No. 25-___

IN THE

Supreme Court of the United States

AVIAGAMES, INC.,

Petitioner,

v.

ANDREW PANDOLFI and MANDI SHAWCROFT,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act ("FAA") requires courts to "place arbitration agreements on an equal footing with other contracts" and to "enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). This "equal-treatment rule" prohibits contractual "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 507 (2018). The rule also prohibits defenses that "have a disproportionate impact on arbitration agreements," even if they "presumably" apply in other limited circumstances. *Concepcion*, 563 U.S. at 342.

The questions presented are:

1. Whether the FAA's equal-treatment requirement is violated by a rule deeming arbitration agreements procedurally unconscionable when they incorporate the American Arbitration Association's rules because those rules are "subject to change"—even though changeable procedural rules are routinely enforced in courts and non-arbitration contracts.

2. Whether California's arbitration-specific severability doctrine—under which the Ninth Circuit refused to enforce the severance provision in the parties' arbitration agreement—violates the FAA's equal-treatment rule.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Aviagames, Inc. ("Avia") was Defendant-Appellant in the Ninth Circuit. Avia has no parent corporation, and no corporation owns 10% or more of its stock.

Respondents Andrew Pandolfi and Mandi Shawcroft, individually and on behalf of all others similarly situated, were Plaintiffs-Appellees in the Ninth Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Pandolfi, et al. v. Aviagames, Inc., et al.*, No. 3:23-cv-05971-EMC (N.D. Cal.) (motion to compel arbitration denied Sept. 4, 2024).
- *Pandolfi v. Aviagames, Inc.*, No. 24-5817 (9th Cir.) (denial of motion to compel arbitration affirmed Aug. 27, 2025; petition for rehearing and rehearing en banc denied Oct. 6, 2025; mandate stayed Oct. 15, 2025).

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Avia respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's order denying Avia's motion to compel arbitration is reproduced at Pet. App. 7a-41a. The Ninth Circuit's opinion affirming the district court's order is reproduced at Pet. App. 1a-6a. The Ninth Circuit's order denying rehearing en banc is reproduced at Pet. App. 123a-124a. The Ninth Circuit's order staying issuance of the mandate is reproduced at Pet. App. 121a-122a.

JURISDICTION

The Ninth Circuit issued its decision in this case on August 27, 2025. It denied Avia's timely petition for rehearing en banc on October 6, 2025. A timely application for an extension of time to file a petition for a writ of certiorari, up to and including February 19, 2026, was granted on December 4, 2025. This petition was timely filed on February 19, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, provides in relevant part:

> 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 Federal Arbitration Act, 9 U.S.C. § 2, provides in relevant part:

> 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.

INTRODUCTION

Since this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Federal Arbitration Act ("FAA" or the "Act") has been interpreted to mean what it says: arbitration agreements "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. The Act requires courts to "place arbitration agreements on an equal footing with other contracts" and to "enforce them according to their terms." *Concepcion*, 563 U.S. at 339. Contractual defenses are preempted if they apply only to arbitration agreements or have meaning only because "an agreement to arbitrate is at issue." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 507 (2018). The rule also prohibits defenses that "have a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342.

This case raises two questions of exceptional importance about state rules that target and disfavor arbitration agreements in violation of the FAA. In the decision below, the Ninth Circuit invalidated the parties' entire arbitration agreement by embracing two California rules—one concerning unconscionability and the other severability—that apply only to and disfavor arbitration agreements.

Specifically, the court first held the parties' arbitration agreement "procedurally unconscionable" because it incorporated the American Arbitration Association's ("AAA's") procedural rules, reasoning that those rules "are subject to change." Pet. App. 4a. Second, applying California's arbitration-specific severance rules, the Ninth Circuit refused to enforce

the agreement's severance provision on the ground that Avia was "engaged in a systematic effort to impose arbitration on the weaker party." Pet. App. 6a.

Both holdings, and the California rules that underlie them, blatantly violate the FAA's "equal-treatment principle" and this Court's foundational holding in *Concepcion*. Both holdings also conflict with the decisions of other circuit courts. And, left uncorrected, both errors will destabilize countless arbitration agreements.

As to the first error, modern arbitration agreements routinely incorporate the procedural rules of providers like AAA or JAMS, even though their rules (like this Court's rules and the Federal Rules of Civil Procedure) are subject to change. Indeed, arbitration agreements *must* incorporate some procedural rules, because arbitrators, unlike courts, are not governed by established rules; their governing rules are a matter of contract.

In deeming an arbitration agreement's incorporation of JAMS's or AAA's "then-current" rules unconscionable, the Ninth Circuit developed an arbitration-specific defense that does not apply to other contracts or to court proceedings, and one that conflicts with other courts' precedents. The decision has cast a cloud over innumerable arbitration agreements within the nation's largest circuit, threatening to unravel the settled expectations of contracting parties.

