Case No. S273802

IN THE SUPREME COURT OF CALIFORNIA

ANGELICA RAMIREZ,
Plaintiff and Respondent,

v.

CHARTER COMMUNICATIONS, Inc.,
Defendant and Petitioner.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND PETITIONER

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Application to File *Amici Curiae* Brief

Pursuant to CRC 8.520(f), the Chamber of Commerce of the United States of America ("Chamber") and the Civil Justice Association of California ("CJAC") request permission to file the accompanying *amici curiae* brief in support of defendant and petitioner. This brief addresses the following issue:

> **Does the appellate court's refusal to enforce the parties' arbitration agreement violate this Court's precedent and the Federal Arbitration Act?**

The Chamber and CJAC represent businesses, professional associations, and financial institutions before federal and state branches of government. They strongly favor voluntary pre-dispute arbitration contracts as a fair, efficient and economical alternative to conventional court litigation for resolving disputes between parties. Toward this end, they participate as *amici curiae* in select cases before courts that implicate their purposes, the issue here being a prime example.

Amici believe that the brief they have written and lodged with this application for filing will assist the Court in its consideration of the issue presented. *Amici*'s brief brings argument and analysis that complements that of the parties. *Amici* contend that the court of appeal's opinion wrongly affirmed the trial court's refusal to honor the arbitration provision in petitioner's employment contract with respondent. It did so on the grounds that certain provisions of that agreement are "unconscionable" and cannot be severed to save the rest of the agreement. This is contrary to law and sound public policy.

Because the lower courts refused to enforce the arbitration agreement according to its terms, amici believe this case presents an opportunity for the Court to clarify the standard for severability in the context of arbitration agreements and ensure that California law governing such contracts does not run afoul of the Federal Arbitration Act.

No party or counsel for a party in the pending case authored the proposed *amici curiae* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

Accordingly, amici respectfully request that this Court accept and file the attached amici brief.

DATED: March 6, 2023 Respectfully submitted,

EIMER STAHL LLP

By: /s/ Robert E. Dunn
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TABLE OF CONTENTS

TABLE OF AUTHORITIES 6
INTRODUCTION 10
A. Interest of Amici 10
B. Summary of Argument 11
ARGUMENT 13
I. Arbitration Agreements Benefit Both Employees and Employers by Providing Speedy, Efficient, and Just Resolution of Employment Claims. 13
II. The Court of Appeal Violated Basic Rules of Contract Interpretation by Refusing to Sever the Provisions it Found Unconscionable Despite the Parties' Clear Intent to Sever Any Unenforceable Provisions. 17
A. California Law Favors Severability of Unconscionable Provisions in Contracts to Save the Remainder of the Contract. 18
B. *Armendariz* Does *Not* Endorse a Rule Against Severance When There is More Than One Unconscionable Provision in an Arbitration Contract. 20
III. The Arbitration-Specific Rule for Severability the Court of Appeal Applied Here Violates the FAA. 25
A. The "More than One Unconscionable Provision" Rule Imposed Here is Hostile to Arbitration. 25
B. *Viking River Cruises* Underscores the FAA's Strong Support for Enforcing Severability in Arbitration Agreements. 28
CONCLUSION 30
CERTIFICATE OF WORD COUNT 32
DECLARATION OF SERVICE 33

TABLE OF AUTHORITIES

Cases

Adair v. Stockton Unified Sch. Dist.
(2008) 162 Cal.App.4th 1436 ..... 19, 20

American Exp. Co. v. Italian Colors Restaurant
(2013) 570 U.S. 228 27

Armendariz v. Foundation Health Psychare Servs., Inc.
(2000) 24 Cal.4th 83 .....passim

AT&T Mobility LLC v. Concepcion
(2011) 563 U.S. 333 .....passim

Baeza v. Superior Court
(2011) 201 Cal.App.4th 1214 ..... 19, 20

Birbrower, Montalbano, Condon & Frank v. Superior Court
(1998) 17 Cal.4th 119 ..... 19, 20

