FAA?

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INTRODUCTION

This petition presents a question on which this Court previously granted certiorari but lost the chance to resolve. At the same time, the petition adds an even more pressing question that gives this Court an opportunity to consider the previously granted question in a broader context.

The broader context is the California judiciary's persistent defiance of this Court's clear rulings on arbitration. In *AT&T Mobility LLC v. Concepcion*, this Court held that the Federal Arbitration Act (FAA) requires courts to "place arbitration agreements on an equal footing with other contracts." 563 U.S. 333, 339 (2011). That means courts may not craft "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *Concepcion*, 563 U.S. at 339). The California Supreme Court stands alone in reaffirming a pre-*Concepcion* opinion that does exactly that.

The opinion is *Armendariz v. Foundation Health Psychare Services, Inc.*, 6 P.3d 669 (Cal. 2000). *Armendariz* has come to stand for three arbitration-specific rules—all of which were applied in this case:

1. An arbitration clause in an employment agreement is invalid unless it satisfies a panoply of arbitration-specific "minimum requirements," because California courts consider those prerequisites necessary to effectively vindicate rights conferred by state law when

a dispute is being resolved in the arbitral forum.

2. Even apart from the effective-vindication principle of rule 1, a term in an employment agreement's arbitration provision is also unconscionable per se if it fails to satisfy one of those "minimum requirements" or otherwise fails to satisfy any number of ad hoc, policy-driven, arbitration-specific rules designed to protect employees.

3. In contrast to a liberal policy toward severability in every other context, when an arbitration provision has more than one invalid term, the whole provision is presumptively invalid and the parties must litigate in court.

In these three respects, California is an outlier. In the wake of *Concepcion*, no other jurisdiction has held that arbitration-specific rules like these survive FAA preemption. Multiple circuits and state supreme courts have rejected the rationales on which each of the above rules is based. Isolated voices on the California Supreme Court and Ninth Circuit have vocally protested *Armendariz*'s arbitration-specific rules as inconsistent with *Concepcion*, as have multiple lower courts and commentators. But the protests have fallen on deaf ears in the California appellate courts.

This Court recognized those protests four years ago, when it granted a petition for certiorari addressing *Armendariz*'s arbitration-specific severability rule. *See Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 462 (9th Cir. 2014), *cert. granted*,

136 S. Ct. 27 (2015). But a settlement deprived the Court of its chance to override that rule. *See* 136 S. Ct. 1539 (2016).

Since then, the need for this Court to address *Armendariz*, and the split it represents, has only grown more urgent—not just with regard to the arbitration-specific severability rule but also with regard to the broader anti-arbitration scheme of which it is a part. Defiance like this is always problematic, but its effect is magnified here because California is home to 12% of the U.S. workforce. And the third rule applies beyond the employment context, imperiling arbitration in any sort of contract governed by California law.

Time and again this Court has found it necessary to confront anti-arbitration obstructionism and repeat that "lower courts must follow this Court's holding in *Concepcion*." *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). More often than not, the obstruction has come from a California court. This Court has warned that it will "be alert to new devices and formulas" that reflect "judicial antagonism toward arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). Here, the "device" of "judicial antagonism" is not even new. It is nearly 20 years old and, as the decision below reflects, is only expanding. The California courts need another reminder. It is time.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The opinion of the California Court of Appeal is reported at 239 Cal. Rptr. 3d 679 and reproduced

in the Appendix (App.) at 3a-45a. The California Supreme Court's unreported order denying review of the Court of Appeal's decision is reproduced at App. 48a. The trial court's unreported decision granting petitioner's motion to compel arbitration is reproduced at App. 46a-47a.

JURISDICTION

The Court of Appeal issued its decision on November 2, 2018. Petitioner filed a timely petition for review, which the California Supreme Court denied on February 13, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or

> the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

A. The California Supreme Court's *Armendariz* Rules

In *Armendariz*, the California Supreme Court erected a series of hurdles to the enforcement of arbitration agreements that cover employees' statutory rights, based on the court's policy judgment that such agreements "must be subject to particular scrutiny." 6 P.3d at 680. Three such arbitration-specific obstacles are relevant here:

First, the court held that employment claims are not arbitrable unless "the arbitration permits an employee to vindicate his or her statutory rights" under state law. *Id.* at 674. The court borrowed the principle from a D.C. Circuit case, *Cole v. Burns International Security Services*, which held that arbitration clauses in employment agreements are enforceable as long as the arbitration allows employees to effectively vindicate their *federal* statutory rights (there, Title VII claims). 105 F.3d 1465, 1481-82 (D.C. Cir. 1997). In concluding that the arbitration agreement at issue

allowed employees to effectively vindicate those federal rights, the *Cole* court noted that it:

> (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

Id. at 1482 (emphasis omitted). *Armendariz* adopted those five factors as indispensable "minimum requirements" for the enforcement of an agreement to arbitrate statutory discrimination claims under California law. 6 P.3d at 682 & n.8.

Second, the court crafted special rules for assessing whether provisions of employment arbitration agreements are unconscionable. Concerned that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context," the court applied the doctrine to strike provisions it found to be "unfairly one-sided" and "lack[ing] mutuality." *Id.* at 692-93.

Third, the court proceeded to consider whether the arbitration agreement could be enforced without the offending provisions. It held the terms were not severable. Because the agreement in question "contain[ed] more than one unlawful provision," the court discerned a "systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's

advantage." *Id.* at 697. The court thus determined that the arbitration agreement was unenforceable in its entirety. *Id.* at 674.

The California Supreme Court has repeatedly reaffirmed key aspects of *Armendariz* in the eight years since this Court decided *Concepcion*. *See, e.g.*, *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013); *Sanchez v. Valencia Holding Co.,* 353 P.3d 741, 753 (Cal. 2015). Thus, the California courts have come to conclude that each feature of *Armendariz* remains "good law." App. 18a-19a; *see infra* at 16, 23-24.

