Case No. S273802

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Charter Communications, Inc.

Defendant-Petitioner,

v.

Angelica Ramirez

Plaintiff-Respondent

On Review from The Court of Appeal for the Second Appellate District,
Division Four, 2nd Civil No. B309408

After An Appeal from the Superior Court of Los Angeles County
Case Number 20STCV25987

CORRECTED[1] APPLICATION OF EMPLOYERS GROUP FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND PETITIONER CHARTER COMMUNICATIONS, INC.

COBLENTZ PATCH DUFFY & BASS LLP
Fred Alvarez (SBN 68115)
ef-fwa@cpdb.com
Anthony D. Risucci (SBN 316587)
ef-adr@cpdb.com
Tom Lin (SBN 319911)
ef-txl@cpdb.com
One Montgomery Street, Suite 3000
San Francisco, California 94104-5500
Telephone: 415.391.4800
Facsimile: 415.989.1663

Attorneys for Employers Group as Amicus Curiae

[1] On March 6, 2023, counsel for Employers Group inadvertently submitted its application to file its amicus brief without an attorney signature; the undersigned resubmits this corrected filing.

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

APPLICATION FOR LEAVE TO FILE AN AMICUS BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, proposed *amicus curiae*, Employers Group, respectfully submits this application for leave to file an amicus brief in support of Petitioner Charter Communications, Inc. ("Charter"). Employers Group submits its brief together with this application, which is timely made pursuant to Rule 8.520(f)(2).

STATEMENT OF INTEREST OF THE AMICUS CURIAE

Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,800 California employers of all sizes and in every industry, which collectively employ nearly three million employees. Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal courts over many decades, Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as this one. Employers Group has been involved as *amicus curiae* in many significant employment cases.[2]

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[2] (See e.g., *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. __ [142 S.Ct. 1906]; *Chamber of Commerce of the U.S. v. Bonta* (9th Cir., Feb. 15, 2023, No. 20-15291) __ F.4th __ 2023 WL 2013326; *Donohue v. AMN*

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 8.208(e) of the California Rules of Court, the Employers Group certifies that no entities or persons have either an ownership interest of 10% or more in the Employers Group, or a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves.

No party's counsel has authorized this brief, either in whole or in part, nor has any party or party's counsel contributed any money intended to fund the preparation or submission of this brief. Likewise, no person other than the *amicus curiae*, its members, or counsel have contributed money intended to fund the preparation or submission of this brief.

PROPOSED *AMICIUS CURIAE* BRIEF

The central issues in this case are (1) the standards by which a court must review and interpret an arbitration agreement for substantive

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Servs., LLC (2021) 11 Cal.5th 58; *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73; *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858; *Vazquez v. Jan-Pro Franchising Int'l, Inc.* (2021) 10 Cal.5th 944; *Oman v. Delta Air Lines, Inc.* (2020) 9 Cal.5th 762; *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038; *Voris v. Lampert* (2019) 7 Cal.5th 1141; *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175; *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829; *Dynamex Operations W., Inc. v. Superior Court* (2018) 4 Cal.5th 903; *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542; *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074; *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257; *Johnmohammadi v. Bloomingdale's, Inc.* (9th Cir. 2014) 755 F.3d 1072; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, abrogated by *Viking River*; *Duran v. US. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203; *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Harris v. Superior Court* (2011) 53 Cal.4th 170; *Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal.4th 1158; *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094.)

unconscionability; and (2) the extent to which a court has an obligation to sever unconscionable provisions and enforce the remainder of an otherwise lawful arbitration agreement. These issues are of critical importance to California businesses and, therefore, to the Employers Group. The proposed *amicus curiae* brief will assist the Court in deciding this matter by underscoring and explaining the uncertainty Employers Group members face when drafting arbitration agreements in good faith for use in their workplaces, due to the unpredictable nature of how California courts interpret and determine whether to enforce them, including whether severance is appropriate.

INTRODUCTION

Recent and longstanding precedent from the Supreme Court has repeatedly upheld Congress's mandate, under the Federal Arbitration Act ("FAA"), that courts must apply a liberal federal policy favoring the enforcement of arbitration agreements in various contexts, including commercial and employment relationships. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 ("*Concepcion*") ["Section 2 [of the FAA] reflects a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract."], internal citations and quotations omitted.) This Court, too, has repeatedly affirmed California's strong policy in favor of arbitration. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125, citing Code Civ. Proc., § 1280 et seq, ["California law strongly favors arbitration. Through the comprehensive provisions of the California Arbitration Act [citation], the Legislature has expressed a strong public policy in favor of arbitration as a speedy and relatively inexpensive means

of dispute resolution."]; see also *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237.)

Employers rely on arbitration as a form of expeditious alternative dispute resolution for workplace disagreements, which are commonplace across all places of business—big and small. However, notwithstanding these clear mandates from our highest courts and lawmakers, the current framework of California jurisprudence leaves employers guessing and engulfed in protracted litigation as to whether the contracts on which they rely will be held enforceable. Indeed, even if one California court finds an arbitration agreement enforceable on one occasion, the very same agreement may be rejected on another occasion by a different court based on novel arguments or even simple disagreements by different courts. The outcome in *Ramirez v. Charter Communications, Inc.* (2022) 75 Cal.App.5th 365 ("*Ramirez*") is a prime example. This predicament persists even if the agreement contains a savings clause to sever any problematic provision that a court later determines to be substantively unconscionable—as was the case in *Ramirez*.

Absent clear guidance from the Court, lower courts will continue to issue inconsistent rulings regarding the enforceability of arbitration agreements, particularly if they give short shrift to severability clauses. Lower courts oftentimes strike down entire arbitration agreements when they hone in on, and provide tortuous readings of, collateral provisions that they perceive as unfair, non-mutual, unreasonable, or oppressive—despite the express severability language of the agreement and prevailing contract interpretation principles that weigh in favor of preserving the enforceability of those contracts in whole or as severed. The Court should issue an opinion that provides a robust rule on severability that offers certainty for the thousands of California employers and millions of employees who seek

to enjoy the benefits of the arbitral forum as their chosen method of resolving common workplace disputes.

To achieve consistency, California courts must interpret arbitration agreements to give them their intended purpose and lawful effect to the fullest extent possible. Even when confronted with multiple unconscionable provisions in an arbitration agreement, courts should strive to sever those provisions and enforce as much of the agreement as reasonably possible—as they would with any other type of contract. This is especially true when the agreement itself contains a severance clause, further demonstrating the parties' intent to proceed with arbitration as their desired forum.