Buckeye Check Cashing, Inc. v. Cardegna
(2006) 546 U.S. 440 11

Carmona v. Lincoln Millennium Car Wash, Inc.
(2014) 226 Cal.App.4th 74 23

Castorena v. Charter
(C.D. Cal. Dec. 14, 2018) 2018 WL 10806903 24

Circuit City Stores, Inc. v. Adams
(2001) 532 U.S. 105 14

Davis v. Kozak
(2020) 53 Cal.App.5th 897 22

De Leon v. Pinnacle Prop. Mgmt. Servs., LLC
(2021) 72 Cal.App.5th 476 22

E.E.O.C. v. Waffle House, Inc.
(2002) 534 U.S. 279 25

Epic Systems Corp. v. Lewis
(2018) 138 S. Ct. 1612 ..... 13, 26, 27

Fitz v. NCR Corp.
(2004) 118 Cal.App.4th 702 23

Gonzales v. Charter Commc'ns, LLC
(C.D. Cal. 2020) 497 F. Supp. 3d 844 24

Greenlake Capital, LLC v. Bingo Invs., LLC
(2010) 185 Cal.App.4th 731 20

Hightower v. Superior Court
(2001) 86 Cal.App.4th 1415 ..... 15, 16

Iskanian v. CLS Trans. Los Angeles, LLC
(2014) 59 Cal.4th 348 ..... 28, 29

Johnmohammadi v. Bloomingdale's, Inc.
(9th Cir. 2014) 755 F.3d 1072 14

Keene v. Harling
(1964) 61 Cal.2d 318..... 20

Lange v. Monster Energy Co.
(2020) 46 Cal.App.5th 436 23

Lhotka v. Geographic Expeditions, Inc.
(2010) 181 Cal.App.4th 816 23

Magno v. Coll. Network, Inc.
(2016) 1 Cal.App.5th 277 17

Marathon Ent., Inc. v. Blasi
(2008) 42 Cal.4th 974179

Marmet Health Care Ctr., Inc. v. Brown
(2012) 565 U.S. 530 26

Martinez v. Master Protection Corp.
(2004) 118 Cal.App.4th 107 23

MKB Mgmt., Inc. v. Melikian
(2010) 184 Cal.App.4th 796 19

Morgan v. Sundance, Inc.
(2022) 142 S. Ct. 1708 27

Ontiveros v. DHL Express (USA), Inc.
(2008) 164 Cal.App.4th 494 23

Patterson v. Superior Court
(2021) 70 Cal.App.5th 473 24

Penilla v. Westmont Corp.
(2016) 3 Cal.App.5th 205 22

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(1987) 482 U.S. 483 ..... 27, 30

Pierotti v. Torian
(2000) 81 Cal.App.4th 1 ..... 13, 20

Preston v. Ferrer
(2008) 552 U.S. 346 30

Prima Paint Corp. v. Flood & Conklin Mfg. Co.
(1967) 388 U.S. 395 27

Ramirez v. Charter Commc'n, Inc.
(2022) 75 Cal.App.5th 365 ..... 17, 24

Shopoff & Cavallo LLP v. Hyon
(2008) 167 Cal.App.4th 1489 20

St. Agnes Medical Center v. PacifiCare of California
(2003) 31 Cal.4th 1187 16

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.
(2010) 559 U.S. 662 13

Trivedi v. Curexo Tech. Corp.
(2010) 189 Cal.App.4th 387 22

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(2022) 142 S. Ct. 1906 ..... 25, 26, 28, 29

Statutes

Civ. Code § 1598 18

Civ. Code § 1599 18

Civ. Code § 1636 19

9 U.S.C. § 2 26

Other Authorities

AAA Empl. Arb. Rules & Mediation Procedures, Rule 27 (revised Jan. 1, 2023) 16

FINRA Rule 13504 16

JAMS Empl. Arb. Rules & Procedures, Rule 18 16

Judicial Council of California, *2022 Court Statistics Report Statewide Caseload Trends 2011–12 Through 2020–21* (2022) 15

Nam D. Pham and Mary Donovan, *Fairer, Faster Better III: An Empirical Assessment of Consumer and Employment Arbitration*, NDP Analytics (Mar. 2022) 14, 15

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INTRODUCTION

A. Interest of Amici

The Chamber of Commerce of the United States of America ("Chamber") and the Civil Justice Association of California ("CJAC") welcome the opportunity to address as *amici curiae* the issue this case presents:

> **Does the appellate court's refusal to enforce the parties' arbitration agreement violate this Court's precedent and the Federal Arbitration Act ("FAA")?**

Amici contend that it does, and unless reversed for reasons advanced by petitioner and supporting *amici*, will throw a legal monkey-wrench into the ability of parties to agree to resolve specified disputes by arbitration instead of litigation in court.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations throughout the country. It advocates on behalf of business before the federal and state governments, including filing amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

CJAC is a statewide association dedicated to improving California's civil liability system through its legislative, regulatory, and judicial advocacy. Founded in 1979, CJAC is a nonprofit, non-partisan, member-supported coalition that represents the interests of businesses, professional associations, and financial institutions. CJAC advocates for policies that allow California businesses and their employees to grow and thrive through a legal environment that is "fair, economical, and

certain." Contractual arbitration by parties to resolve future disputes between them in an arbitral forum instead of before a court furthers this CJAC purpose.