B. Ramos And Winston Agree To Arbitrate Any Partnership-Related Disputes.

Respondent Constance Ramos joined Winston & Strawn LLP's San Francisco office as an income partner in 2014. Before joining Winston, Ramos had earned a doctorate in biophysics and had been a partner at two other global law firms, where she specialized in intellectual property law. App. 5a.

Upon joining Winston, Ramos signed the firm's partnership agreement. It was the same agreement that applies to every partner, from the most junior partner to the most senior members of firm management. That agreement included an arbitration provision requiring any dispute relating to the agreement or partnership to first be addressed in nonbinding mediation. If that mediation failed, the agreement authorized either party to "submit the dispute to binding arbitration before a panel of three arbitrators for resolution." App. 49a-50a. Each partner waived the right to bring disputes relating to the agreement

or partnership to a court without first exhausting the mediation and binding arbitration procedures. *Id.*

The arbitration section of the agreement also details how the arbitration is to be conducted. As relevant here, the provision specifies that:

- Chicago (where Winston has its largest office) is the venue for disputes involving U.S.-based partners. App. 50a.

- All fees from the arbitration "shall be shared equally by the Partnership and the other party," and "[e]ach party shall bear its own legal fees." App. 51a.

- The parties and arbitrators are required to keep "all aspects of the arbitration … in strict confidence." *Id.*

- The panel of arbitrators has no "authority to substitute its judgment for, or otherwise override the determinations of, the Partnership … with respect to any determination made or action committed to by such parties, unless such action or determination violates a provision of the Agreement." *Id.*

The partnership agreement also contains a separate section on severability that provides:

> If any provision of this Agreement, or any application of such provision, shall be held invalid or unenforceable, the remainder of this Agreement … shall not be affected

> thereby. In the event of a finding of partial invalidity, illegality or unenforceability by a court of competent jurisdiction, such court is hereby instructed to modify such provision to the minimum extent necessary to avoid such invalidity, illegality or unenforceability (provided such modification does not alter the purpose or intent of such provision).

App. 49a.

C. The Proceedings Below.

1. In July 2017, Ramos resigned from Winston. The next month, she sued Winston in San Francisco County Superior Court, without first attempting to mediate or arbitrate her claims. She alleged a variety of discrimination, retaliation, and wrongful-termination claims under California law. App. 5a. Winston moved to compel arbitration. Ramos opposed on several grounds, including that the arbitration provision failed to comply with *Armendariz* and was unconscionable in several respects. App. 9a. Winston responded that *Armendariz*'s requirements apply only to employees, not partners; that *Concepcion* makes clear that *Armendariz* is no longer good law even as to employees; that the arbitration clause satisfied *Armendariz*'s requirements in any event and was not unconscionable; and that any supposedly invalid terms could be severed. App. 8a-9a.

The trial court granted Winston's motion. App. 46a. The court accepted, for purposes of the motion,

that Winston and Ramos had a partnership relationship. App. 47a. Even so, the court concluded that provisions of the arbitration clause "related to venue and cost sharing are unconscionable." *Id.* But it ruled that those provisions were severable. Accordingly, the court directed that the arbitration be held in San Francisco, that Ramos "need only pay those costs that she would have to pay if her claims were litigated in court," and that the arbitrator was authorized "to award attorney fees if plaintiff is the prevailing party and attorney fees are available under her claims." *Id.*

2. Rather than proceed with the arbitration on those terms, Ramos filed a petition for a writ of mandate in the California Court of Appeal. App. 10a. She again argued that the arbitration provision was unenforceable in its entirety both because it failed to satisfy *Armendariz*'s "minimum requirements" and because it contained unconscionable terms. *See* App. 18a, 36a.

The Court of Appeal granted the writ. The court agreed that Ramos's claims fell within the scope of the arbitration provision but concluded that the provision was entirely unenforceable under California law. App. 18a, 44a-45a.

As a threshold matter, the court "reject[ed] Winston's argument that *Armendariz* is no longer good law and has been invalidated by" this Court's intervening decisions on FAA preemption. App. 18a-19a. It observed that "[s]ince *Concepcion* was decided, the California Supreme Court has reaffirmed the validity of *Armendariz* multiple times." App. 19a (citing cases).

The court then concluded that multiple terms of the arbitration provision failed to satisfy *Armendariz*'s "minimum requirements." App. 27a-33a, 42a-45a. The first such term was the provision barring the arbitration panel from "substitut[ing] its judgment for, or otherwise overrid[ing] the determinations of, the Partnership." App. 28a-30a. The court read that provision as limiting the relief the arbitrators could provide. The court thus held that this provision violates the *Armendariz* requirement that arbitration agreements must provide for every form of relief that would be available in court. *Id.* The court also held that *Armendariz* precluded enforcement of the provisions requiring each party to pay its own attorneys' fees and split the costs of arbitration. App. 30a, 33a.

Turning to unconscionability, the Court of Appeal acknowledged that "this is … not a case where Ramos did not understand the agreement, was unaware of the arbitration provision, or was tricked into signing the contract." App. 35a. But the court concluded that the same terms that ran afoul of *Armendariz*'s minimum requirements were also substantively unconscionable. App. 36a. In addition, the court found unconscionable the term requiring the parties to keep all aspects of the arbitration confidential. It held that this provision would curtail Ramos's ability to interview witnesses to support her claims, without citing any evidence that anyone had ever interpreted such a provision that way. App. 37a-40a.

The Court of Appeal then held that the unlawful portions could not be severed from the remainder of the arbitration provision, App. 41a-45a, despite the agreement's emphatic direction to sever any invalid

term. The court acknowledged that, under California law, "courts have discretion to sever or limit the application of unconscionable provisions and enforce the remainder of an arbitration agreement." App. 42a. It concluded, however, that, "as a matter of law," it was not possible to cure the unconscionability "simply by striking" the clauses it found unlawful, App. 41a, 45a. Applying the *Armendariz* severability rule and noting that the agreement contained four unenforceable terms, the court therefore held that the entire arbitration provision was void and the case must be litigated in court. App. 41a-45a.