The rule issued by the Court with respect to severability should be as follows: Courts ***must*** sever unconscionable provisions and enforce the remainder of an agreement if (1) the unconscionable provisions are merely collateral to, and do not contravene, the underlying agreement by the parties to arbitrate the dispute and vindicate their rights in arbitration; or (2) the non-collateral unconscionable provisions, in their substantive totality, do not shock the conscience to a degree such that the only logical conclusion is that the drafting party was operating in bad faith against clearly established law at the time it was written.

For the reasons discussed herein, the Court should reverse *Ramirez* and endorse California and Federal policy favoring arbitration by adopting a rule that requires severance whenever an arbitration agreement can be saved and enforced.

ARGUMENT

Uniformity is not found in lower courts' analysis of the substantive unconscionability or severability of arbitration agreements. It is certainly not found in the employment context. The conflict between *Ramirez* and

Patterson v. Superior Court (2021) 70 Cal.App.5th 473 ("*Patterson*") is no surprise. Especially when it comes to severability, there seems to be no overarching rhyme or reason to explain how courts will land. Ever since the Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 ("*Armendariz*"), courts have read and relied on its analysis and holding simultaneously as a mandate to enforce arbitration agreements as written between employers and employees, but also as a license to invalidate the same or substantially similar contracts as unlawful. Clarification of this two-decades-old decision with respect to substantive unconscionability and severability is past due. (See *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1172 ("*Sonic II*") ["I disagree with [the majority's] failure to articulate a clear standard for assessing the unconscionability of arbitration terms in employment agreements. [¶] The majority refers to several formulations but does not settle on a test for unconscionability . . . . [W]e should provide clarity here. Courts of Appeal have successfully applied the 'shock the conscience' standard to decide whether contractual employment arbitration terms are substantively unconscionable . . . . We should settle on this clear test."] (conc. opn. of Corrigan, J.).)

I. The Court Should Adopt A Well-Defined Severance Rule To Serve As A Backstop Against Deviations From California Law And Unwarranted Hostility Towards Arbitration Agreements.

The Court should adopt the rule proffered by *amicus curiae* because it will further California's strong public policy in favor of arbitration; be consistent with Civil Code sections 1599, 1670.5, 3541, and 1643; and would provide many of businesses and their employees, who are parties to arbitration agreements, with certainty.

A. A requirement to sever collateral provisions would not be a new rule, but rather an expansion and clarification of an existing one.

This Court, in *Armendariz*, weighed in on the requirement to sever when confronted with substantively unconscionable collateral provisions. (24 Cal.4th at p. 124.) But too many courts have read into and relied on the fact that, in *Armendariz*, "the arbitration contain[ed] ***more than one*** unlawful provision . . . ." (*Ibid*., emphasis added.) *Amicus curiae* respectfully posit that the Court never suggested that there is a threshold by which multiple problematic collateral provisions are *per se* inseverable. As Charter correctly argues, the decision on severability is qualitative—not quantitative. (See Opening Brief at pp. 50–52.) The myth that there exists a ceiling for too many collateral unconscionable provisions—if included in good faith, as discussed *infra*—should be debunked by the Court. This tallied-up approach taken by lower courts has clogged California and Federal court dockets on collateral issues. California Civil Code sections 1599 and 1670.5 support mandating severance to preserve the core of an arbitration agreement adjacent to substantively unconscionable collateral provisions.

While courts in California wrestle with the severance of collateral provisions, other states focus on the core of the agreement to arbitrate and give credence to the existence of severance provisions. (See, e.g., *Zuver v. Airtouch Communications, Inc.* (Wash. 2004) 103 P.3d 753, 768 ["when parties have agreed to a severability clause in an arbitration agreement, courts often strike the offending unconscionable provisions to preserve the contract's essential term of arbitration."]; *Machado v. System4 LLC* (Mass. 2015) 28 N.E.3d 401, 415 ["even if we were to find any of the discussed provisions unconscionable, the franchise agreements contain a severability clause, requiring any unenforceable term to be severed. This is not the type

of case in which 'illegality pervades the arbitration agreement," [citations], nor are the arbitration provisions "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding.'"]; *Jaworski v. Ernst & Young U.S. LLP* (N.J. Super. Ct. App. Div. 2015) 441 N.J. Super. 464, 482 ["even if the fee-sharing provision was unconscionable, which we hold it is not, the Program contains a clause providing for broad severability in the event any portion of its terms is found unenforceable."]; *Eaton v. CMH Homes, Inc.* (Mo. 2015) 461 S.W.3d 426, 436 ["this Court will give effect to a severability clause when the clause being severed is not a necessary part of the contract."]; *In re Poly-America, L.P.* (Tex. 2008) 262 S.W.3d 337, 360 ["An illegal or unconscionable provision of a contract may generally be severed so long as it does not constitute the essential purpose of the agreement . . . . [Citations.] We have previously allowed severance of illegal contract provisions where the invalid provisions were 'only a part of the many reciprocal promises in the agreement' and 'did not constitute the main or essential purpose of the agreement.'"]; *Ignazio v. Clear Channel Broadcasting, Inc.* (Ohio 2007) 865 N.E.2d 18, 21 ["severing the offending provision and enforcing the remainder of the agreement is consistent with this state's strong public policy in favor of arbitration. The law favors and encourages arbitration as a means of resolving disputes. [Citation.] There is a strong presumption in favor of arbitration, and any doubts should be resolved in its favor."]; *Ex parte Celtic Life Ins. Co.* (Ala. 2002) 834 So.2d 766, 769, citing 17A C.J.S., Contracts § 297 (1999) [discussing the general "duty of the court to preserve so much of a contract as may properly survive its invalid and ineffective provisions"].)

The main purpose of an arbitration agreement is to arbitrate disputes. (See *Poublon v. C.H. Robinson Company* (9th Cir. 2017) 846 F.3d 1251, 1273, citing *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974,

996, modified, (Mar. 12, 2008)]).) "[A]rbitration is intended as an alternative to litigation, and the unconscionability of an arbitration agreement is viewed in the context of the rights and remedies that otherwise would have been available to the parties." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 922.) Provisions in the arbitration agreement that would go to the core of the agreement are those that affect the minimal requirements in order to undergo a fair arbitration. For example, as laid out in *Armendariz*, providing for a neutral arbitrator, more than minimal discovery, all of the types of relief that would otherwise be available in court, and not requiring an employee to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. (*Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, 848; see also *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1075, fn. 1, 1080–1082 [agreement's silence as to judicial review, scope of remedies, and allocation of costs did not bar enforcement; court could infer requisite terms].)