B. Summary of Argument

"Arbitration is favored in this state as a voluntary means of resolving disputes[.]" (*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 115.) The Federal Arbitration Act ("FAA") similarly enshrines a "national policy favoring arbitration and plac[ing] arbitration agreements on equal footing with all other contracts." (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443.) Yet the lower courts in this case refused to honor the arbitration provision in petitioner's employment contract with respondent. It did so on the grounds that certain provisions of that agreement are "unconscionable" and cannot be severed to save the rest of the agreement. This is contrary to law and sound public policy.

These same provisions have been upheld by many California and federal courts when challenged as unconscionable. Even assuming that one or more of the provisions are unconscionable, to treat them as unseverable runs afoul of California law and the FAA's requirement that arbitration contracts be treated equally with other contracts.

Severability was denied here despite clear language in the arbitration agreement that "any portion or provision of the agreement" found "unenforceable" is "severable." The purported reason for ignoring this language is the appellate court's finding that more than one provision of the arbitration agreement is unconscionable. But this concocted rule against severance is not applied to other types of contracts, making it contrary to this Court's teaching that arbitration

agreements be placed on "equal footing with other contracts." (*Armendariz*, 24 Cal.4th at 127.)

Armendariz does not hold that the presence of more than one unconscionable provision dooms an arbitration agreement. It does specify several requirements that employment arbitration agreements must satisfy, but all are met by the arbitration agreement here. Accordingly, even if this Court concludes that certain provisions of petitioner's arbitration agreement are unlawful, it should still reverse on the ground that the lower courts misapplied California law by refusing to sever those provisions from the rest of the agreement.

Moreover, an arbitration-only rule invalidating arbitration agreements due to the presence of more than one unconscionable provision despite the parties' expressed intent to sever such provisions violates the FAA. The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms," and the terms here plainly call for severance of any unlawful provisions. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 344, 346.) The FAA also mandates that arbitration agreements be placed "on the same footing as other contracts," and the arbitration-only rule applied here fails that test. (*Id*. at 338-39, 360.) Accordingly, the judicially created rule requiring invalidation where more than one provision is found unlawful is preempted by the FAA.

This Court should reverse the decision below and clarify that neither state nor federal law countenances judicial hostility to arbitration agreements. On the contrary, courts must rigorously "enforce arbitration agreements according to their terms." (*Epic Systems Corp. v. Lewis* (2018) 138 S. Ct. 1612, 1621, citation omitted.)

ARGUMENT

I. Arbitration Agreements Benefit Both Employees and Employers by Providing Speedy, Efficient, and Just Resolution of Employment Claims.

Millions of employees agree to arbitrate disputes with their employers because arbitration offers a "speedy and relatively inexpensive means" of resolving various types of employment-related claims. (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 35.) Arbitration generally results in a quicker resolution than could be obtained in court, and the flexible, customized dispute-resolution procedures available through arbitration can significantly reduce administrative costs for all parties. Studies have found that arbitrations of employment disputes result in *higher* success rates and *greater* awards for employees than traditional litigation. Arbitration also reins in discovery costs, provides for more predictable awards, and preserves confidentiality. These mutual benefits favor upholding arbitration agreements whenever possible, including by severing unconscionable provisions.

Employers favor arbitration because it curtails abusive discovery practices, maintains confidentiality where appropriate, and avoids the uncertainty of a "runaway jury" or potentially ruinous class-wide damages awards. (See Russel Myles & Kelly Reese, *Arbitration: Avoiding the Runaway Jury* (1999) 23 Am. J. Trial Advoc. 129, 144 ["permitting a punitive damages case to go to a jury is still a risky matter which some have likened to Russian roulette"]; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 684 ["a party may not be compelled under the F[ederal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."].)

Although some courts suspect that arbitration agreements are one-sided contracts that routinely disadvantage employees, data does not support that apprehension. To the contrary, "the speed, informality, and lower costs of arbitration provide real advantages" for *both sides* "over litigating in court." (*Johnmohammadi v. Bloomingdale's, Inc.* (9th Cir. 2014) 755 F.3d 1072, 1076.) These "advantages of the arbitration process" do not "disappear when transferred to the employment context." (*Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 123.)