Winston timely petitioned for review in the California Supreme Court, which denied the petition, with Justice Chin voting to grant. App. 48a.

REASONS FOR GRANTING THE PETITION

This case presents two certworthy issues on which the California courts have persisted in taking outlier positions, in defiance of this Court's rulings. The first relates to *Armendariz*'s prerequisites for enforceability of arbitration provisions in employment agreements. § I. The second, on which this Court has previously granted certiorari, relates to a severability rule that applies more harshly to arbitration contracts than to any other. § II. Both issues are important and recurring, and this case is an ideal vehicle for considering them. § III.

I. California's Prerequisites For Enforcing Arbitration Provisions In Employment Agreements Make It An Outlier In Defiance Of This Court's FAA Jurisprudence.

The FAA provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That provision reflects "a liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339 (internal quotation marks omitted). Moreover, "[u]nder the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339 (citations omitted); *see Epic Sys.*, 138 S. Ct. at 1621. "A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

While § 2 permits courts to invalidate arbitration agreements based on "generally applicable contract defenses," the FAA preempts all defenses "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. It also displaces "doctrine[s] normally thought to be generally applicable, such as duress or … unconscionability," when they

are "applied in a fashion that disfavors arbitration." *Id.* at 341; *see Kindred Nursing*, 137 S. Ct. at 1426.

In other words, as the Court recently explained, § 2 "establishes a sort of 'equal-treatment' rule for arbitration contracts." *Epic Sys.*, 138 S. Ct. at 1622. "[T]his means the saving clause does not save defenses that target arbitration either by name or by more subtle methods." *Id.* Just last month, the Court reiterated that state law is preempted to the extent it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 WL 1780275, at *5 (U.S. Apr. 24, 2019) (quoting *Concepcion*, 563 U.S. at 352). Although the application of this equal-treatment principle to *class* arbitration has divided the Court, the principle itself is uncontroversial: "any state rule treating arbitration agreements worse than other contracts stands as an obstacle to achieving the Act's purposes." *Id.* at *18 (Kagan, J., dissenting) (brackets and internal quotation marks omitted); *see also id.* at *8-9 (Thomas, J., concurring).

Armendariz violates these criteria. First, in the name of ensuring that employees can effectively vindicate their state-law statutory rights, *Armendariz* impermissibly imposes certain arbitration-specific "minimum requirements" for arbitrating employment claims. § I.A. Second, California courts apply arbitration-specific unconscionability rules both to justify *Armendariz*'s "minimum requirements" and to impose ad hoc, policy-driven rules designed to protect employees. § I.B. In both respects, California has put itself in the familiar position of an FAA outlier—

exhibiting hostility to arbitration and flouting this Court's FAA precedent.

A. California's "minimum requirements" single out arbitration agreements for disfavored treatment in defiance of this Court's direction and the uniform views of other courts.

1. When the California Supreme Court in *Armendariz* established its five "minimum requirements" for enforcing employment agreements to arbitrate employment claims, it made no bones about its arbitration-specific objectives: It felt the need to subject this category of arbitration agreements to "particular scrutiny" because of an overarching concern that employees would be unable to "fully vindicate [a state-law] statutory cause of action *in the arbitral forum*." *Id.* at 680-81 (brackets and internal quotation marks omitted; emphasis added). It treated an arbitration agreement that does not satisfy all five of these requirements as tantamount to a *total waiver* of the employee's state statutory rights. *See id.* at 681-89. And the only context in which those five requirements will ever apply is *in arbitration.*

That is the very paradigm of a rule that "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. And since the "minimum requirements" are "unique" to arbitration contracts and "restricted to that field," they violate this Court's direction to place such contracts "'on equal footing with all other contracts.'" *DirecTV*, 136 S. Ct. at 469, 471. These requirements also directly contravene this Court's prior admonition that

"[t]he 'goals and policies' of the FAA … are antithetical to threshold limitations placed specifically and solely on arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). Thus, *Armendariz*'s requirements cannot survive *Concepcion*.

Yet the California courts nevertheless insist that *Armendariz* is "good law." App. 18a-19a. They do so based on an analysis that is irreconcilable with a long line of this Court's precedent, from *Perry* to *Concepcion* and beyond. They continue to reason that they are not actually discriminating against arbitration but rather applying a generally applicable contract defense: namely, the public policy against "forc[ing] a party to forgo unwaivable public rights." *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 989 (Cal. 2003). They echo the California Supreme Court's explanation that the *Armendariz* requirements arise from "a recognition that some arbitration agreements and proceedings may harbor terms, conditions and practices that undermine the vindication of unwaivable rights." *Id.* (emphasis omitted); *see Armendariz*, 6 P.3d at 673-74, 681-82, 683-84 (repeatedly justifying its minimum requirements as necessary to ensure the vindication of state statutory rights in arbitration). And they do so safe in the knowledge that the California Supreme Court has consistently (and recently) reaffirmed its commitment to this "effective vindication" rationale, *see Sanchez,* 353 P.3d at 753; *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 149 (Cal. 2014); *Sonic-Calabasas*, 311 P.3d at 201, and has consistently denied review in cases applying the "minimum requirements."

Concepcion itself rejected exactly that sort of "effective vindication" rationale. This Court there confronted another doctrine crafted by California courts to facilitate the "vindication" of state-law claims: the so-called *Discover Bank* rule that class action waivers in consumer arbitration agreements are unconscionable and should not be enforced. *See* 563 U.S. at 338. Indeed, in crafting that rule, the California Supreme Court had reasoned that "class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights." *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108-10 (Cal. 2005).