Where parts of an otherwise lawful arbitration agreement do not touch on these core purposes, they are collateral and must be severed if found unconscionable. Preserving the contractual relationship serves the interests of justice and California public policy, especially when the remainder of the agreement is bilateral. (*Lara v. Onsite Health, Inc.* (N.D. Cal. 2012) 896 F.Supp.2d 831, 848, citing *Armendariz*, 24 Cal.4th at p. 124; see also *Ramirez-Baker v. Beazer Homes, Inc.* (E.D. Cal. 2008) 636 F.Supp.2d 1008, 1024.)

Ramirez did not undertake any analysis to determine whether either of the alleged substantively unconscionable provisions were collateral vis-à-vis the underlying agreement to arbitrate. (75 Cal.App.5th at p. 387.) Indeed, most courts that refuse to sever do not. Instead, courts that refuse to sever often rely on the existence of two or more problematic provisions,

under *Armendariz*, infer an insidious intent, and then conclude the agreement to arbitrate is permeated by unconscionability.[3]

The strong California legislative and judicial preference is severance. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1477–1478 ("*Roman*"); *Levin v. Caviar, Inc.* (N.D. Cal. 2015) 146 F.Supp.3d 1146, 1159, citing *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 985 ("*Dotson*"); Civ. Code, § 1670.5 ["Though the decision to sever is within the discretion of the court, ***the preferred course*** "is to sever the offending term and enforce the balance of the agreement."], emphasis added.) This preference is heightened, especially, when the arbitration agreement includes a provision expressing the parties' intent to sever problematic provisions to save the lawful remainder. (*Cisneros Alvarez v. Altamed Health Servs. Corp.* (2021) 60 Cal.App.5th 572, 596, modified, (Mar. 4, 2021) [reversing trial court because, when confronted with a severance provision, severance was appropriate to remove substantively unconscionable provision]; *Chun Ping Turng v. Guaranteed Rate, Inc.* (N.D. Cal. 2019) 371 F.Supp.3d 610, 632.)

Courts must sever unconscionable provisions and enforce the remainder of an agreement if the unconscionable provisions are merely collateral to, and do not contravene, the underlying agreement by the parties

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[3] (*See, e.g.*, *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138, 1149; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 715; *De Leon v. Pinnacle Prop. Mgmt. Servs., LLC* (2021) 72 Cal.App.5th 476, 493; *Ali v. Daylight Transport, LLC* (2020) 59 Cal.App.5th 462, 482; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 254; *Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1250; *Beco v. Fast Auto Loans, Inc.* (2022) 86 Cal.App.5th 292, 313; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 666; *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 90; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 185; *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 918; *Lange v. Monster Energy Company* (2020) 46 Cal.App.5th 436, 455.)

to arbitrate their disputes and vindicate their rights in arbitration. This rule is supported by California's common law doctrine on severability and the Civil Code. (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 991, as modified, (Mar. 12, 2008) ["the text of Civil Code section 1599 is clear. Adopted in 1872, it codifies the common law doctrine of severability of contracts: 'Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.' [Citation.] ***By its terms, it applies even—indeed, only—when the parties have contracted, in part, for something illegal***. Notwithstanding any such illegality, it preserves and enforces any lawful portion of a parties' contract that feasibly may be severed."], emphasis added.) When it comes to the severability of illegal, unfair, oppressive, or unreasonable collateral provisions, this rule must apply equally to arbitration agreements in the employment context.

B. Applying the "shock the conscience" rule to severability would align with *Armendariz* and the Court's substantive unconscionability jurisprudence.

While the Court has held that, "[i]t has long been recognized that substantive unconscionability is not susceptible to 'precise definition[,]'" *Sonic II*, *supra,* 57 Cal.4th at p. 1163, it has an opportunity to make a precise definition as to when severance is appropriate and required in the context of arbitration agreements. Although Civil Code section 1670.5 gives trial courts some discretion whether to sever the unconscionable provision or refuse to enforce entire agreement, it also appears "to contemplate the latter course ***only*** when an agreement is 'permeated' by unconscionability[.]" (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 710, emphasis added.) But permeation has been too subjectively applied by lower courts when there are multiple, problematic, collateral provisions. Courts may not invalidate an arbitration

agreement on unconscionability grounds based on their subjective view that the arbitration provides a less advantageous forum to one party, unless the agreement goes so far as to "forbid[] the assertion of certain statutory rights," or if it imposes "filing and administrative fees . . . that are so high as to make access to the forum impracticable." (*American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 235–236 ("*Italian Colors*").) However, that is exactly what the *Ramirez* court did.[4]

Incorporating the "shock the conscience" test into the severance standard to determine when a court must sever is therefore appropriate under Section 1670.5 and this State's strong policy in favor of arbitration. Put differently, courts must sever unconscionable provisions and enforce the remainder of an agreement if the unconscionable provisions, in their substantive totality, do not shock the conscience to a degree such that the ***only*** logical conclusion is that the drafting party was operating in bad faith

[4] After reversing the trial court's finding of substantive unconscionability as to one provision, the *Ramirez* court found other provisions substantively unconscionable based solely on status and relationship of the parties (i.e., the employee vs. the employer). (*Ramirez*, *supra*, 75 Cal.App.5th at p. 387 [refusing to sever because, without discussing whether the provisions were collateral, "[g]iven the multiple defects we have found that work to Ramirez's distinct disadvantage, it is not reasonably probable that the trial court would have reached a different decision regarding severability had the errors not been committed."]; *id*. at pp. 443–444 ["We agree with Ramirez and conclude that the arbitration agreement is unfairly one-sided because it compels arbitration of the claims more likely to be brought by an employee, the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by an employer, the stronger party."].) The Supreme Court has already rejected an approach that would "require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier." (*Italian Colors*, *supra*, 570 U.S. at pp. 237–238.)

against clearly established law at the time it was written. This rule is in line with *Armendariz*.

The Court in *Armendariz*, in dicta, alluded that severance is precluded if the drafting party operated in "bad faith, i.e., with a knowledge of their illegality." (24 Cal.4th at p. 124, fn. 13.) Courts that followed, including this one, have held that in determining whether a provision was written in bad faith, one must read the provision against the clarity of the law at the time it was written. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1075–1076; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 93, modified, (Jan. 8, 2004); accord *Gibson v. Nye Frontier Ford, Inc.* (Alaska 2009) 205 P.3d 1091, 1098–1099.) *Little* elucidated this idea well. When confronted with a substantively unconscionable provision that allowed arbitration awards exceeding $50,000 to be appealed by either party, the *Little* Court remanded to the lower court to determine whether the California law was "sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that this [appellate arbitration provision] was drafted in bad faith." (*Little*, *supra*, 29 Cal.4th at p. 1075.) The determination must not be made with the benefit of hindsight in light of subsequent events or the parties' relationship. (See *Setzer v. Robinson* (1962) 57 Cal.2d 213, 217; see also *Colton v. Stanford* (1890) 82 Cal. 351, 403.) When confronted with multiple substantively unconscionable—but collateral—provisions, severance must be ordered unless the inclusion of those provisions similarly show bad faith.