A recent study based on data collected from the federal PACER system and the two largest arbitration service providers in the country—the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Services ("JAMS")—highlights the benefits of arbitration for all parties. (See Nam D. Pham and Mary Donovan, *Fairer, Faster Better III: An Empirical Assessment of Consumer and Employment Arbitration*, NDP Analytics (Mar. 2022), at 4, https://tinyurl.com/m9wfhhsz [hereinafter "Fairer, Faster, Better"].) The authors found that pursuing a claim in arbitration resulted in more wins for employees and consumers, higher monetary awards, and a quicker path to recovery. In consumer-initiated arbitration, for example, the "win rate" for consumers was 42%, compared to 29% in litigation from 2014–2021 (the years of the study). (*Id.* at 12.) The results showed a similar rate of success in arbitrations between employers and employees. Employees that initiated arbitration enjoyed a nearly 38% win-rate, while employees prevailed in fewer than 11% of cases initiated in court during the same period. (*Ibid.*)

Not only are consumers and employees more likely to prevail in arbitration than in conventional litigation, but they are also more likely

to obtain higher awards. On average, consumer claimants were awarded $79,945 in successful arbitrations, while plaintiffs who litigated in federal court obtained $71,354 on average from 2014–2021. (*Id.* at 13-14.) The results were similar for employer-employee disputes. On average, employees who pursued arbitration obtained $444,134, while those who pursued litigation obtained an average of $407,678. (*Ibid.*)

These favorable results were also obtained much faster through arbitration than litigation: It took consumer claimants an average of 321 days to obtain an award in arbitration compared to 439 days in federal litigation. (*Id.* at 15.) And it took employee-claimants an average of 659 days to prevail in arbitration compared to 715 days in federal litigation. (*Ibid.*)

The efficiency of arbitration is even more pronounced when compared to the pace of litigation in the California court system, which moves more slowly than the national average. The most recent data available indicates that it can take more than *two years* to resolve a civil case in the Superior Courts, and nearly 1,000 additional days to complete an appeal. (See Judicial Council of California, *2022 Court Statistics Report Statewide Caseload Trends 2011–12 Through 2020–21* (2022), at 36, 50, https://tinyurl.com/3v5c7bpd.) As courts have recognized, "the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels." (*Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1431–32, *as modified on denial of reh'g* (Feb. 28, 2001); *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1204 [noting that "public policy [] favor[s] arbitration" because it is "intended to encourage persons who wish to avoid delays incident to a civil action" to

resolve their differences "by a tribunal of their own choosing"].) And to the extent that protracted proceedings tend to benefit defendants, the relative speed of the arbitration process redounds to the benefit of consumers and employees.

These results are largely the product of arbitration's unique procedural features. For example, in addition to streamlined discovery, the Financial Industry Regulatory Authority's ("FINRA") arbitration rules discourage prehearing motions to dismiss and prohibit the arbitral panel from acting upon such motions except in a few very limited circumstances. (See FINRA Rule 13504(a)(1), (a)(6).) Under the AAA rules, an arbitrator "may" allow parties to file dispositive motions, but only if the arbitrator determines that the moving party has shown "substantial cause" that the motion is likely to succeed. (See AAA Empl. Arb. Rules & Mediation Procedures, Rule 27 (revised Jan. 1, 2023); see also JAMS Empl. Arb. Rules & Procedures, Rule 18 [applying similar rule].) These provisions make it much less likely that an arbitration will be dismissed at the pleading stage, allowing claimants—including employees—to present the merits of their case.

Given its benefits to both sides, "those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." (*Hightower*, 86 Cal.App.4th at 1431 *as modified on denial of reh'g* (Feb. 28, 2001).) Here, the parties clearly stated their intention to make the Agreement "valid and enforceable to the fullest extent permitted by laws." (AA:1:132–33.) They further clarified that they wanted *any* arguably unconscionable provisions to be severed so that the remainder of the contract could be enforced. (See *id.* [severance provision applies to "any portion or provision of this

Agreement (including, without implication or limitation, any portion or provision of any section of this Agreement)"].) In declining to sever those portions of the agreement they found unconscionable, the lower courts frustrated this intention and deprived the parties of the benefits of arbitration. As explained below, the lower courts' refusal to sever any unlawful provisions and enforce the core arbitration provisions violated state and federal law, both of which require courts to put arbitration agreements on "equal footing with other contracts." (*Armendariz*, 24 Cal.4th at 127; accord *Concepcion*, 563 U.S. at 339.)

II. The Court of Appeal Violated Basic Rules of Contract Interpretation by Refusing to Sever the Provisions it Found Unconscionable Despite the Parties' Clear Intent to Sever Any Unenforceable Provisions.