Concepcion held that the FAA preempted the *Discover Bank* rule because that rule "st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 563 U.S. at 352 (internal quotation marks omitted). In so holding, this Court rejected the notion that the *Discover Bank* rule could be upheld as reflecting "the general principle of unconscionability or public-policy disapproval of exculpatory agreements," or as otherwise "necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 342, 351. The bottom line is that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 351.

Two years later, in *American Express Co. v. Italian Colors Restaurant*, this Court rejected another version of the effective-vindication principle. 570 U.S. 228, 231-38 (2013). There, the argument was that enforcing an arbitration clause would prevent the effective vindication of federal antitrust claims. *Id.*

at 231-32. In concluding otherwise, the Court noted *Concepcion* "specifically rejected" the argument that "class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'" *Id.* at 238 (quoting *Concepcion*, 563 U.S. at 351).

A fundamental difference between *Italian Colors* and *Armendariz* is that *Italian Colors* at least presented an assertion that an arbitration agreement prevented the effective vindication of a *federal* statute. That difference motivated three dissenting votes. But one point that unified the Justices was that no such principle could apply to a case like this: Any "effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law." *Id.* at 252 (Kagan, J., dissenting). The dissenters recognized that the FAA has "no earthly interest (quite the contrary)" in vindicating *state* laws. *Id.*; *see id.* at 233 (majority opinion) (holding that the effective-vindication exception to enforcing arbitration agreements applies only when "the FAA's mandate has been overridden by a contrary *congressional* command" (emphasis added; internal quotation marks omitted)). Thus, the California courts' efforts to salvage the *Armendariz* requirements from preemption rest on an effective-vindication rationale every member of the Court in *Italian Colors* had rejected.

2. California's scheme is an outlier, as are the principles on which it is based. No other court has sustained any form of "minimum requirements" or other arbitration-specific rules since *Concepcion*. Indeed, even before *Concepcion*, the Seventh Circuit, in a case governed by California law, declined to

impose "special requirements" based on *Armendariz*. *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004). It held: "It is in the end irrelevant whether the Supreme Court of California wants to treat arbitration less favorably than other promises in form contracts; no state can apply to arbitration … any novel rule." *Id.* Thus, if Ramos had tried to evade the arbitration provision by suing in Chicago, home to Winston's largest office, there is no doubt that the court would have found *Armendariz's* "minimum requirements" preempted.

The same is true if this case had been brought in any other jurisdiction. Since *Italian Colors*, no other court in the country has held that a state rule may escape FAA preemption based on applying the effective-vindication concept to state-law claims. In keeping with the unanimous view in *Italian Colors,* several have explicitly rejected the notion. The Ninth Circuit, for example, confronted a different California rule, the effect of which was to "prohibit outright arbitration of three particular types of claims" when the plaintiff was seeking public injunctive relief. *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 933, 935 (9th Cir. 2013). The California Supreme Court had justified that restriction on the theory that arbitration of such claims would "likely lead to the diminution or frustration of the public benefit." *Id.* at 933 (internal quotation marks omitted). The Ninth Circuit categorically held that "[t]he 'effective vindication' exception … does not extend to state statutes." *Id.* at 936. And the Tenth Circuit reached a similar conclusion when it held that a New Mexico rule was preempted because it was "based on a perceived infe-

riority of arbitration to litigation as a means of vindicating one's rights" under state law. *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1167-69 (10th Cir. 2014).

Indeed, the D.C. Circuit, which issued the *Cole* opinion from which the California Supreme Court adapted its "effective vindication" rule, *see supra* at 5-6, has since expressly limited the rule to federal rights. It held that *Cole*'s rationale is based on "respecting *congressional* intent," *Brown v. Wheat First Sec., Inc.*, 257 F.3d 821, 825 (D.C. Cir. 2001) (emphasis added), and, if a nonfederal right is at issue, the case must "be resolved in favor of the only federal law involved, the FAA," *id.* at 826.

Several state supreme courts have reached similar conclusions. *See Tallman v. Eighth Jud. Dist. Ct.,* 359 P.3d 113, 122 (Nev. 2015) ("*Concepcion* does not permit a state court to invalidate" an arbitration provision on the basis that it "hampers effective vindication of an employee's state-law-based … claims."); *Machado v. System4 LLC*, 993 N.E.2d 332, 332-33 (Mass. 2013) (recognizing that *Italian Colors* abrogated prior Massachusetts cases that conditioned enforcement of arbitration agreements on the effective vindication state-law claims); *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1186-88 (Fla. 2013); *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515-16 (Mo. 2012); *see also, e.g.*, *Saltzman v. Thomas Jefferson Univ. Hosps., Inc.*, 166 A.3d 465, 474 (Pa. Super. Ct. 2017) ("[T]he effective vindication rule does not apply to state statutes.").

It is no surprise, then, that lower courts throughout the country,[1] as well as commentators,[2] have recognized that the *Armendariz* "minimum requirements" cannot survive preemption.

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[1] *See, e.g.*, *Begonja v. Vornado Realty Tr.*, 159 F. Supp. 3d 402, 412 (S.D.N.Y. 2016) ("*Armendariz* is inconsistent with … *Italian Colors*."); *James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1033 (S.D. Tex. 2012) ("*Armendariz* sets categorical, *per se* requirements specific to arbitration clauses. The *Armendariz* requirements … cannot be described as grounds that 'exist at law or in equity for the revocation of any contract.'"); *Beard v. Santander Consumer USA, Inc.*, No. 1:11-cv-11-1815, 2012 WL 1292576, at *9 & n.7 (E.D. Cal. Apr. 16, 2012) ("Courts have questioned *Armendariz*'s continuing viability after *Concepcion*"; collecting cases); *Ruhe v. Masimo Corp.*, No. 11-00734, 2011 WL 4442790, at *2 (C.D. Cal. Sept. 16, 2011).