The second error is just as disruptive. Under general contract law, courts routinely sever invalid provisions to preserve the parties' overall agreement. But in California, courts discard arbitration severance

provisions when any provision in the agreement is held unconscionable and the court believes that arbitration was imposed on a weaker party. Given the frequency with which California courts find arbitration provisions unconscionable, this arbitration-specific "no severance" doctrine is regularly used to stop arbitration altogether. The Ninth Circuit's embrace of this arbitration-specific rule further guts the FAA and implicates a long-standing conflict that this Court has implicitly recognized.

This Court has already recognized the need to address the conflict between California's arbitration-specific severability test and *Concepcion*. It previously granted certiorari on this same question, but lost the opportunity to resolve the issue when the parties settled before argument. *See MHN Gov't Servs., Inc. v. Zaborowski*, 576 U.S. 1095 (2015) (No. 14-1458); Petition for a Writ of Certiorari in *MHN Gov't Servs., Inc. v. Zaborowski*, 2015 WL 3637766, at *i (filed June 10, 2015). That conflict is even more worthy of review now that the Ninth Circuit has doubled down on a maximalist interpretation of California's anti-arbitration severability framework.

Accordingly, this Petition should be granted.

STATEMENT OF THE CASE

Avia is a gaming company that publishes Pocket7Games, a platform offering a suite of skill-based games. Pet. App. 43a. Avia allows players to download some of these games onto mobile phones as individual applications. *Id.* Either way, players can compete head-to-head or tournament-style for cash or for tickets within the games. *Id*. at 43a, 99a.

As with many online companies, users of Avia's services must agree to the provisions set out in Avia's Terms of Service before playing its games. They do so first when creating an account, again when verifying their ages to play for cash prizes, and any time the Terms are updated. *Id.* at 31a, 77a.

When reading those terms, users learn in the first paragraph that they are agreeing to a "MANDATORY ARBITRATION PROVISION" and that this provision appears in Section 15 of the agreement. *Id.* at 84a. With two exceptions not relevant here, the provision requires binding arbitration of "[a]ll disputes, claims or controversies arising out of or relating to . . . the relationship between [the user] and [Avia]." *Id.* at 111a. The agreement selects AAA as the administering forum and incorporates the "then-current" version of AAA's Consumer Arbitration Rules for consumer disputes. *Id.* at 112a.

Avia's arbitration provision also contains a delegation clause, which reserves disputes about the "enforceability, revocability, or validity of the arbitration provision" for the arbitrator. *Id.* Consumers have the right to opt out of arbitration within 30 days of agreeing to the Terms. *Id.* at 116a.

Respondents Andrew Pandolfi and Mandi Shawcroft played Avia's games. Both assented to Avia's Terms, including the arbitration agreement. *Id.* at 47a, 112a. They nevertheless filed a putative class action against Avia in the Northern District of California alleging that Avia's contests violate both federal and California law. *Id.* at 43a. Avia moved to compel arbitration. Respondents opposed the motion on a number of theories, including that the arbitration agreement was unconscionable under California law.

The district court denied Avia's motion to compel, holding the arbitration agreement unconscionable. *Id.* at 14a, 31a, 39a-40a. The court primarily focused on a bellwether provision relating to mass arbitration of claims.[1] When 25 or more "similar claims are asserted against Aviagames or [the consumer] by the same or coordinated counsel," the arbitration agreement provides a "bellwether process," in which cases proceed in tranches of 20 (with 10 cases selected by each side). *Id.* at 115a. The court found this provision insidious, reasoning that consumers might be deterred from bringing claims due to delays in the bellwether process. Thus, the court held, both the delegation clause and the bellwether provision were unconscionable. *Id.* at 19a-24a, 33a-34a. The court also found that the agreement's provision for a one-year limitations period was unconscionably restrictive. *Id.* at 35a.

Rather than sever these provisions, the court concluded that Avia should be penalized for including them. Invoking California's arbitration-specific severance regime, the court characterized the provisions as "designed to structurally and systematically make arbitration an inferior forum." *Id.* at 40a. The court ignored the arbitration agreement's severability clause, which required severance if any part of it was "found to be unenforceable or unlawful for any reason, including

[1] Mass arbitrations occur when coordinated plaintiffs' counsel simultaneously file large numbers of arbitration claims—often tens of thousands—against a single company, triggering massive costs on the company through the imposition of arbitration fees. *See, e.g.*, R. Freer, *Rational Actors, Class Action Waivers, and the Emergence of Mass Individual Arbitrations*, 84 U. Pitt. L. Rev. 359, 391 (2022).

. . . because it is found to be unconscionable." *Id.* at 117a.