In refusing to sever the arguably invalid provisions in petitioner's arbitration agreement, the appellate court held that "[s]everance may be properly denied when the agreement contains more than one unconscionable provision, and there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." (*Ramirez v. Charter Commc'n, Inc.* (2022) 75 Cal.App.5th 365, 386–87.) Other Courts of Appeal have likewise invalidated arbitration agreements on the ground that "[a]n agreement to arbitrate is considered 'permeated' by unconscionability where it contains *more* than one unconscionable provision." (Opp. at 46 [quoting *Magno v. Coll. Network, Inc.* (2016) 1 Cal.App.5th 277, 292], emphasis added.) But courts do not treat severance as turning on the *number* of unconscionable provisions when dealing with other types of contracts. And the supposedly unlawful provisions here are ancillary to the contract's main objective—to provide for a just and speedy resolution of disputes—and

thus any "taint" from those provisions does not permeate the entire agreement. The Court of Appeal's decision not to sever thus appears based on an arbitration-only rule that treats arbitration agreements less favorably than other types of contracts. Because any such rule is incompatible with California law, this Court should reverse and make clear that arbitration agreements must be placed on equal footing with other types of contracts.

A. California Law Favors Severability of Unconscionable Provisions in Contracts to Save the Remainder of the Contract.

California law provides that "[w]here 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." (Civil Code § 1599.) A court should thus hold an "entire contract" to be "void" only where the contract "has but a single object, and such object is unlawful." (*Id.* § 1598.) This Court has interpreted these statutory provisions as a prohibition against voiding an entire contract unless its "central purpose . . . is tainted with illegality." (*Marathon Ent., Inc. v. Blasi* (2008) 42 Cal.4th 974, 996, *as modified on denial of reh'g* (Mar. 12, 2008) (internal citation omitted); see also *id.* at 991 ["By its terms, . . . [Section 1599] preserves and enforces any lawful portion of a parties' contract that feasibly may be severed."].) Courts should thus sever any illegal provisions that are "collateral to the main purpose of the contract" and enforce the remainder of the contract. (*Id.* at 996.)

To that end, California courts "take a very liberal view of severability" and will defer to the parties' intention to sever any

unenforceable provisions to save the remainder of the agreement. (*Adair v. Stockton Unified Sch. Dist.* (2008) 162 Cal.App.4th 1436, 1450; see also *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1230 [finding that the unenforceability of the damages provision in a construction contract "d[id] not invalidate the entire contract" because the severability clause evidenced the parties' intent to save the valid parts of the agreement].) In ordinary contract cases, courts uphold the valid parts of a contract "where the interests of justice or the policy of the law would be furthered" (*Adair*, 162 Cal.App.4th at 1450), and invalidate the entire contract *only* where they are "unable to distinguish between the lawful and unlawful parts of the agreement." (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 138–40.) Indeed, even where the "consideration given for the contract involves illegality," courts "may sever the illegal portion of the contract from the rest of the agreement." (*Id.* at 138.)

This "liberal view of severability" promotes two foundational contract principles. (*MKB Mgmt., Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 803–04.) First, severing the offending portion of a contract gives the parties the benefit of their bargain by ensuring that neither party receives an undue benefit nor suffers an undue burden as a result of the court voiding the entire agreement. (*Ibid.*) And second, severance gives effect to the intentions of the parties. (*Ibid.*; see also Civ. Code § 1636 ["A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful"]; *Keene v. Harling* (1964) 61 Cal.2d 318, 320–21 [explaining that a contract may be severed "consistent with the intent of the parties"].)

Accordingly, California courts typically eschew finding an entire contract void and unenforceable. If the court determines that some provision of a contract is unenforceable, the court engages in the "equitable and fact specific" process of determining whether severance would "serve the interests of justice." (*Baeza*, 201 Cal.App.4th at 1230; see also *Adair*, 162 Cal.App.4th at 1450) [affirming trial court's decision to sever an illegal provision from a contract "in order to achieve substantial justice between the parties"]; *Birbrower*, 17 Cal.4th, 138 [reversing and remanding with the direction to sever an unenforceable attorney's fees provision]; *Greenlake Capital, LLC v. Bingo Invs., LLC* (2010) 185 Cal.App.4th 731, 739–40 [remanding with directions to apply the severance doctrine "based on equitable considerations"]; *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1524 [finding that the unenforceable sections of a contingent fee arrangement did "not taint or preclude recovery under the valid contingent fee agreements"].)

B. *Armendariz* Does *Not* Endorse a Rule Against Severance When There is More Than One Unconscionable Provision in an Arbitration Contract.

Under this precedent, it is rarely appropriate to invalidate the entirety of an arbitration provision. After all, the object of most arbitration agreements is the "speedy and relatively inexpensive" resolution of disputes, which is a perfectly lawful objective. (*Pierotti*, 81 Cal.App.4th at 35.) And even if one considers an arbitration agreement to have multiple objects—e.g., avoiding the delay inherent in the judicial process, providing streamlined procedures to reduce expenses, providing certainty as to the scope of available damages, ensuring confidentiality, providing for resolution by an expert in the field, etc.—courts should

have little difficulty in finding at least *one* of those objects to be lawful. And where even one object of the agreement is lawful, that portion of the agreement must be enforced, regardless of how many unlawful provisions need to be severed. (Civ. Code § 1599.) But rather than applying the plain language of § 1599, lower courts interpreting arbitration agreements too often do what the lower courts did here—invalidate the entire agreement if more than one provision is found unlawful.