[2] *See, e.g.*, Imre Stephen Szalai, *More Than Class Action Killers: The Impact of* Concepcion *and* American Express *on Employment Arbitration*, 35 Berkeley J. Emp. & Lab. L. 31, 48 (2014) ("State-specific standards developed specifically for arbitration agreements—like … the *Armendariz* fairness factors for employment arbitration—seem doomed under *Concepcion*'s broad preemption analysis."); E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 Harv. Negot. L. Rev. 1, 23 (2015) (observing that three of the five *Armendariz* factors are preempted by the FAA in light of *Concepcion*).

B. California is an outlier in impermissibly invoking an arbitration-specific unconscionability doctrine as an end run around FAA preemption.

1. After concluding that three terms of the arbitration provision failed to satisfy *Armendariz*'s "minimum requirements," the Court of Appeal here held, in a single sentence, that those same terms are also unconscionable—merely because they did not satisfy *Armendariz*. App.37a. Importing the *Armendariz* requirements into the unconscionability analysis has become the norm in California courts. They now routinely abandon a full-fledged case-specific unconscionability analysis of employment arbitration agreements and instead simply declare that "[e]limination of or interference with any of [the *Armendariz* requirements] makes an arbitration agreement substantively unconscionable." *Wherry v. Award, Inc.*, 123 Cal. Rptr. 3d 1, 6 (Ct. App. 2011).[3]

Changing the label from "minimum requirements" to "unconscionability" changes nothing, however. The California rules are every bit as arbitration-specific—and arbitration-hostile—under either rubric. Just as States may not overtly single out arbitration agreements for disfavored treatment, they may not apply any state rule—whatever the label—to

[3] *See also, e.g.*, *Penilla v. Westmont Corp.*, 207 Cal. Rptr. 3d 473, 487-88 (Ct. App. 2016) (analyzing *Armendariz* requirements in determining whether arbitration agreement is substantively unconscionable); *Roman v. Superior Court*, 92 Cal. Rptr. 3d 153, 166-67 (Ct. App. 2009) (same); *Ontiveros v. DHL Express (USA), Inc.*, 79 Cal. Rptr. 3d 471, 485 (Ct. App. 2008) (same).

"covertly accomplish[] the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426.

Here, again, California's failure to place arbitration agreements "'on equal footing with all other contracts,'" *id.* at 1424, is evident from the California Supreme Court's stated objective in applying the unconscionability doctrine. *Armendariz* itself placed arbitration agreements on a different footing, declaring that "ordinary principles of unconscionability may manifest themselves in forms *peculiar* to the *arbitration* context." 6 P.3d at 693 (emphasis added). In doubling down on *Armendariz* as recently as 2013, the California Supreme Court explained that in the employment context, "the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the *resolution* of the wage dispute *inaccessible* and *unaffordable*" *Sonic-Calabasas*, 311 P.3d at 204 (emphasis added); *see Armendariz*, 6 P.3d at 690 (expressing similar policy judgments about the relative efficacy of arbitration to conclude, "we must be *particularly attuned* to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an *arbitration agreement*" (emphasis added)).

Accordingly, the California Supreme Court continues to adhere to its pre-*Concepcion* view that it is permissible to invoke unconscionability to enforce rules that apply only "in the context of arbitration" or rules that otherwise "'have a disproportionate impact on arbitration,'" *Sonic-Calabasas*, 311 P.3d at 201

(quoting *Concepcion*, 563 U.S. at 342). In that court's distorted view of *Concepcion*, such a state rule is not preempted unless the discriminatory treatment is so severe as to "'interfere[] with fundamental attributes of arbitration.'" *Id.* at 201 (quoting *Concepcion*, 563 U.S. at 344). Conversely, the court believes that California's pro-employee policy trumps federal law whenever a contractual provision "would have a substantial deterrent effect" on proceeding with a claim in a particular case. *Sanchez,* 353 P.3d at 755.

Though the California Supreme Court has purported to heed—rather than defy—this Court's precedent, this is, in truth, a full-frontal assault on *Concepcion*. In *Concepcion*, too, the court below had invalidated a key provision in an arbitration agreement based on a California Supreme Court decision establishing an arbitration-specific rule under the guise of the unconscionability doctrine. This Court held that that label could not save a state-law rule from preemption if the law failed to place arbitration agreements "on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. As this Court later said, considerations of "general public policy" do not give state courts license to disfavor enforcement of arbitration agreements by deeming them unconscionable. *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 534 (2012) (per curiam); *see also Lamps Plus*, 2019 WL 1780275, at *7.

Indeed, *Concepcion* anticipated—and disapproved of—this exact form of circumvention and directly refutes the Court of Appeal's view of how much anti-arbitration animus is permissible. The Court of-

fered the hypothetical of "a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery." 563 U.S. at 341-42. A court might attempt to justify such a rule by claiming that discovery limitations are "exculpatory" and one-sided: "restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue." *Id.* at 342. A rule like that must be preempted, the Court observed, because it "would have a disproportionate impact on arbitration agreements," even though it is nominally applicable to "any" contract. *Id.*

The upshot, as this Court later explained, is that the FAA prohibits not only state rules that overtly discriminate against arbitration, but also "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426. That standard dooms the California Supreme Court's view that it is perfectly acceptable to use unconscionability principles to sustain rules that apply only "in the context of arbitration" or otherwise "'have a disproportionate impact on arbitration,'" *Sonic-Calabasas*, 311 P.3d at 201; *see Lamps Plus*, 2019 WL 1780275, at *18 (Kagan, J., dissenting) ("What matters … is whether the state law in question targets arbitration agreements, blatantly or covertly, for substandard treatment. When the law does so, it cannot operate." (brackets, internal quotation marks, and citation omitted)). As Justice Chin of the California Supreme Court explained in dissent: "Under the high court's decisions, the majority cannot invent a unique rule for implementing a

[California] legislative policy decision to confer 'specific protections' on 'a particular class' and avoid preemption simply by calling that rule a rule of unconscionability." *Sonic-Calabasas*, 311 P.3d at 235 (citation omitted).