The Ninth Circuit affirmed. It agreed that the parties could not structure arbitration proceedings with a bellwether process or agree to a shortened limitations period. *Id.* at 6a. And it imposed another restriction on arbitration proceedings, holding that the arbitration agreement was procedurally unconscionable because it incorporated "the then-current version of the AAA's Consumer Arbitration Rules," which "are subject to change" by AAA. *Id.* at 112a, 4a. The Ninth Circuit likewise affirmed the district court's decision to not sever the offending provisions, reasoning that the inclusion of multiple unconscionable provisions indicated that Avia "engaged in a systematic effort to impose arbitration on the weaker party." *Id.* at 6a.

REASONS FOR GRANTING THE WRIT

The FAA embodies "an 'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)). To that end, FAA § 2 mandates that arbitration agreements "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. By limiting the grounds for revocation to those applicable to "any contract," the FAA prohibits courts from "singling out [arbitration] contracts for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 252 (2017).

The FAA's equal-treatment rule invalidates not only contractual "defenses that apply only to arbitration,"

but also any "that derive their meaning from the fact that an agreement to arbitrate is at issue." *Epic Sys.*, 584 U.S. at 507-508 (quoting *Concepcion*, 563 U.S. at 339). Thus, the FAA preempts state laws that expressly disfavor arbitration agreements and those that purport to apply to all contracts but actually "have a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. Likewise, the FAA preempts "generally applicable contract defense[s]," that apply, in practice, "only to arbitration." *Id.* at 339. As a result, even a seemingly neutral rule is preempted if it "interfere[s] with fundamental attributes of arbitration." *Id.* at 344.

The decision below discards the FAA's bedrock equal-treatment principle in two important—and far-reaching—ways. *First*, the Ninth Circuit held that incorporation of an arbitral provider's procedural rules is procedurally unconscionable whenever the provider can change them. The court then applied this novel rule to hold unconscionable an arbitration provision incorporating *AAA's default consumer arbitration rules*. Given how common those rules are in arbitration agreements, the decision below threatens to upend a staggering amount of contractual expectations.

Second, the Ninth Circuit reiterated its support for California's arbitration-specific severability doctrine, which subjects arbitration agreements to an arbitration-specific "interests of justice" review to determine whether arbitration has been improperly "impose[d]" on a party. Applying this severance test, the California courts routinely disfavor arbitration agreements, and in the decision below, the Ninth Circuit embraced the State's approach. This was not

a one-off case. The severability issue arises *every time* a court finds one or more provisions of an arbitration agreement invalid under California law. And as this Court has recognized, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion*, 563 U.S. at 342.

Both rulings defy the FAA and this Court's precedents and conflict with other circuit and state high court decisions. This Court's review is necessary to resolve the splits of authority and to uphold the supremacy of federal law. The petition should be granted.

I. THE NINTH CIRCUIT'S PROHIBITION ON "THEN-CURRENT" ARBITRATION RULES SINGLES OUT ARBITRATION, IMPLICATES A CONFLICT OF AUTHORITY, AND VIOLATES THE FAA.

In the opinion below, the Ninth Circuit held that an arbitration agreement's incorporation of an arbitration provider's "then-current" procedural rules is "procedural[ly] unconscionab[le]" because those rules "are subject to change." Pet. App. 4a-5a (holding that the arbitration agreement itself is procedurally unconscionable for this reason); *see also id.* at 5a (holding the delegation clause procedurally unconscionable for the same reason). In the Ninth Circuit's view, "[u]nder California law," an arbitration clause evinces "oppression" whenever it incorporates an arbitration provider's "rules which might change" *id.* (quoting *Heckman v. Live Nation Ent., Inc.*, 120 F.4th 670, 682 (9th Cir. 2024), in turn quoting *Harper v. Ultimo*, 7 Cal. Rptr. 3d 418, 422 (Cal. Ct. App. 2003)). The court did so despite the fact that the

California courts, themselves, apply state procedural rules that are subject to change and that non-arbitration agreements adopt all sorts of changing procedural rules without protest. The Ninth Circuit is specifically burdening arbitration agreements and arbitration generally in a way that no other contract and no court is burdened.

A. The Decision Below Violates the FAA and *Concepcion*

By singling out arbitration and arbitration agreements for disfavored treatment, the Ninth Circuit's ruling flouts *Concepcion*. Neither California nor the Ninth Circuit treats other contracts this way. *All* non-arbitration contracts are subject to ever-changing state and federal procedural, evidentiary, and appellate rules whenever a breach claim is filed. Every day, parties draft contracts that incorporate ever-changing third-party rules, regulations, or standards—ASME regulations for construction contracts; IEEE standards for contracts dealing with electronics; GAAP rules for accounting; FINRA rules for financial contracts; and so on. And, of course, all contracts containing forum-selection or choice-of-law clauses incorporate the law of the designated jurisdiction, which can change.