That inversion of the statutory scheme in the context of arbitration agreements stems largely from a common misreading of this Court's decision in *Armendariz*. There, the Court invalidated an employment arbitration agreement on the ground that the entire agreement was "permeated by an unlawful purpose." (*Armendariz*, 24 Cal.4th at 124.) The Court first noted that the agreement limited the scope of arbitration to "employee claims regarding wrongful termination," which indicated a lack of mutuality. (*Id.* at 120.) The Court held that the damages provision also indicated a lack of mutuality because it did "not permit the full recovery of damages for employees, while placing no such restriction on the employer." (*Id.* at 121 [pointing to a provision "exclud[ing] damages for prospective future earnings, [and] so-called 'front pay'"].)

In deciding to invalidate the entire agreement, the Court noted that "two factors weigh against severance of the unlawful provisions." (*Id.* at 124.) The first was that "the arbitration agreement contain[ed] more than one unlawful provision; it ha[d] both an unlawful damages provision and an unconscionably unilateral arbitration clause. Such *multiple defects* indicate[d] 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 124, emphasis added.) Second, the Court did not believe it could "strike or restrict" any "single provision" "to remove the unconscionable taint from the agreement." (*Id.* at 124–25.) In other words, the Court concluded that the fundamental purpose of the agreement was *not* to obtain a just and speedy resolution of disputes but rather to disadvantage employees. Severance could not remove this taint.

Although the arbitration agreement in *Armendariz* was invalidated because its primary purpose was unlawful, some lower courts have lifted the "multiple defects" language out of context and held that arbitration agreements are "'permeated' by unconscionability where [they] contain[] more than one unconscionable provision." (*De Leon v. Pinnacle Prop. Mgmt. Servs., LLC* (2021) 72 Cal.App.5th 476, 492–93.) Although paying lip-service to *Armendariz*, these courts have erroneously invalidated arbitration agreements despite the parties' stated intent to sever *all* unenforceable provisions. (See, e.g., *Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 223 [refusing to sever because "the arbitration provision has more than one unlawful term"]; *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 918 [refusing to sever because the arbitration provision "suffere[d] from multiple defects"]; *Trivedi v. Curexo Tech. Corp.*, (2010) 189 Cal.App.4th 387, 398 [refusing to sever because "[a]t least two provisions were properly found to be substantively unconscionable, a circumstance considered by our Supreme Court to 'permeate' the agreement with unconscionability"]; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826 [same]; *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal.App.4th 494, 515 [refusing to sever based on conclusion that "at least three

provisions of the arbitration agreement are substantively unconscionable"]; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 727–28 [refusing to sever two unenforceable provisions]; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 119 [refusing to sever three unenforceable provisions]; *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 90 [refusing to sever based on conclusion that agreement had "multiple defects"].)

But *Armendariz* did not announce a rule against severance whenever a court finds more than one provision in an arbitration agreement unconscionable. In fact, *Armendariz* expressly recognized that fundamental contract principles weigh in favor of severing unlawful provisions rather than invalidating the entire agreement. (See 24 Cal.4th at 123–24.) As the Court explained, "the doctrine of severance attempts to conserve a contractual relationship" so long as the relationship does not further an "illegal scheme." (*Armendariz*, 24 Cal.4th at 123-24.) Accordingly, "[n]o authority supports the . . . conclusion that any more than a single unconscionable provision in an arbitration agreement precludes severance." (*Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 454.) Rather, "the presence of multiple unconscionable clauses is merely one factor in the trial court's inquiry; it is not dispositive. That an agreement can be considered permeated by unconscionability if it contains more than one unlawful provision does not compel the conclusion that it *must* be so." (*Id.* at 454, emphasis in original.)

This misreading of *Armendariz* has led courts to disfavor arbitration agreements, in violation of this Court's admonition to put such agreements on "equal footing with other contracts." (*Armendariz*,

23 Cal.4th at 127.) That error is especially stark here, where the court refused to sever even though dozens of other courts have reviewed petitioner's arbitration agreement and concluded that it furthers the lawful objective of obtaining the just and speedy resolution of disputes with petitioner's employees. (See Pet. Op. Br. at 15–17 [citing cases].)[1] The court's decision to invalidate the entire agreement stems exclusively from its erroneous conclusion that whenever an agreement has more than one unconscionable provision it must be "permeated" with illegality. (See *Ramirez*, 75 Cal.App.5th at 386.) That is not the law in California, and this Court should reverse and make clear that unlawful provisions must be severed, consistent with the parties' intent, where (as here) severance would not "condon[e] an illegal scheme." (*Armendariz*, 24 Cal.4th at 124.)