In distorting this Court's direction, the California Supreme Court has persisted in ensuring that "California's courts" will continue to be "more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion*, 563 U.S. at 342. Take, for example, the fourth term of the agreement that the Court of Appeal found unconscionable here: the confidentiality provision. App. 37a-40a. It says merely: "Except to the extent necessary to enter judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence." App. 37a. That sort of nondisclosure agreement is ubiquitous in contracts of all sorts—and is a key reason why many prefer arbitration to courts. *See Concepcion*, 563 U.S. at 345. Yet the Court of Appeal read this provision as prohibiting a party from "attempt[ing] to informally contact or interview any witnesses outside the formal discovery process," and on that basis found the provision unconscionable. App. 39a-40a.

In no other context but arbitration would a California court adopt such an unnatural reading in order to strike a confidentiality provision. That is the very definition of discrimination against arbitration clauses. And the court's separate rationale for invalidating the provision—that "requiring discrimination cases [to] be kept secret … may discourage potential plaintiffs from filing discrimination cases," App.

40a—is a prime specimen of a prohibited policy-based reason to disfavor arbitration. *See Lamps Plus*, 2019 WL 1780275, at *7 (even "general rules" of contract interpretation are preempted when they disfavor arbitration based on "public policy considerations").

2. Here, too, California is an outlier. Several of the same cases discussed above (at 19-21) rejecting a state-law effective-vindication doctrine have also recognized that slapping the "unconscionability" label on a concern for vindicating state policy does not save an arbitration-hostile rule from preemption. The Tenth Circuit, for example, has held that "just as the FAA preempts a state statute that is predicated on the view that arbitration is an inferior means of vindicating rights, it also preempts state common law—including the law regarding unconscionability—that bars an arbitration agreement because of the same view." *THI*, 741 F.3d at 1167; *see also McKenzie Check Advance*, 112 So. 3d at 1186-88. "A loud chorus of courts and commentators has increasingly warned that unconscionability is being used as a ruse for a 'new judicial hostility' toward arbitration." Hiro N. Aragaki, AT&T Mobility v. Concepcion *and the Anti-discrimination Theory of FAA Preemption*, 4 Y.B. Arb. & Med. 39, 60 (2012).

More specifically, several federal courts of appeals (including the Ninth Circuit) and state high courts reject the California Supreme Court's view that States remain free to invoke unconscionability in order to enforce rules that apply only "in the context of arbitration" or otherwise "'have a disproportionate impact on arbitration,'" *Sonic-Calabasas*, 311 P.3d at 201 (quoting *Concepcion*, 563 U.S. at 342). As the Ninth Circuit

put it: "We take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013); *accord Gross v. GGNSC Southaven, L.L.C.*, 817 F.3d 169, 178 (5th Cir. 2016) ("*Concepcion* ... disapproved of nominally neutral rules that, in practice, 'would have a disproportionate impact on arbitration agreements.'"); *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 197-98 (6th Cir. 2016) ("[W]hen a 'doctrine normally thought to be generally applicable ... is … applied in a fashion that disfavors arbitration,'" that "disproportionate impact 'stand[s] as an obstacle to the accomplishment of the FAA's objectives.'"); *U.S. Home Corp. v. Michael Ballesteros Tr.*, 415 P.3d 32, 42 (Nev. 2018); *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 791 S.E.2d 128, 133 n.6 (S.C. 2016).

* * *

In sum, the decision below is just the latest example of the California courts' continued imposition of prerequisites unique to arbitration, in defiance of *Concepcion* and *Italian Colors*—and in contrast to the uniform appellate consensus across the country.

II. California Is An Outlier In Applying An Arbitration-Only Severability Rule That Is Preempted By The FAA.

The second question presented is a species of the California Supreme Court's same arbitration-adverse approach, under the same rationale, from the same

source. In every case where a court finds a provision of an arbitration agreement invalid, the court confronts the question of remedy: Should the court sever the offending provision and compel arbitration or invalidate the entire arbitration agreement outright and send the parties to court? Under *Armendariz*, California courts apply a harsher severability rule to contracts involving an agreement to arbitrate than to other contracts, as the Court of Appeal did here. App. 42a-45a (citing *Armendariz*, 6 P.3d at 696-97).

This Court has already granted certiorari in a case presenting the exact same question: "whether California's arbitration-only severability rule is preempted by the FAA." Cert. Pet. at i, *Zaborowski*, 136 S. Ct. 27 (2015) (No. 14-1458), 2015 WL 3637766. A settlement prevented this Court from resolving the issue. *See* 136 S. Ct. 1539. This is the opportunity to decide the question that this Court set out to resolve nearly four years ago.

The petition in *Zaborowski* detailed the stark divergence between California's general severability rule and its arbitration-specific applications. *See* 2015 WL 3637766, at *12-16. To summarize: California courts generally "take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 152 Cal. Rptr. 3d 79, 95 (Ct. App. 2013) (internal quotation marks omitted). This liberal, pro-enforcement approach to severability is codified by statute: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and

valid as to the rest." Cal. Civ. Code § 1599. Only "[i]f the court is unable to distinguish between the lawful and unlawful parts of the agreement" may the court invalidate "the entire contract." *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 12 (Cal. 1998). Applying that approach, the California Supreme Court has instructed courts to "preserve[] and enforce[] any lawful portion of a … contract that feasibly may be severed." *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 750-51 (Cal. 2008). California courts also generally respect a contract's severability clause as "evidence of the parties' intent that, to the extent possible, the valid provisions of the contracts be given effect, even if some provision is found to be invalid or unlawful." *Baeza v. Superior Court*, 135 Cal. Rptr. 3d 557, 568 (Ct. App. 2011).