The California courts, like courts across the country, routinely enforce such provisions in non-arbitration agreements. *See, e.g.*, *EpicentRx, Inc. v. Superior Ct.*, 18 Cal. 5th 58, 84 (2025) (emphasizing the presumption that forum-selection clauses are enforceable); *1-800-Got Junk? LLC v. Superior Ct.*, 189 Cal. App. 4th 500, 513 (2010) (noting California's "strong policy favoring enforcement" of choice-of-law provisions); *Gilbane Fed. v. United Infrastructure*

Projects FZCO, 275 F. Supp. 3d 1180, 1193 (N.D. Cal. 2017) (under California law, IEEE standards incorporated into a contract by reference must be enforced even if there is "no significant reason" for preferring those standards to those promulgated by other entities), *aff'd*, 777 F. App'x 873 (9th Cir. 2019).

It is only in the arbitration context that a contract's incorporation of rules that are "subject to change" supposedly makes the contract "unconscionable." This decision to single out arbitration agreements for special unconscionability rules impermissibly discriminates against arbitration, in violation of the FAA and *Concepcion*.

B. The Decision Below Conflicts With Decisions From Other Courts

The Ninth Circuit's decision also conflicts with those of other courts, which have upheld contracts adopting changeable arbitration rules against unconscionability challenges even where plaintiffs presented far stronger cases for unconscionability than Respondents do here.

The Sixth and Seventh Circuits, for example, have rejected unconscionability challenges to contracts adopting changeable arbitration rules even when those rules were subject to *unilateral* change *by an interested party* to the agreement. *See Goff v. Nationwide Mut. Ins., Co.*, 825 F. App'x 298, 304 (6th Cir. 2020) (clause giving an employer the unilateral "right to change, alter, amend, or otherwise modify the rules and procedures of any arbitration proceedings" not procedurally unconscionable); *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 806 (7th Cir. 2003) (arbitration provision imposed through

unilateral amendment not unconscionable, despite the fact that plaintiffs "had no opportunity to review, negotiate, or comment on the [arbitration] program").

Indeed, until now, even courts applying California law—and the unconscionability law of other states that is "the same" as to California's—have held that "the fact that [the party who drafted the arbitration agreement] may unilaterally modify the terms of the [agreement], including the arbitration provision, does not, without more, render the arbitration provision procedurally unconscionable." *Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 417-18, 426 (E.D.N.Y. 2014); *see also, e.g., Uptown Drug Co., Inc. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172, 1181 (N.D. Cal. 2013) (rejecting argument that an arbitration clause "is unconscionable because [the defendant] reserved the right to unilaterally modify the clause").

The Mississippi Supreme Court was even more explicit on this point in *Virgil v. Sw. Miss. Elec. Power Ass'n*, 296 So. 3d 53, 62 (Miss. 2020), a decision which well illustrates the conflict. There, the plaintiffs were members of an electric cooperative who sued their co-op in state court for failing to return excess revenues. The trial court compelled arbitration under an amendment to the co-op's bylaws, which had added a mandatory arbitration clause. According to the plaintiffs, the arbitration clause was procedurally unconscionable because it was the unilaterally imposed product of changeable bylaw rules and imposed requirements that were "not included in the bylaws when Plaintiffs signed the membership application." *Id.*

The Mississippi Supreme Court rejected the argument, explaining that the plaintiffs had "agreed to be bound by the bylaws" when they joined the co-op and had always known that those bylaws "could be amended." *Id*. Further, the plaintiffs' argument that the arbitration clause alone (and not any other amended clause) was "procedurally unconscionable" because it resulted from an after-the-fact amendment "single[d] out the arbitration provision for disfavored treatment, in violation of *Concepcion*." *Id*. at 63.

That reasoning and result directly conflicts with the Ninth Circuit's decision here. If anything, the plaintiffs' unconscionability argument in *Virgil* was less far-fetched than the one here. In *Virgil*, after all, the very *existence* of the arbitration requirement was created by a post-hoc amendment; that amendment was unilaterally imposed by the defendant; and the plaintiffs had no opportunity to opt out. Yet the Mississippi Supreme Court had no trouble concluding that the FAA barred the plaintiffs' arbitration-specific theory of unconscionability.

Here, the agreement to have AAA arbitrate disputes was clearly and unmistakably included in Avia's Terms at the time Respondents agreed to them; Avia has no authority to unilaterally impose amended arbitration requirements or to alter AAA's procedural rules; and users could opt-out of arbitration simply by sending an email.