Officially cementing this rule and applying it to the preference of severance is congruent with California contract law and this State's public policy favoring arbitration. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 836, fn. 10 [Code of Civil Procedure section 1281 establishes California's fundamental policy "that arbitration agreements will be

enforced in accordance with their terms."].) It would also prevent courts from decclining to sever provisions that are clearly collateral to the central purpose of an arbitration agreement simply because, in the employment context, one party enjoys a great benefit. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Dev. (US), LLC* (2012) 55 Cal.4th 223, 246, 145 ["A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to 'shock the conscience.'"]; *Sonic II*, 57 Cal.4th at p. 1160 [the party seeking to invalidate an arbitration agreement must show "a substantial degree of unfairness beyond 'a simple old-fashioned bad bargain.'"].) That is, it would ensure that arbitrations that meet the *Armendariz* minimum requirements of fairness would move forward absent a showing of bad faith by the drafting party. Most importantly, it would allow courts to develop guidance on substantive unconscionability and permit employers to respond prospectively to courts against the clarity of the law with respect to the lawfulness of collateral provisions.

This rule would also remedy the concern raised by the dissenting opinion in *Kho* regarding the ease of always finding ***some*** level of substantive unconscionability: "because it would not be difficult for a court to find a 'relatively low degree of substantive' unfairness in an adhesion contract, [citation], the majority's new rule casts significant doubt on the enforceability of many contractual terms in the employment context, not just arbitration provisions." (8 Cal.5th at p. 147, dis. opn. of Chin, J.) An arbitration provision is only unconscionable if it is so one-sided that it

shocks the conscience. (*Pinnacle*, 55 Cal.4th at p. 246.) The standard for severance should be no different.

II. Multiple Sections of The Civil Code Articulate California's Strong Policy in Favor of Arbitration and Severance and Lend Further Support to the Proposed Rule.

Despite denying arbitration and refusing severance, all throughout *Armendariz*, the Court cited to various sections of the Civil Code that underscore a court's obligation to enforce lawful provisions of contracts as written. (*Armendariz*, *supra*, 24 Cal.4th at pp. 121–122, quoting Civ. Code, § 1670.5; *id.*, quoting Civ. Code, § 1599.) Additional sections of the Civil Code buttress the hallmark proposition that courts must read contracts—and, thus, arbitration agreements and employment agreements—as written and agreed to by parties. (Civ. Code, § 3541 ["[a]n interpretation which gives effect [to an agreement] is preferred to one which makes void"]; Civ. Code, § 1643 [if possible without violating the parties' unambiguous intent, a contract is interpreted so as to make it "lawful, operative, definite, reasonable and capable of being carried into effect"].) When strictly followed, California courts have cited these statutes to honor contracts to arbitrate, with or without severance. But when ignored, courts deny and discount the parties' intent to submit their disputes to a forum that has been endorsed by California and Federal policy.

A. Courts that stay within the guardrails of the Civil Code apply a standard that is consistent with what is California's strong public policy by severing when appropriate.

This Court's jurisprudence on severance and Civil Code section 1599 dates back decades. Indeed, the Court in *Keene v. Harling* (1964) 61 Cal.2d 318, represented that

> Whether a contract is entire or separable depends upon its language and subject matter, and this question is one of construction to be determined

> by the court according to the intention of the parties. If the contract is divisible, the first part may stand, although the latter is illegal. It has long been the rule in this state that when the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the . . . law . . . [divides] according to common reason; and having made that void that is against law, lets the rest stand. Thus, the rule relating to severability of partially illegal contracts is that a contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other side. This rule has been frequently applied in this state.

(*Id*. at pp. 320–321, internal quotations and citations omitted.) There, by relying on Section 1599's predecessor statute, the Court isolated the problematic—in fact, criminally illegal—portion of a contract to give effect to the lawful remainder of the commercial agreement. (*Id*. at p. 321.) These principles of contract interpretation are supposed to be consistently applied to agreements to arbitrate, whether in the commercial or employment space. (*Concepcion*, *supra*, 563 U.S. at p. 339; *Perry v. Thomas* (1987) 482 U.S. 483, 493, fn. 9; *Sanchez*, *supra*, 61 Cal.4th at p. 912 ["our unconscionability standard is, as it must be, the same for arbitration and nonarbitration agreements."]; *Sonic II*, *supra*, 57 Cal.4th at p. 1144 [courts must apply unconscionability rules and enforce agreements "evenhandedly"].)

California's rule on severance must also be coupled with Civil Code sections 3541 and 1643, which are the State's laws on contract interpretation. In *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199 ("*24 Hour Fitness*")—an opinion that predates

Armendariz—an employee sued her employer and individual defendants working for the employer alleging sexual harassment. The trial court denied summary judgment to the defendants on the ground that there existed a disputed material fact as to whether all the employee's claims were subject to an arbitration agreement. (*Id*. at p. 1207.) The defendants petitioned for writ relief from the Court of Appeal. On appeal, the employee alleged, among other things, that the arbitration agreement was unconscionable. (*Id*. at p. 1212.) Specifically, one of the employee's arguments was that the agreement did not attain mutual assent because there was a discrepancy in the agreement regarding the responsibility for paying the arbitrator's costs. (*Id*. at pp. 1213–1214.) The court, however, relied on Civil Code sections 3541 and 1643 and the strong public policy in favor of arbitration to give the arbitration agreement a reading that held it enforceable.[5] (*Id*. at p. 1215, quoting *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 ["courts will indulge every intendment to give effect to such proceedings."].) "Construing the agreement to give it effect, we resolve the difference in provisions against [the employer] and in favor of the employees. Thus, if the employee loses, the arbitrator's fees and expenses are split in half. If the employee wins, [the employer] will pay the employee's portion." (*24 Hour Fitness*, *supra*, 66 Cal.App.4th at p. 1215.) These statutes on contract interpretation should work in tandem to favor

[5] Severance was not an issue because the Court of Appeal found no substantive unconscionability because "the arbitration clause applies equally to employer and employee; allows both parties substantially the same array of discovery procedures available in civil actions; and does not create an imbalance in remedies potentially available to either side." (*Id*. at 1213.)

severing unconscionable provisions, if found, and to enforce the remainder of arbitration agreements.