For arbitration, however, the severability rules are much harsher. Under *Armendariz*, courts may invalidate the entire arbitration agreement if it contains more than one improper clause. In that circumstance, courts view the arbitration agreement as "permeated by an unlawful purpose." *Armendariz*, 6 P.3d at 697. And they treat it as an utter irrelevancy when, as here, the contract contains a severability clause expressing the parties' intention (here, emphatically, *see supra* at 8-9) to salvage the agreement if the unlawful terms can be excised. *See Parada v. Superior Court*, 98 Cal. Rptr. 3d 743, 753, 768-70 (Ct. App. 2009). The California Supreme Court's rationale is that "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage."

6 P.3d at 697. The *Armendariz* two-strikes presumption now represents settled California law—but only for arbitration agreements.[4]

This aspect of *Armendariz* is also exactly the sort of unequal treatment the FAA preempts. And it contravenes this Court's holding in *Concepcion* that the FAA preempts state-law rules styled as "generally applicable contract defense[s]" when those rules apply, in practice, "only to arbitration." 563 U.S. at 339. As the dissent in *Zaborowski* observed: "The reasoning in *Armendariz* that multiple unconscionable provisions will render an arbitration agreement's purpose unlawful has 'a disproportionate impact on arbitration agreements' and should have been preempted by the [FAA]." *Zaborowski*, 601 F. App'x at 464 (Gould, J., concurring in part and dissenting in part). One can scour the entire history of California contract law and find not a single instance of a court applying a two-strikes presumption outside the arbitration context.

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[4] *See, e.g.*, *Carmona v. Lincoln Millennium Car Wash, Inc.*, 171 Cal. Rptr. 3d 42, 55 (Ct. App. 2014) (where there are "multiple unconscionable provisions," the trial court "does not abuse its discretion in determining the arbitration agreement is permeated by an unlawful purpose"); *Trivedi v. Curexo Tech. Corp.*, 116 Cal. Rptr. 3d 804, 813 (Ct. App. 2010) (where "at least two provisions" were stricken as unconscionable, the case presents "a circumstance considered by our Supreme Court to 'permeate' the agreement with unconscionability"); *Ontiveros*, 79 Cal. Rptr. 3d at 489 (upholding trial court's refusal to sever because "three provisions of the arbitration agreement are substantively unconscionable"); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 106 (Ct. App. 2004) (*Armendariz* "held that more than one unlawful provision in an arbitration agreement weighs against severance.").

Like the *Armendariz* prerequisites, this aspect of California law is also an outlier. No other state applies a severability double standard. When a particular arbitration agreement has objectionable provisions, other courts generally sever the objectionable features and enforce the arbitration agreement, consistent with this Court's instruction to resolve doubts in favor of arbitration. Whereas the court below—and the Ninth Circuit in *Zaborowski*—treated the employment agreement's explicit severability clause as an irrelevancy, at least three other circuits are especially vigilant about respecting explicit clauses directing that invalid clauses must be severed.

The Sixth Circuit, for example, has held that, when an arbitration agreement "includes a severability provision, courts should not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement." *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 675 (6th Cir. 2003). Rather, the "intent of the parties and [federal] policy in favor of arbitration dictate" that the remainder of the agreement be enforced. *Id.* The Eighth Circuit has similarly concluded that the parties' intentions control, as expressed in a severability clause, but also that "'those intentions are generously construed as to issues of arbitrability.'" *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir. 2001) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)); *see also Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 85-86 (D.C. Cir. 2005) (Roberts, J.) (noting that enforcing a severability clause "honor[s] the intent of the parties" and is also "faithful to the federal policy which 'requires that we

rigorously enforce agreements to arbitrate'" (quoting *Mitsubishi Motors*, 473 U.S. at 626)).

In the nearly four years that have elapsed since this Court granted certiorari in *Zaborowski*, the need for this Court's review has only grown more urgent. Since then, the arbitration-specific *Armendariz* severability rule has become even more prevalent, and lower courts apply it as a de facto directive from the California Supreme Court.[5] Even federal courts have expressly recognized that rule as part of California law. *See, e.g.*, *Wood v. Team Enters.,* No. 18-06867, 2019 WL 1516758, at *3 (N.D. Cal. Apr. 7, 2019) ("Under California law, '[a]n employment arbitration agreement can be considered permeated by unconscionability if it "contains more than one unlawful provision."'"). Yet the California Supreme Court still has not reassessed the rule, despite this Court's repeated admonition that state-law contract rules cannot unfairly target arbitration agreements.

In this case, if the Court of Appeal had applied California's general severability rules, it would have excised the offending provisions but still enforced the agreement to arbitrate. The trial court, for its part, had no problem crafting an order striking the provisions it found to be unconscionable and ordering the parties to proceed to arbitration without those terms.

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[5] *See, e.g.*, *Magno v. The Coll. Network, Inc.* 204 Cal. Rptr. 3d 829, 841 (Ct. App. 2016) ("An agreement to arbitrate is considered 'permeated' by unconscionability where it contains more than one unconscionable provision."); *Penilla*, 207 Cal. Rptr. 3d at 489 ("Where an 'arbitration agreement contains more than one unlawful provision,' that factor weighs against severance.").

App. 47a. But because the Court of Appeal instead applied California's arbitration-specific severability rule, the arbitration provision was void in its entirety purely because it "contain[ed] four unconscionable terms." App. 42a-46a.

Under these circumstances, it is even clearer than it was in 2015 that California courts will not correct this misapplication of preemption law; only this Court can right the course.

III. This Case Presents Exceptionally Important Issues In An Ideal Vehicle.

As this Court has emphasized, "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act … including the Act's national policy favoring arbitration." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17-18 (2012) (per curiam). Because of that, state courts have "a prominent role to play as enforcers of agreements to arbitrate." *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009). And because nationwide adherence to that policy is "a matter of great importance," those courts must obey this Court's FAA precedent. *Nitro-Lift*, 568 U.S. at 17-18.