The Ninth Circuit's decision also cannot be reconciled with this Court's and numerous circuit courts' decisions enforcing arbitration provisions that adopt "then-current" arbitration rules. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 5 (1983) (enforcing agreement that

required "arbitration in accordance with the Construction Industry Arbitration Rules of the [AAA] *then obtaining*") (emphasis added); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 66 (2019) (enforcing agreement incorporating "arbitration rules of the [AAA]," which, as noted, are subject to change); *Zeidman v. Lindell Mgmt. LLC*, 145 F.4th 820, 824 (8th Cir. 2025), *cert. denied*, 2026 WL 79757 (U.S. Jan. 12, 2026) (holding arbitrator exceeded authority by failing to follow rules where arbitration agreement provided that it would be conducted "under the then-current rules of the AAA"); *Valli v. Avis Budget Grp. Inc.*, 162 F.4th 396, 402 (3d Cir. 2025) (enforcing arbitration agreement providing that "AAA's then-current rules for commercial arbitration" applied); *Roberts v. Wells Fargo Clearing Servs., LLC*, 2022 WL 16826715, at *1 (11th Cir. Nov. 9, 2022) (enforcing arbitration agreement that applied the "then-current Rules of the Financial Industry Regulatory Authority"); *Blanton v. Domino's Pizza Franchising LLC,* 962 F.3d 842, 844-845 (6th Cir. 2020) (enforcing arbitration agreement providing that "[t]he American Arbitration Association ('AAA') will administer the arbitration and the arbitration will be conducted in accordance with then-current [AAA Rules]"); *Associated Builders Corp. v. Ratcliff Const. Co.*, 823 F.2d 904, 906 (5th Cir. 1987) (enforcing arbitration agreement that adopted the "then current rules of the Construction Industry Arbitration Rules of the American Arbitration Association"). The notion that all these provisions were actually "unconscionable" defies credulity.

C. The Decision Below Undermines Huge Swaths Of Arbitration Agreements

Left uncorrected, the Ninth Circuit's decision will upend countless arbitration agreements and devastate parties' settled expectations in the Nation's largest federal circuit. The vast majority of arbitration agreements incorporate the rules of an arbitration provider, most commonly AAA or JAMS, because in arbitration, the applicable procedural rules are a matter of contract—one reason why the Ninth Circuit's unconscionability rule is trained at and disproportionately impacts arbitration. The arbitration agreement must specify the governing rules, or the parties must consent to an arbitration provider, which amounts to consent "to be bound by [that provider's] procedural rules," unless specifically "indicate[d] otherwise in the contract." *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867 (10th Cir. 1999); *see also, e.g., Idea Nuova, Inc. v. GM Licensing Grp., Inc.*, 617 F.3d 177, 182 (2d Cir. 2010) ("An agreement to submit commercial disputes to 'AAA arbitration for resolution' is properly construed to agree to arbitration pursuant to the AAA Commercial Arbitration Rules and to incorporate those rules into the Agreement.").

The fact that consent to an arbitration provider is consent to the provider's rules underscores how preposterous the Ninth Circuit's unconscionability holding is. When AAA arbitrators conduct arbitrations, they (like judges) normally apply their *current* procedural rules. *See* AAA Consumer Arbitration Rule R-1(a), https://perma.cc/JC44-V524 ("these Rules and any amendment of them shall apply in the form in effect at the time [the arbitration

demand is] received by the AAA"); JAMS Rule 3, https://perma.cc/E6EW-CJ92 ("The Rules in effect on the date of the commencement of an Arbitration . . . shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules"). But under the Ninth Circuit's decision, that practice is unconscionable, rendering provisions consenting to arbitration providers at risk.

That cannot be, and is not, the law. The age-old practice of applying current procedural rules is not "unconscionable." Thus, numerous courts, including this one, have not hesitated to apply then-current arbitration rules. *See supra* pp. 14-15 (collecting cases). If the rule were otherwise, vast numbers of arbitration clauses—along with choice-of-law and forum-selection clauses—would be unconscionable.

II. CALIFORNIA'S ARBITRATION-SPECIFIC "NO SEVERABILITY" RULE LIKEWISE CONFLICTS WITH OTHER COURTS AND VIOLATES THE FAA.

The Ninth Circuit's embrace of California's anti-arbitration severability doctrine is a separate, compelling ground for granting certiorari. Indeed, this Court previously granted certiorari to review the doctrine, but lost the opportunity when the parties settled before oral argument. *See Zaborowski*, 576 U.S. 1095 (2015) (No. 14-1458); Petition for a Writ of Certiorari in *Zaborowski*, 2015 WL 3637766, at *i (filed June 10, 2015). This case provides an excellent vehicle for finally addressing whether California's arbitration-specific anti-severance rule is preempted by the FAA.

A. California Severability Doctrine Uniquely Targets and Burdens Arbitration Agreements

When it comes to contracts generally, California recognizes a "strong legislative and judicial preference . . . to sever the offending term and enforce the balance of the agreement." *Ramirez v. Charter Commc'ns, Inc.*, 551 P.3d 520, 544 (Cal. 2024) (quoting *Roman v. Sup. Ct.*, 92 Cal. Rptr. 3d 153, 166-67 (Ct. App. 2009)). Courts thus look to whether the contract "cannot be cured" by severance, which occurs when either "the central purpose of the contract is tainted with illegality," or the contract "requires augmentation to cure the unconscionability." *Id.* at 546-47.