Armendariz did not change the impact of these Civil Code sections so readily relied upon by courts for decades. When read correctly, the *Armendariz* Court actually emphasized them. Indeed, after the Court's decision in 2000, some Courts of Appeal continued to properly enforce employment arbitration agreements and severance principles, relying on California law. A prime example is *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462. When presented with a petition for writ of mandate following the granting of an employer's motion to compel arbitration, it affirmed by relying on *Armendariz* and Civil Code sections 3541, 1643, as well as section 1670.5 on severability.

In *Roman*, an employee challenged the arbitration agreement between her and her employer on the grounds that it was non-mutual, denied her statutory remedies, unduly limited discovery, and contained an impermissible cost-splitting provision. (*Roman*, *supra*, 172 Cal.App.4th at pp. 1471–1478.) With respect to mutuality, the employee contended that the agreement only applied to her claims because the agreement she signed noted "I agree." (*Id.* at p. 1472.) But in the spirit of California's policy favoring arbitration, the *Roman* court read the agreement under appropriate California policy favoring arbitration and rejected this argument. (*Id*. at p. 1473, quoting *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1204.) The Court of Appeal also heeded "the requirement we interpret the provision in a manner that renders it legal rather than void," Civ. Code, § 3541, and relied on Civil Code section 1643 to read the contract so as to make it "lawful, operative, definite, reasonable and capable of being carried into effect." (*Id*. at p. 1473.) The court indicated that "we would necessarily construe the arbitration agreement as imposing a valid, mutual obligation to arbitrate." (*Ibid*.) In so holding,

notwithstanding the "I agree" phrase from the employee's signature, the agreement was bilateral. (*Ibid*.)

The *Roman* court also rejected the employee's challenge to the incorporation of the American Arbitration Association's ("AAA") employment rules governing discovery, which reserved discretion to the arbitrator to manage and order discovery. (*Roman*, *supra*, 172 Cal.App.4th at p. 1475.) Relying on *Armendariz*, which held that "some discovery is often necessary for vindicating a FEHA claim[,]" the Court of Appeal held that this was not substantively unconscionably nor a reason for denying arbitration. (*Id*. at p. 1475.) But the *Roman* court did find the arbitration cost-splitting provision substantively unconscionable—however, it was severable under California law. (*Id*. at p. 1477, citing Civ. Code, § 1670.5.) The analysis in *Roman* focused on this State's legislative intent, which this Court should reinforce when deciding the issues before it: "In determining whether to sever or restrict illegal terms rather than voiding the entire contract, '[t]he overarching inquiry is whether 'the interests of justice . . . would be furthered by severance.' [citations] Significantly, ***the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement.***" (*Id*. at pp. 1477–1478, quoting *Armendariz*, 24 Cal.4th at p. 124, emphasis added.)

B. <u>When courts are hostile to arbitration agreements, they give the Civil Code short shrift or do not mention it at all.</u>

For every decision, like *Roman* or *24 Hour Fitness*, that treats *Armendariz* and the California Civil Code as a shield to honor and protect arbitration agreements, there is a Court of Appeal opinion that points to *Armendariz* as a sword to invalidate otherwise lawful agreements and refusing to sever.

For instance, in *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702 ("*Fitz*"), the Court of Appeal did not even cite to Civil Code sections 3541

or 1643 when it found that an agreement's limitation on discovery to be substantively unconscionable and refused to sever, despite it reserving discretion with the arbitrator to permit and order more discovery modeled after the AAA's rules (which were the rules applicable in *Roman*). (*Id*. at p. 719, citing *Armendariz*, 24 Cal.4th at p. 106.) While this particular provision had a specific limitation of two depositions, the agreement nonetheless represented that, "[i]f a party establishes that an adverse material inconsistency exists between the arbitration agreement and [the AAA] rules, the arbitrator shall apply [AAA] rules." (*Id*.) The *Fitz* court went out of its way by finding that

> allowing the rules of the AAA to trump [the employer's] modification would fail to provide employees with adequate notice of the applicable rules of discovery . . . . [the employer] deliberately replaced the AAA's discovery provision with a more restrictive one, and in so doing failed to ensure that employees are entitled to discovery sufficient to adequately arbitrate their claims. [The employer] should not be relieved of the effect of an unlawful provision it inserted in the [arbitration agreement] due to the serendipity that the AAA rules provide otherwise.

(*Id*. at p. 721). In other words, the Court of Appeal refused to give the agreement "an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect" under Civil Code section 1643. Nor did it show preference to an interpretation to give the agreement a lawful effect, which "is preferred to one which makes void" under Civil Code section 3541. Instead, along with an alleged non-mutual provision, it inferred "bad faith" and contended that severance was

inappropriate because to do so would be to condone "an illegal scheme." (*Id*. at p. 727–728.)

In another opinion focused on a discovery provision, a Court of Appeal made presumptions about how a future arbitrator would read the agreement—and ignored the plain language of the agreement. The arbitration agreement in *Murrey v. Superior Court of Orange County* (2023) 87 Cal.App.5th 1223, 1241 ("*Murrey*"), contained a limitation on discovery to three depositions and 20 interrogatories but gave the arbitrator the discretion to expand discovery, which was language directly incorporated from the AAA's rules. But rather than interpreting the agreement as written and in a way to give it a lawful effect—as Civil Code sections 1643 and 3541 require—the *Murrey* court ignored these contract interpretation canons to find this provision unconscionable on the assumption that "[a]n arbitrator could reasonably infer he or she should would need to overcome the 'presumption' for using [the employer's] designated rules . . . [which] does not clarify who has the burden of proof." (*Id*. at p. 1242.) This analysis is the opposite of what California law mandates of contract interpretation—i.e., the court read what did not exist in the plain text in order to give it an unlawful effect. When courts review collateral provisions with a half-glass-empty approach, it precludes the preference in favor of severability because, by then, the court has already made up its mind.

Hostility towards the enforcement of employment arbitration provisions are not just limited to scrutiny surrounding discovery provisions. Another example is *Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626 ("*Navas*"). There, the arbitration agreement expressly said it "will be valid for ***all legal claims*** between [the employer] and [the employee]." (*Id*. at p. 636, emphasis added.) But the *Navas* court honed in on language that followed under a list of "Covered Claims," which included

typical claims an employee would bring against an employer. (*Ibid*.) Instead of reading the agreement under California contract principles (as *Roman* did), the court read this as a limitation and therefore non-mutual—despite the express language saying that it "will be valid for all legal claims." (*Ibid*.; cf. *Baltazar*, *supra*, 62 Cal.4th at p. 1249 [expressly rejecting this argument]; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 182 [despite a similar covered-claims provision listing only claims that an employee typically brings, the court held that "any and all claims arising out of or in any way connected with your employment . . . clearly was a bilateral arbitration requirement binding both parties."].) These readings in *Navas*, *Fitz*, and *Murrey* are inconsistent with California law's directives with respect to contract interpretation and this State's strong policy in favor of enforcing arbitration agreements.