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[1] See, e.g., *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473, 490 (finding no substantive unconscionability and affirming that courts must "interpret the provisions in a contract in a manner that render them legal rather than void when possible"); *Gonzales v. Charter Commc'ns, LLC* (C.D. Cal. 2020) 497 F. Supp. 3d 844, 854 (finding that the arbitration agreement was not substantively unconscionable and explaining that such a finding would "conflict[] with the federal policy favoring arbitration, and would entangle federal courts in the questionable business of scrutinizing every potentially ambiguous contract provision – even those not in controversy – for the purpose of defeating arbitration") (internal citation omitted); *Castorena v. Charter Commc'ns, LLC* (C.D. Cal. Dec. 14, 2018) No. 2:18-CV-07981-JFW-KS, 2018 WL 10806903, at *5 (finding that the arbitration agreement "applies broadly to all claims either party has against the other arising from the employment relationship," and that "[t]he terms of the agreement are balanced: employees are not deprived of the opportunity to conduct discovery and employees are not restricted in the types of remedies they can pursue.").

III. The Arbitration-Specific Rule for Severability the Court of Appeal Applied Here Violates the FAA.

This Court can (and should) reverse the Court of Appeal's decision solely based on its failure to properly apply California law under this Court's precedent. But beyond that, the lower court's erroneous conclusion that the presence of more than one unconscionable provision renders the entire agreement unenforceable is inconsistent with the FAA. Reversal is thus doubly appropriate because the FAA preempts state law to the extent there is any conflict between the two.

A. The "More than One Unconscionable Provision" Rule Imposed Here is Hostile to Arbitration.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place [these] agreements upon the same footing as other contracts." (*E.E.O.C. v. Waffle House, Inc.* (2002) 534 U.S. 279, 288-89; see also *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906, 1917 ["The FAA was enacted in response to judicial hostility to arbitration."].) To promote this purpose, Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (*Concepcion*, 563 U.S. at 339, 344.) Section 3 "requires courts to stay litigation of arbitral claims pending arbitration of those claims 'in accordance with the terms of the agreement.'" (*Id.* at 344.) And Section 4 "requires courts to compel arbitration 'in accordance with the terms of the agreement' upon the motion of either party to the agreement." (*Id.* at 344.) Taken together, these provisions "reflect[] an emphatic federal policy in favor of arbitral dispute resolution." (*Marmet Health Care Ctr., Inc. v. Brown* (2012) 565

U.S. 530, 533 (per curiam), internal citation omitted); see also *Concepcion*, 563 U.S. at 344 ["The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"], citation omitted.)

Consistent with this purpose, the FAA preempts any state law that imposes a barrier to arbitration. (See 9 U.S.C § 2; *Concepcion*, 563 U.S. at 339.) To be sure, the FAA's saving clause permits arbitration agreements to be invalidated on the same "grounds as exist in law or in equity for the revocation of any contract." (9 U.S.C. § 2.) But while a "court may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability," it may not do so based on "legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Viking River Cruises*, 142 S. Ct. at 1917 [citations omitted]; see also *Epic Systems,* 138 S. Ct. at 1622 ["[T]he saving clause recognizes only defenses that apply to 'any' contract[,]" thereby "establish[ing] a sort of 'equal-treatment' rule for arbitration contracts."].) Put differently, although the FAA's "saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Concepcion*, 563 U.S. at 343; see also *Epic Systems*, 138 S. Ct. at 1622 ["[T]he saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfering with fundamental attributes of arbitration."].) Courts must therefore "'rigorously enforce' arbitration agreements" (*American Exp. Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 233) and "be alert to new devices and formulas" that

may reflect "judicial antagonism toward arbitration." (*Epic Systems*, 138 S. Ct. at 1623.)

The severability rule applied by the lower courts in this case and others—*i.e.*, no severance whenever the court finds more than one provision of an arbitration agreement unconscionable—flatly contravenes the FAA's clear instruction to place arbitration agreements on equal footing with other types of contracts. Instead of "rigorously enforcing" the terms of the parties' agreement, courts too often refuse to sever unlawful provisions despite the parties' clear intent to sever and enforce the core agreement. (See *supra* II.B.) Employing one rule for non-arbitration contracts and a separate, stricter rule for arbitration contracts violates the FAA. (See *Perry v. Thomas* (1987) 482 U.S. 483, 492 n.9.) The same would be true, of course, of any rule that tended to *favor* arbitration agreements, though courts in this state seldom err in that direction. (See *Morgan v. Sundance, Inc.* (2022) 142 S. Ct. 1708, 1713 ["[T]he FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."].) The purpose of the FAA is simply "to make 'arbitration agreements as enforceable as other contracts, but not more so.'" (*Morgan*, 142 S. Ct. at 1713 [quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404, n. 12].) The rule applied by the Court of Appeal here conflicts with the FAA's equal-treatment command and thus is preempted.