The Court of Appeal's failure to do so here is not some minor or isolated error. It is characteristic of the California judiciary's persistent defiance of *Concepcion*. Dissenting voices on the Ninth Circuit and the California Supreme Court have railed against this systematic effort to "'chip[] away at' [this Court's] precedents broadly construing the scope of the FAA … , despite [this Court's] admonition against doing

so." *Little*, 63 P.3d at 999 (Brown, J., concurring and dissenting) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001)); *see Zaborowski*, 601 F. App'x at 464-66 (Gould, J., concurring in part and dissenting in part). They have protested the California Supreme Court's relentless effort to "formulat[e]" new "device[s] for invalidating arbitration agreements." *Sonic-Calabasas*, 311 P.3d at 236 (Chin, J., concurring and dissenting) (internal quotation marks omitted).

To no avail.

This Court has not hesitated to intervene when state courts refuse to follow the FAA's mandates in contexts that are far less consequential.[6] All too frequently, this Court's interventions have been

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[6] *See Kindred Nursing*, 137 S. Ct. at 1428-29 (holding that the FAA preempted the Kentucky Supreme Court's rule that a power of attorney could authorize a representative to enter into an arbitration agreement only if the power of attorney expressly so provided); *Nitro-Lift*, 568 U.S. at 17-18 (2012) (summarily reversing Oklahoma Supreme Court's refusal to permit arbitrator to decide validity of covenants not to compete); *Marmet Health Care Ctr.*, 565 U.S. 530 at 533-34 (summarily reversing West Virginia intermediate appellate court's refusal to enforce arbitration clauses in nursing home admission agreements); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (per curiam) (summarily reversing Florida intermediate appellate court's refusal to compel arbitration of any of plaintiffs' claims based on determination that two of the four claims in plaintiffs' complaint were nonarbitrable); *Doctor's Assocs.*, 517 U.S. at 688-89 (reversing Montana Supreme Court's adherence to a rule that arbitration clauses are unenforceable unless the contract includes a specified notice on its first page).

prompted by arbitration-hostile decisions out of California—and in particular, decisions by the California Court of Appeal, which, as here, the California Supreme Court declined to review.[7] Review is even more urgent here because the questions presented have such far-reaching consequences.

The first question presented implicates *all* California employment agreements that require arbitration of employment-related claims. As home to 12% of the U.S. workforce, California has an outsized impact on employment law.[8] The impact is even greater given that the California courts have expanded *Armendariz* along multiple dimensions. The California Supreme Court has held that the "minimum requirements" apply to agreements to arbitrate not just statutory claims, but also common-law wrongful termination claims. *Little*, 63 P.3d at 989. And now the "minimum requirements" apply not just to employees, but also to independent contractors, *Wherry*, 123 Cal. Rptr. 3d at 6—and even to law firm partners.

Meanwhile, arbitration agreements have become increasingly commonplace in the employment context. *See, e.g.*, Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An*

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[7] *See DirecTV*, 136 S. Ct. at 471 (reversing California Court of Appeal); *Preston v. Ferrer*, 552 U.S. 346 (2008) (same); *Perry*, 482 U.S. at 492-93 (same).

[8] *Compare* Bureau of Labor Statistics, State Occupational Employment and Wage Estimates: California (May 2018), https://tinyurl.com/y2vz4jqd, *with* Bureau of Labor Statistics, National Occupational Employment and Wage Estimates (May 2018), https://tinyurl.com/z8om2jz.

Empirical Comparison, 48 Disp. Resol. J. 44, 44 (Nov. 2003-Jan. 2004) (noting the "massive," "well documented" increase in the use of employment arbitration agreements). Arbitration procedures offer advantages to employers and employees alike. *See The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, Corp. Couns. Bus. J. (July 2006), https://tinyurl.com/y4pvgftp. Thus, by categorically disfavoring arbitration of employment claims, California law interferes with "the benefits of private dispute resolution" for all parties to an employment dispute: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348.

As to the second question presented, California's arbitration-specific approach to severability extends far beyond the employment context. It applies to every type of arbitration agreement where a court finds more than one provision objectionable. This two-strike severability rule stacks the deck against arbitration, even if the objectionable terms could be easily excised. This Court already recognized the importance of the severability issue, even in isolation, by granting certiorari in *Zaborowski*.

This Court should take this opportunity to address both. This case provides a perfect vehicle to address the severability issue in the broader context from which it emerged. The record is well developed and undisputed with respect to the employment contract and the arbitration provisions at issue. The competing views and reasoning of the trial court and Court of Appeal are also fully presented in the record.

Armendariz is nearly 19 years old. The California Supreme Court has had eight years to conform to *Concepcion*. Not only has it refused, but it has reaffirmed aspects of *Armendariz* in a way that has confirmed to the lower courts that "***Armendariz* is Good Law**" in every respect. App. 18a-19a; *see Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912, 937 (N.D. Cal. 2018) ("In the wake of *Concepcion*, California courts, including the California Supreme Court, have found that *Armendariz* is still good law ...."). Remarkably, no petition has presented this Court with an opportunity to address each of *Armendariz*'s three key features in the wake of *Concepcion* and none has presented *Armendariz*'s "minimum requirements."[9]

Now is the time.

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[9] Other petitions have addressed aspects of California unconscionability law that are unrelated to the *Armendariz* minimum requirements. *See, e.g.*, Cert. Pet. at ii, *Wan Hai Lines Ltd. v. Elite Logistics Corp.*, 136 S. Ct. 1452 (2016), (No. 15-750), 2015 WL 8602624 (challenging holding that contractual 30-day limitations period for notice of claims was unconscionable); Cert. Pet. at i, *O'Melveny & Myers LLP v. Davis*, 552 U.S. 1161 (2008) (No. 07-647), 2007 WL 4103979 (challenging holding that mandatory employment agreements are always adhesive and procedurally unconscionable). And, as discussed (at 29-30), *Zaborowski* presented an opportunity to consider severability in isolation. But no petition has presented an opportunity to address *Armendariz*'s "minimum requirements"—much less an opportunity to address that alongside those other two features.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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