C. ***Patterson*** **Followed Civil Code Sections 3541 And 1643's Directives, But *Ramirez* Did Not.**

The case before the Court serves as yet another example, as it conflicts with *Patterson*, which followed California contract interpretation principles. When confronted with the interim attorney's fee provision, the *Patterson* court did exactly what California law requires:

> [G]iven the strong public policy favoring arbitration [citations] and ***the requirement we interpret the provisions in a contract in a manner that render them legal rather than void when possible*** (see Civ. Code, §§ 1643 [if possible without violating the parties' unambiguous intent, a contract is interpreted so as to make it "lawful, operative, definite, reasonable, and capable of being carried into effect"], 3541 ["[a]n interpretation which gives effect is preferred to one which makes void"]), we construe the prevailing party fee provision in the arbitration agreement to impliedly incorporate the FEHA asymmetric rule for awarding attorney fees and costs . . . . [¶]

> Similarly, by construing the fee-shifting provision in the Charter arbitration agreement to preclude an award of attorney fees and costs to Charter following a successful motion to compel arbitration absent a showing that Patterson's opposition to the motion was frivolous, unreasonable or groundless, as set forth in section 12965(b), the provision is enforceable.

(*Patterson*, *supra*, 70 Cal.App.5th at p. 490, emphasis added.) But the *Ramirez* court contended that it could not give the interim attorney's fee provision this interpretation because, under Section 1643, it would go against the intent of the parties. (*Ramirez*, *supra*, 75 Cal.App.5th at p. 379.) Yet, at the same time, it gave the prevailing-party provision a lawful interpretation under the Fair Employment and Housing Act ("FEHA")—without any discussion about the parties' intent. (*Id*. at p. 376.) Not only did *Ramirez* conflict with *Patterson*, it conflicted with itself. In the same way that the parties mutually agreed to the prevailing-party provision on remedies, the parties both agreed to the award of interim attorney's fees on arbitration. When the *Ramirez* court elected to find one permissible and the other substantively unconscionable, it ignored Civil Code sections 3541 and 1643.

These deviations from Civil Code sections 3541 and 1643 frustrate the severance analysis because it allows a court to stack substantively unconscionable provisions. (*Kho*, *supra*, 8 Cal.5th 111 at p. 147, dis. opn. of Chin., J.) A rule from the Court that mandates lower courts to strictly follow California law on contract interpretation and severance principles to uphold arbitration agreements will avoid these inconsistencies and eliminate any hostility that courts often apply only to arbitration agreements. This rule would reinforce the idea that courts must "indulge every intendment to give effect to such proceedings." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) After such an interpretation, severance

must be favored when possible. (*Beynon v. Garden Grove Medical Group* (1980) 100 Cal.App.3d 698, 713, citing 1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 343, p. 290 ["California cases take a very loose view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law (as the court conceives it) would be furthered."].) Absent a rule like the one proposed by *amicus curiae*, there will be more conflicts like *Ramirez* and *Patterson* because the severance application is an afterthought, when it should steer the entire analysis.

III. Lower Courts Lack Sufficient Guidance on the Severance of Collateral Provisions Vis-à-vis the Underlying Agreement to Resolve Disputes in Arbitration.

Clear and express agreements to arbitrate are too often overshadowed—and even disregarded entirely—by what courts identify as substantively unconscionable collateral provisions, even when those agreements have clear severability clauses. Severability standards must align with California's public policy of enforcing arbitration agreements to which parties mutually consent. As shown by Section II, *supra*, courts often selectively abide by the Civil Code, a phenomenon which allows far too much leeway for courts to surprise California employers with novel arguments that nitpick and void arbitration agreements as unfair, unreasonable, non-mutual, oppressive, or deviating too far from rules governing court litigation. (Cf. *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 826; *Sonic II*, *supra*, 57 Cal.4th at p. 1148; *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911, quoting *Pinnacle Museum Tower Assn.*, *supra*, 55 Cal.4th at p. 246.)

Agreements by employers and employees to arbitrate would be best protected by a substantial and well-defined severability standard that does not encourage these collateral attacks at aspects of arbitration clauses that

do not go to the core of the agreement. Indeed, courts can continue to develop the law of unconscionability by coming to divergent conclusions about the enforceability of *individual clauses* in arbitration agreements so long as they truly honor the Civil Code when it comes to assessing severability. This Court, therefore, should establish a rule that provides lower courts with clear instruction to save the heart of the arbitration agreement—like they would any other contract. Thus, a lower court could find individual clauses unconscionable as appropriate, but not throw out the ***entire*** agreement if they are merely collateral to the basic agreement to arbitrate disputes. The rule that *amicus curiae* proposes accomplishes the goal of consistent enforcement of arbitration agreements—which requires the consistent application of severability of merely collateral provisions—because it directs courts to attempt to save an arbitration agreement whenever collateral provisions do not taint the agreed-upon decision to arbitrate employment claims or when there is no clear showing that an employer was attempting to pull a fast one and insert a provision clearly barred by law at the time of drafting the agreement.[6]

[6] The Court in *Armendariz* cautioned about adopting a policy where "[a]n employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter." (24 Cal.4th at p. 124, fn. 13.) But the rule proposed by *amicus curiae* prevents such overreach, because if any overreach amounted to multiple substantive unconscionable provisions that—collectively—lead to the conclusion that the drafter operated in bad faith, severance is not mandated.

A. Lower courts do not consistently distinguish collateral provisions from those central to the underlying arbitration agreement.

The current application of severability by lower courts is far too unpredictable.[7] Despite arbitration being touted as "highly favored as an economical, efficient alternative to traditional litigation in law courts," *Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1076, as well as a "speedy and relatively inexpensive means of dispute resolution," *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322, and "common, expeditious, and judicially favored," *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 707—courts still take aim at good-faith efforts to make this streamlined and efficient forum a reality.