B. *Viking River Cruises* Underscores the FAA's Strong Support for Enforcing Severability in Arbitration Agreements.

The Supreme Court's recent decision in *Viking River Cruises* confirms that the FAA requires the rigorous enforcement of severability provisions. There, the Supreme Court considered whether the FAA preempted a California rule that invalidated contractual waivers of the right to assert representative claims under the Private Attorneys General Act of 2004 ("PAGA"). (See *Viking River Cruises*, 142 S. Ct. at 1913.) Under PAGA, an "aggrieved employee" may file a civil action against his former employer for violations of California labor laws, and PAGA's procedural "mechanism permits 'aggrieved employees' to use the Labor Code violations they personally suffered as a basis to join to the action any claims that could have been raised by the State in an enforcement proceeding." (*Viking River Cruises*, 142 S. Ct. at 1923.) The employer in *Viking River Cruises* sought to avoid PAGA's reach by enforcing an arbitration provision that included a waiver of the right to bring representative PAGA claims. (*Id.* at 1916.)

The California Court of Appeal held that "categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable 'representative' claims." (*Id.* at 1916; see *Iskanian v. CLS Trans. Los Angeles, LLC* (2014) 59 Cal.4th 348, 384 [holding that where "an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law."].) The court of appeal thus declined to sever that portion of the waiver applicable to representative PAGA claims and instead held that the entire waiver was unenforceable. (*Ibid.*)

The Supreme Court reversed, holding that the FAA preempted the rule this Court established in *Iskanian* insofar as it precluded division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. (*Id.* at 1916–25.) As the Court explained, the "expansive rule of joinder in the arbitral context" that *Iskanian* purported to impose "would defeat the ability of parties to control which claims are subject to arbitration." (*Id.* at 1924.) Because the FAA preempted "*Iskanian*'s indivisibility rule," the parties could agree to arbitrate an employee's individual PAGA claims based on personally sustained violations while waiving the right to arbitrate representative PAGA claims. (*Ibid.*)

Applying that holding to the arbitration agreement before it, the Court explained that the "severability clause in the agreement provides that if the waiver provision is invalid in some respect, any 'portion' of the waiver that remains valid must still be 'enforced in arbitration.'" (*Id.* at 1925.) Given the validity of the "portion" barring arbitration of representative PAGA actions, the Court held that the employer was "entitled to enforce the agreement insofar as it mandated arbitration of [the employee's] individual PAGA claim." (*Ibid.*)

The Court's decision in *Viking River Cruises* highlights the deference courts should give to severance provisions in arbitration agreements. And *Viking River Cruises* is just the latest in a series of decisions holding that the FAA preempts California rules that evidence hostility towards arbitration. (See *Concepcion*, 563 U.S. at 343–44 [FAA preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts because it "interferes with fundamental attributes of arbitration"]; *Preston v. Ferrer* (2008) 552

U.S. 346, 359 [the FAA preempts any California state law that would place primary jurisdiction in another forum where the parties had agreed to arbitrate all questions arising under a contract]; *Perry*, 482 U.S. at 491–92 [the FAA preempts California Labor Code § 229 which allowed employees to maintain an action for the collection of wages without regard to the existence of any private agreement to arbitrate].)

Here, the severability rule applied by the lower courts "interferes with fundamental attributes of arbitration" by denying access to the arbitral forum where the parties agreed to resolve their disputes. Accordingly, to the extent that this Court concludes that the lower courts properly applied California law, the Court should recognize that this arbitration-only severability rule is preempted by the FAA. Applying the normal rule of contract severability, the Court should hold that the arbitration provision is enforceable even if one or more of the ancillary provisions are unconscionable.

CONCLUSION

For these reasons, *amici* urge the Court to reverse the decision below. If the Court concludes that any of the provisions in the parties' arbitration agreement are unconscionable, it should sever those provisions so that the remainder of the agreement to arbitrate can be enforced.

Dated: March 6, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the attached amici curiae brief consists of 5,608 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: March 6, 2023

/s/ Robert E. Dunn
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I, Robert E. Dunn, declare:

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Supreme Court of California

PROOF OF SERVICE

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