But that is not the case when the contract is an arbitration agreement. According to the California Supreme Court, "[e]ven if a contract *can* be cured" through severance, "the court should also ask whether the unconscionability *should* be cured . . . because the interests of justice would be furthered." *Id.* at 516 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 669 (Cal. 2000)). Severance is improper where severance would "condone an illegal scheme," or where "the defects in the agreement indicate that the stronger party engaged in a systematic effort to impose arbitration on the weaker party." *Id.* at 516-517; *see also Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 106 (Cal. Ct. App. 2004) ("[M]ore than one unlawful provision in an arbitration agreement weighs against severance."). California also requires courts to "consider the deterrent effect" of not severing provisions to prevent parties from drafting "one-sided arbitration agreement[s]." *Ramirez*, 551 P.3d at 547. Therefore, a court applying California contract law

can refuse to enforce an arbitration agreement where it deems doing so in the interests of justice to protect the weaker party from arbitration.

This standard "discriminat[es] on its face against arbitration." *Kindred Nursing Ctrs.*, 581 U.S. at 251. While the *Ramirez* Court nonetheless asserted that California's standard "is not hostile to arbitration," the reality is that the above rules apply exclusively to, and disfavor, arbitration agreements. To benefit from severance, an arbitration agreement must undergo additional reviews for any "systematic effort to impose arbitration on [a] weaker party" and whether "deterrence" is warranted—rules that do not apply to any other contract and are facially hostile to arbitration. *Ramirez*, 551 P.3d at 547.

The interests-of-justice standard does not implicate any other comparable unconscionability risks for non-arbitration contracts. *Id.* For the past 20 years, California has recognized only *one* example of the "interests of justice" requiring invalidation of a severance provision: arbitration. That directly "target[s]" arbitration "by name." *Epic Sys.*, 584 U.S. at 508; *see Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 464 (9th Cir. 2014) (Gould, J., concurring in part and dissenting in part) (recognizing that California's severability law "has a disproportionate impact on arbitration agreements and should [be] preempted by the Federal Arbitration Act").

If the California legislature had enacted additional requirements for arbitration agreements to remain valid whenever a court found unconscionability, that statute would plainly violate the FAA's equal-treatment rule. *See, e.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). That California's

courts have imported the same presumption into their decisional law changes nothing: a "court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Concepcion*, 563 U.S. at 341 (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)); *see also, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534 (2012) (remanding unconscionability decision under state law and ruling that "state common-law principles" must be "not specific to arbitration").

Moreover, the California Supreme Court has been candid that this rule "singl[es] out arbitration agreements for disfavored treatment" or "suspect status." *Kindred Nursing Ctrs.*, 581 U.S. at 248, 252 n.1. In its decision adopting the rule, the California Supreme Court emphasized that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 6 P.3d at 693. And it talked at length about the "potential disadvantages" of arbitration, stressing that courts "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." *Id.* at 690. More recently, it doubled down on this judicial hostility to arbitration by directing that courts "consider the deterrent effect" of non-severability. *Ramirez*, 551 P.3d at 547. So even where an arbitration agreement "*can* be cured," courts may still refuse severance in order to punish the drafting party for seeking to enforce a "one-sided arbitration agreement." *Id.*

These machinations are grounded in California's impermissible "suspicion of arbitration as a method of weakening the protections afforded in the substantive law." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). Arbitration is ultimately "a matter of contract," *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013), and "adaptability" is a "hallmark[] of arbitration," *Mitsubishi Motors Corp.*, 473 U.S. at 633. The FAA thus allows parties to "specify . . . the rules under which . . . arbitration will be conducted." *Am. Exp. Co.*, 570 U.S. at 233 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)). Yet California presumes that arbitration's flexibility is abusive and punishes innovation through its arbitration-specific "no severance" rule.

B. Other Jurisdictions Rightly Reject Arbitration-Specific Severability Rules

The Ninth Circuit's decision implicates a longstanding conflict over whether anti-arbitration severance rules violate the FAA—a conflict this Court implicitly recognized when it granted certiorari in *Zaborowski*, No. 14-1458.

As the *Zaborowski* petitioners explained, the Seventh Circuit has held that to the extent California "create[s] special requirements" for arbitration clauses, those special requirements are "preempted by § 2 of the [FAA]." *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004). In the words of Judge Easterbrook: "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.*

California's arbitration-only anti-severance rule is a "special hurdle [] for arbitration agreements," *id.*, which under *Oblix* would be preempted. Thus, had this case been litigated in the Seventh Circuit, the purportedly unconscionable arbitration provisions would have been severed and the motion to compel granted.