In *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, the Court of Appeal correctly identified as collateral an arbitration agreement's discovery provision that limited depositions to one individual, with a reservation that the arbitrator may order additional depositions. (*Id*. at p. 983.) Importantly, the *Dotson* court did ***not*** find this to be substantively unconscionable, but it noted that even if did, the limitation did "not permeate the agreement with an unlawful purpose and could easily have been removed without requiring reformation or augmentation of the remainder of the agreement." (*Id*. at pp. 985–986, citing *Armendariz*, *supra*, 24 Cal.4th at pp. 124–125.) The Court of Appeal would have severed, and it found that the trial court erred by not doing so. (*Id*. at p. 986.) But with similar discovery limitations that are purely collateral to the underlying agreement to arbitrate—courts have come out with a

[7] "Over the years, the Supreme Court has struck down a number of California laws or judge-made rules relating to arbitration as preempted by the FAA." (*Chamber of Commerce of the U.S.*, *supra*, 2023 WL 2013326; *Concepcion*, *supra*, 563 U.S. at p. 342 ["California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts."].)

hodgepodge of outcomes, even though "California courts do not by any means require that an arbitration agreement permit 'unfettered discovery.' [Citation.] Parties may certainly 'agree to something less than the full panoply of discovery provided in [a civil action].'" (*Sanchez v. Carmax Auto Superstores Cal., LLC* (2014) 224 Cal.App.4th 398, 404.)

The Court of Appeal in *Torrecillas v. Fitness Int'l, LLC* (2020) 52 Cal.App.5th 485 held that the limitation to five depositions coupled with discretion of the arbitrator to order additional discovery was ***not*** substantively unconscionable. (*Id*. at p. 497.) But *Ramirez* found that the limitation to four depositions was substantively unconscionable. (75 Cal.App.5th at p. 386.) In *De Leon v. Pinnacle Property Management Services, LLC* (2021) 72 Cal.App.5th 476, 487, three depositions was too limited. And two depositions was similarly substantively unconscionable in *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 911.

Despite the *Dotson* court holding that the trial court abused its discretion when it refused to sever the alleged problematic—yet ***collateral***—discovery provision that limited to one deposition each side, *Ramirez*, *De Leon*, and *Davis* declined to sever on the assumption that if they did, there would be no discovery provision. (See, e.g., *De Leon*, *supra*, 72 Cal.App.5th at p. 492; *Ramirez*, *supra*, 75 Cal.App.5th at 387, fn. 11; cf. *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 119.) Yet, in *Navas*, *supra*, 85 Cal.App.5th 626, the Court of Appeal held that an arbitration agreement's omission of a provision that spelled out discovery rights

> does not make it unconscionable because the right to discovery is guaranteed by [Code of Civil Procedure] section 1283.05, subdivision (a), which provides, in relevant part, '[T]he parties to the arbitration shall have the right to take depositions and obtain discovery . . . .' An employer who agrees to arbitrate claims

> impliedly "consent[s]' to a procedure that allows for discovery.

(*Id*. at p. 633.) On this collateral issue, employers are simply left guessing as to what number of depositions is permissible and what is too restrictive. Further, unless courts consistently apply a robust severance standard as a backstop, guessing incorrectly about how many depositions are necessary for unconscionability purposes could also mean the entire arbitration agreement is in jeopardy.

B. Lower courts too often rely on stacking up challenges presented by collateral provisions as a reason to bring an entire arbitration agreement down.

Under *Armendariz*, "[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (24 Cal.4th at p. 124.) While *Armendariz*, noted that more than one unlawful provision can support a conclusion that unconscionability permeates the underlying agreement—it did not hold that any time more than one problematic provision exists, permeation is found.

> No authority supports the . . . conclusion that any more than a single unconscionable provision in an arbitration agreement ***precludes*** severance. "An arbitration agreement ***can*** be considered permeated by unconscionability if it 'contains more than one unlawful provision . . . ." [Citations] . . . . But the presence of multiple unconscionable clauses is merely ***one*** factor in the trial court's inquiry; it is not dispositive. [Citations] 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.

(*Lange v. Monster Energy Company* (2020) 46 Cal.App.5th 436, 454, emphasis in original.) And yet, that is exactly how some courts have

treated multiple unconscionable collateral provisions—despite the central purpose of the contract, despite there being a severance provision, and despite the common law and statutory requirement to sever.

Sometimes courts refuse to sever collateral provisions that other courts routinely sever after finding them substantively unconscionable. (See *Nunez v. Cycad Management LLC* (2022) 77 Cal.App.5th 276.) In a wrongful termination suit, the Court of Appeal in *Nunez* found two provisions of an arbitration agreement substantively unconscionable: (1) limitation of discovery to three depositions, and (2) provision that affords the arbitrator discretion to award all attorney's fees and costs to the prevailing party. These two types of provisions are routinely severed. (See, e.g., *Dotson*, *supra*, 181 Cal.App.4th at p. 986 [trial court abused its discretion when it refused to sever provision limiting to one deposition]; *Serafin*, *supra*, 235 Cal.App.4th at p. 184 [attorney's fee and costs provision collateral and severable].) However, the court found severance inappropriate because they allegedly permeated the entire agreement. The result was—despite both sides agreeing to arbitrate their differences—no party was permitted to enjoy the dispute resolution forum to which they initially consented.[8]

Similarly, in *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138, the Court of Appeal refused to sever provisions that (1) provided for a 6-month statute of limitations; (2) carved out injunctive relief from arbitration; and (3) provided for fee-shifting. (*Id*. at p. 1147.)

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[8] "[U]nder California law, an employee can 'consent' to an employment contract by entering into it, even if the contract was a product of unequal bargaining power and even if it contains terms (such as an arbitration provision) that the employee dislikes, so long as the terms are not invalid due to unconscionability or other generally applicable contract principles." (*Chamber of Commerce of the U.S.*, *supra*, 2023 WL 2013326 at *11.)

But again, these are collateral provisions that do not go to the heart of the central purpose of the agreement to arbitrate, and courts regularly compel arbitration after severing these problematic clauses. (See e.g., *Capehart v. Heady* (1962) 206 Cal.App.2d 386 [concluding that three-month limitation period in lease was not unreasonable]; *Beeson v. Schloss* (1920) 183 Cal. 618 [finding six-month limitation reasonable in employment contract]; *In re Juul Labs, Inc., Antitrust Litigation* (N.D. Cal. 2021) 555 F.Supp.3d 932, 955; *Jones v. Deja Vu, Inc.* (N.D. Cal. 2005) 419 F.Supp.2d 1146, 1150; *Burgoon v. Narconon of Northern California* (N.D. Cal. 2015) 125 F.Supp.3d 974, 991; *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1271 [severing carveout for confidentiality claims that are often only brought by the employer]; *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 256 [abuse of discretion for trial court not to sever fee-splitting provision]; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 710 [provision that purports to deprive employee of statutory attorney's fees as prevailing party is severable]; *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 102 [same].) And again, the parties were left with resolving their disputes in court—the forum in which they mutually agreed to avoid.

Failure to sever collateral provisions in arbitration agreements does not serve California's strong public policy favoring arbitration. California employers—especially small businesses—who lean on expeditious, informal resolution of their all-too-common workplace grievances are prejudiced when the severability clauses in those agreements are not robustly honored. Instead, if a successful attack on a collateral provision can imperil the entire agreement to arbitrate, employers can be dragged into protracted litigation over the enforceability of their arbitration agreements, only then to continue in further time-consuming and expensive litigation in court to address the merits of those grievances. Robust guidance on

severance principles will prevent this fundamental uncertainty over whether the underlying agreement to arbitrate will be honored.

IV. California Employers Will Continue to Suffer Harm Absent the Court's Adoption of a Rule that Provides Predictability on When Their Arbitration Agreements Will be Honored.

Arbitration agreements between employers and employees are extremely common for California businesses. Employers have relied on these agreements as a means of addressing routine workplace disputes for decades. And they have good reason to rely on these contracts—they are expressly endorsed by California and Federal policy as being an economical and efficient alternative to costly and time-consuming litigation in courts. "Commerce depends on the enforceability, in most instances, of a duly executed written contract. A party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain. Not all one-sided contract provisions are unconscionable; hence the various intensifiers in our formulations: 'overly harsh,' 'unduly oppressive,' 'unreasonably favorable.' (*Baltazar*, *supra*, 62 Cal.4th at p. 1245, quoting *Pinnacle*, *supra*, 55 Cal.4th at p. 246.) Small and large employers understand and appreciate the benefits of this alternative dispute resolution forum, which is why many contract in hopes to enjoy it. But for decades, that promise has been broken by judicial hostility towards arbitration agreements because one party employs the other.

What was supposed to be a speedy and cost-conscious method of resolving employment-related differences often becomes years of protracted litigation about an underlying contract. Savings clauses in these agreements do not provide any insurance. The current severability regime for arbitration agreements in the employment context does not provide employers with the peace of mind they need for resolving common employment disputes, which often hurts many small, family-owned

businesses that draft their arbitration agreements in good faith. These employment disputes often cannot be avoided, and neither should arbitration. Just as courts should honor the Federal and State policy that favors arbitration, so too should courts respect an employer and its employee's mutual promise to resolve their disagreements in arbitration by severing unconscionable collateral provisions, drafted in good faith, that do not go to the heart of that promise.

CONCLUSION

For all these reasons, the Court should adopt a rule that requires courts to sever unconscionable provisions and enforce the remainder of an agreement if (1) the unconscionable provisions are merely collateral to, and do not contravene, the underlying agreement by the parties to arbitrate the dispute and vindicate their rights in arbitration; or (2) the unconscionable provisions, in their substantive totality, do not shock the conscience to a degree such that the only logical conclusion is that the drafting party was operating in bad faith against clearly established law at the time it was written. Should the Court adopt such a rule, it must also rule in favor of Petitioner Charter Communications, Inc.

DATED: March 7, 2023

COBLENTZ PATCH DUFFY & BASS LLP

By: /s/ Fred Alvarez
FRED ALVAREZ
ANTHONY D. RISUCCI
TOM LIN
Attorneys for Employers Group as Amicus Curiae

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1).)

The undersigned counsel for *amici curiae* Employers Group and CELC, pursuant to Rule 8.204(c)(1) of the California Rules of Court, certifies that this brief contains 9,449 words, as counted by the word count of Microsoft Word used to prepare this brief.

DECLARATION OF SERVICE

I DIANA CAMPOS, declare:

I am a resident of the state of California and over the age of eighteen years and not a party to the within action, my business address is Coblentz Patch Duffy & Bass LLP, One Montgomery Street, Suite 3000, San Francisco, CA 94104. On March 7, 2023, I served the foregoing document **Application Of Employers Group For Leave To File Amicus Curiae Brief In Support Of Defendant And Petitioner Charter Communications, Inc.** via electronic transmission through TrueFiling, the court's electronic filing system to the email(s) on file:

James A. Bowles
Casey L. Morris
Elissa L. Gysi
HILL, FARRER & BURRILL LLP
One California Plaza
300 South Grand Avenue, 37th Floor
Los Angeles, California 90071
Tel: (213) 620-0460
Fax: (213) 624-4840
E-mail: jbowles@hillfarrer.com
cmorris@hillfarrer.com
egysi@hillfarrer.com

Eric A. Panitz
PANITZ LAW GROUP APC
18000 Studebaker Road
Suite 700
Cerritos, California 90703
Tel: (526) 924-7800
Fax: (526) 924-7801
E-mail: eric@panitzlaw.com

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 7, 2023 at Pacifica, California.

/s/ Diana Campos
Diana Campos

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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Case Number: **S273802**
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Elissa Gysi Hill Farrer & Burrill LLP 281338	egysi@hillfarrer.com	e-Serve	3/7/2023 2:53:50 PM
Eric Panitz Panitz Law Group APC 243877	eric@panitzlaw.com	e-Serve	3/7/2023 2:53:50 PM
James A. Bowles Hill, Farrer & Burrill, LLP 89383	jbowles@hillfarrer.com	e-Serve	3/7/2023 2:53:50 PM
Anthony Risucci COBLENTZ PATCH DUFFY & BASS LLP 316587	ef-adr@cpdb.com	e-Serve	3/7/2023 2:53:50 PM
Jamin Soderstrom Soderstrom Law PC 261054	jamin@soderstromlawfirm.com	e-Serve	3/7/2023 2:53:50 PM
Jamin Soderstrom Soderstrom Law Firm 261054	diana@soderstromlawfirm.com	e-Serve	3/7/2023 2:53:50 PM
Casey Morris Hill Farrer & Burrill, LLP 238455	cmorris@hillfarrer.com	e-Serve	3/7/2023 2:53:50 PM
Fred Hiestand Attorney at Law 44241	fred@fjh-law.com	e-Serve	3/7/2023 2:53:50 PM
Fred Alvarez	ef-fwa@cpdb.com	e-Serve	3/7/2023 2:53:50 PM

Tom Lin 319911	ef-txl@cpdb.com	e-Serve	3/7/2023 2:53:50 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/7/2023

Date

/s/Anthony Risucci

Signature

Risucci, Anthony (316587)

Last Name, First Name (PNum)

Coblentz Patch Duffy & Bass LLP

Law Firm