The Ninth Circuit's decision below also conflicts with numerous courts of appeal decisions holding enforcement of severance provisions necessary to the FAA's goals. For example, in a line of cases stretching back decades, the Sixth Circuit has refused to read state law as imposing special severance requirements on arbitration agreements, citing "Supreme Court precedent dictat[ing] that we resolve any doubts as to arbitrability in favor of arbitration." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003); *see also Gavin v. Lady Jane's Haircuts for Men Holding Co., LLC*, 135 F.4th 461, 464 (6th Cir. 2025). Thus, "when [an] agreement includes [a] severability provision, [the] intent of the parties and [federal] policy in favor of arbitration dictate" that the remainder of the agreement be enforced, particularly given the FAA's mandate to "resolve any doubts as to arbitrability in favor of arbitration." *Morrison*, 317 F.3d at 675. And courts must "not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement." *Gavin*, 135 F.4th at 464.

Similarly, in *Bodine v. Cook's Pest Control Inc.*, the Eleventh Circuit emphasized that if "severability clauses are enforceable under [state] law" generally, then federal courts must give them effect because "the FAA requires that arbitration agreements be treated

no less favorably than other contracts under state law." 830 F.3d 1320, 1328 (11th Cir. 2016). Or, as the Fifth Circuit put it, "The severing of [an objectionable provision] serves to expand the scope of arbitration," and is therefore the favored result under federal law. *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003). The Eighth and DC Circuits have said the same thing. *See, e.g., Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (enforcing an arbitration agreement's severance clause is consistent with the "FAA's policy favoring the enforcement of arbitration agreements"); *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84-86 (D.C. Cir. 2005) (enforcing severance provisions in arbitration agreements is "faithful to the federal policy which requires that we rigorously enforce agreements to arbitrate").

These decisions cannot be squared with the Ninth Circuit's (and California's) open disregard for severance provisions in arbitration agreements and their anti-arbitration "no severance" rules.

C. This Case Illustrates The Pitfalls Of California's Approach

This case shows what will happen if California's arbitration-specific severability rules are allowed to stand: routine arbitration agreements will be invalidated wholesale.

If the agreement here were assessed outside the arbitration context, severance would be straightforward because the challenged terms are "collateral to the agreement's main purpose." *Ramirez*, 551 P.3d at 547. The challenged batching/bellwether provision and one-year limitations period are ancillary case-management and

timing provisions; removing them would neither disturb the parties' broad, bilateral commitment to arbitrate "all disputes . . . arising out of or relating to" the parties' relationship nor alter the designated forum and governing rules. Yet the Ninth Circuit refused severance precisely because this is an arbitration agreement, concluding the provisions *should* not be severed even if they *could* be. That result cannot be reconciled with the FAA's "emphatic federal policy in favor of arbitral dispute resolution." *Marmet*, 565 U.S. at 532-33.

Like other companies across the country, Avia has grappled with the rise of mass arbitration—the practice by which plaintiffs' lawyers file tens of thousands of arbitration claims against a single company to impose ruinous and nonrecoverable fees and costs on defendants. *See, e.g.*, R. Freer, *supra*, at 391. This strategy is highly effective at securing blackmail settlements for plaintiffs' firms—and devastating for companies—because most consumer arbitration agreements require the company to pay nonrefundable arbitration costs, usually at the outset of litigation. Indeed, California law often compels companies to agree to pay those costs in order to arbitrate consumer disputes. *See, e.g., Fisher v. MoneyGram Int'l, Inc.*, 281 Cal. Rptr. 3d 771, 788 (Cal. Ct. App. 2021). These costs are ruinous in the mass-arbitration context. *See, e.g.,* Freer*, supra*, at 391 (noting that AAA ultimately billed Uber $92 million in fees for one mass arbitration). In short, mass arbitration is an existential crisis for both companies and arbitration providers. *See id.* at 392 (noting a trend "to abandon arbitration altogether").

Like many other companies, Avia sought to address this novel problem by modifying its arbitration agreements to include a batching and bellwether process to facilitate global resolution of mass arbitrations—the same kind of process used in MDLs and California coordinated proceedings to manage mass filings. *See* Pet. App. 115a. Like in federal and state courts, the process works by relying on staged filings and bellwether provisions to ensure that individual claims can be resolved fairly and on their merits.

At the time this suit was filed, no appellate court had found batching and bellwether provisions problematic. Indeed, several courts have recognized the *benefits* of bellwether proceedings in promoting the fair and orderly resolution of claims. *See, e.g.*, *McGrath v. DoorDash, Inc.*, 2020 WL 6526129, at *10 (N.D. Cal. Nov. 5, 2020) (describing similar bellwether provision as "fair and impartial"); Tr. 38, 40, *Tubi, Inc., v. Keller Postman LLC,* 1:24-cv-01616 (D.D.C. Dec. 19, 2024) (urging the parties to agree to "5 to 10" "bellwether arbitrations" in order to secure a resolution, to which the parties later agreed, *see id.* at 43-47); *Ruiz v. CarMax Auto Superstores, Inc.*, 2024 WL 1136332, *6 (C.D. Cal. Jan. 18, 2024) (rejecting unconscionability challenge to a "Mass Arbitration Protocol" that required claims to "proceed in batches of ten").

Yet rather than recognize that these provisions are increasingly common, are grounded in accepted federal and state practice, and are necessary to cope with a new and existential problem, the courts below simply *presumed* that Avia had imposed batching and bellwether provisions to "structurally and

systematically make arbitration an inferior forum" and to "chill" suits, and then punished Avia by refusing to enforce its contractually-provided severance rights. Pet. App. 40.

If parties can "choose to have portions of their contract governed by the law of Tibet [or] the law of pre-revolutionary Russia," *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015), then they should be able to try new arbitral procedures—indeed, procedures inspired by MDL and mass tort proceedings—without losing their contractual right to arbitrate. California and the courts below nonetheless impose this draconian result through California's arbitration-specific "no severance" rule. That plainly violates the FAA.

III. THIS CASE IS EXCEPTIONALLY IMPORTANT.

It is always "a matter of great importance" that "courts adhere to a correct interpretation of the [FAA]." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17-18 (2012) (per curiam) (granting summary reversal where the lower court had disregarded the FAA's non-discrimination principle). That is especially true when it comes to the Ninth Circuit, which encompasses nearly one fifth of all Americans and an even greater portion of the U.S. economy. Unfortunately, both the Ninth Circuit and California courts have long demonstrated the "judicial hostility to arbitration agreements" that the FAA seeks to combat. *Concepcion*, 563 U.S. at 339.

Nowhere is that "bias[] against arbitration" more evident than in the arbitration-only rules these courts have devised to void arbitration agreements. *See, e.g.*, Stephen A. Broome, *An Unconscionable Application of*

the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L.J. 39, 40-41, 44-48 (2006); *Concepcion*, 563 U.S. at 339 (noting that courts applying California law "have been more likely to hold contracts to arbitrate unconscionable than other contracts"); *see also, e.g., Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55, 58 (9th Cir. 2021) (Bumatay, J., concurring) ("Recent Supreme Court decisions . . . make clear that our [FAA] precedent is in serious need of a course correction."); *Hohenshelt v. Superior Ct.*, 318 Cal. Rptr. 3d 475, 480 (Ct. App. 2024) (Wiley, J., dissenting) ("California state law disagrees, strongly and persistently, with federal law about whether arbitration is desirable"), *rev'd in part on other grounds*, 573 P.3d 944 (Cal. 2025) (holding that the FAA does not preempt a statute making time of the essence for fee payments in arbitration contracts).

The persistent failure of the Ninth Circuit and California courts to enforce the FAA has required this Court's intervention, over and over again. *See, e.g., Epic Sys.*, 584 U.S. at 525 (reversing Ninth Circuit); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662-63 (2022) (reversing California Court of Appeal); *Lamps Plus v. Varela*, 587 U.S. 176, 189 (2019) (reversing the Ninth Circuit); *DIRECTV*, 577 U.S. at 58-59 (reversing California Court of Appeal); *Concepcion*, 563 U.S. at 352 (reversing Ninth Circuit); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 76 (2010) (reversing Ninth Circuit); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (reversing California Court of Appeal); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124 (2001) (reversing Ninth Circuit).

This case is no different. In the span of just five pages, the opinion below defies the FAA twice. First, the Ninth Circuit announces a rule that declares a huge swath of arbitration agreements procedurally unconscionable merely because they incorporate standard "then-current" procedural rules. Pet. App. 4a-5a. This ruling is so egregious that it warrants summary reversal if the Court is not inclined to grant certiorari.

Second, the opinion embraces an overtly anti-arbitration and arbitration-specific severability rule. Pet. App. 5a-6a. Here too, the implications are breathtaking. Severability is implicated every time *any* provision within an arbitration agreement is found unconscionable (an extremely common occurrence under California law that will be even more common given the Ninth Circuit's ban on "then-current" AAA and JAMS rules).

And the district court's reasoning was limitless. It concluded, without any investigation into Avia's actual intent or motivations, that the bellwether provision was part of a "structural[]" and "systematic[]" scheme for arbitration because it theoretically could chill some unknown consumer from suing. Pet. App. 40a. But that reasoning would apply anytime a court finds any provision unconscionable, because an unconscionability finding entails an unfavorable (*i.e.*, chilling) provision. The Ninth Circuit affirmed in an even more conclusory manner. That ruling will only encourage the California federal and state courts to reflexively disregard severance provisions and invalidate arbitration agreements wholesale.

* * *

Just as this Court has not hesitated to intervene in other cases where the Ninth Circuit has openly defied the FAA, it should not hesitate here. The errors in the opinion below are obvious, serious, and will have sweeping consequences throughout the nation's largest circuit if not corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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