No. 13-_____

IN THE

Supreme Court of the United States

BINGHAM MCCUTCHEN LLP, ET AL.,

Petitioners,

v.

HARTWELL HARRIS,

Respondent.

On Petition for Writ of Certiorari
to the Court of Appeal of California,
Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law rule that forbids arbitration of state-law employment-discrimination claims unless an arbitration agreement "clearly and specifically" refers to those claims, even when the parties agree to arbitrate "any legal disputes * * * which arise out of, or are related in any way to" the "employment * * * or its termination."

PARTIES TO THE PROCEEDING

Petitioners Seth Gerber and Jonathan Loeb are parties to the proceeding not listed in the caption. They join this petition in full.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bingham McCutchen LLP is a limited liability partnership under the laws of Massachusetts. It has no parent company. All of its partners are private entities, and no publicly held corporation has a 10% or more ownership interest in Bingham McCutchen LLP.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Los Angeles County Superior Court refusing to compel arbitration (Pet. App. 15a) is unreported. The decision of the California Court of Appeal affirming the superior court (Pet. App. 3a) is reported at 154 Cal. Rptr. 3d 843 (Ct. App. 2013).

JURISDICTION

The California Court of Appeal issued its decision on March 29, 2013. Pet. App. 3a. On April 12, Petitioners filed a timely petition for rehearing; it was denied by email on April 29. *Id.* at 2a. On May 8, Petitioners filed a timely petition for review in the California Supreme Court; it was denied on June 19. *Id.* at 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, provides that:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

I. THE FAA AND STATE HOSTILITY TO ARBITRATION

1. Congress enacted the FAA nearly 90 years ago, 43 Stat. 883 (1925), to combat a deep-seated judicial hostility to arbitration inherited from English courts whose jealousy of their own jurisdiction led them to view arbitrators as threats. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 12–14 (1984); see also *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270–272 (1995); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985). Anti-arbitration sentiment was not confined to federal courts, but pervaded state courts and state laws as well. See *Southland*, 465 U.S. at 13–14. So in the FAA, Congress established federal arbitrability rights that inhere in arbitration agreements solely by virtue of their involvement in interstate commerce and made those rights enforceable in every domestic court. See *id.* at 12–13.

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. That provision displaces state law on arbitrability and replaces it with "a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24–25 & n.32 (1983). Section 2, in other words, creates a "federal common law" of arbitrability. *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

Section 2 preserves only a sliver of state law that would negate federally protected arbitration agreements—state law that provides for "the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Sec-

tion 2's saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). But it forbids "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citation omitted); see *Perry*, 482 U.S. at 492–493 & n.9 (holding that Section 2 preempts any "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue"). And even when a state-law rule *facially* fits within Section 2's saving clause, if the rule is *applied* "in a fashion that disfavors arbitration," it stands as an obstacle to the accomplishment of the FAA's objective of "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility*, 131 S. Ct. at 1747–1748 (citation and internal quotation marks omitted). The rule is preempted.

Old habits die hard. More and more, the anachronistic hostility to arbitration manifests itself in holdings of state courts. See *Perry*, 482 U.S. at 492–493 & n.9; see, *e.g.*, *AT&T Mobility*, 131 S. Ct. at 1750 (preempting California's unconscionability rules as applied to adhesive arbitration agreements). A common thread in anti-arbitration decisions is a belief that an agreement to arbitrate amounts to a waiver of substantive rights and remedies. An agreement to arbitrate is just a choice of forum; it forgoes only the opportunity to have a state or federal judge preside. See *Mitsubishi Motors*, 473 U.S. at 628. Arbitrators are empowered to award the same relief and remedies as courts in individual cases.

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

2. California courts have had and still have an uneasy relationship with Section 2. Several of this Court's pathmarking FAA decisions have reversed judgments of the California courts, including the intermediate appellate courts. See *Southland*, 465 U.S. 1 (reversing the California Supreme Court); *Perry*, 482 U.S. 483 (reversing the California Court of Appeal, Second Appellate District); *Preston* v. *Ferrer*, 552 U.S. 346 (2008) (reversing the California Court of Appeal, Fourth Appellate District). Two years ago, reviewing a California unconscionability rule, the Court called attention to the fact that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *AT&T Mobility*, 131 S. Ct. at 1747 (citing two law review articles).

3. In the decision below, the California court of appeal continued the anti-arbitration streak. Without mentioning the parties' intent, the court invalidated an agreement to arbitrate "any legal disputes * * * which arise out of, or are related in any way to * * * employment * * * or its termination" because the agreement does not clearly and specifically mention statutory employment-discrimination claims. There is nothing extraordinary or confusing about the agreement's wording. It is nearly identical to agreements this Court has upheld in employment disputes arising under state and federal statutes.[1]

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[1] See *Gilmer*, 500 U.S. at 23 (holding a federal age discrimination claim subject to an agreement to arbitrate "any controversy * * * arising out of the employment or termination

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The holding of the court of appeal decided an important federal question on arbitrability in conflict with decisions of this Court and of several United States courts of appeals. The lower court's holding directly conflicts with *Mitsubishi Motors*, which rejected an identical clear-and-specific statement rule as inconsistent with Section 2's requirement that arbitrability be determined solely in light of the parties' intent. See *Mitsubishi Motors*, 473 U.S. at 624–628. The lower court's holding conflicts with decisions on the scope of Section 2's saving clause, many of which have preempted analogous heightened notice requirements. And the lower court's holding conflicts with decisions recognizing that agreements to arbitrate do not waive substantive rights and remedies and thus do not violate state public policies against waiver of those rights and remedies.

For these reasons—each of which independently justifies review—the Court should grant the petition. Given the egregiousness of the lower court's errors, summary reversal may be appropriate. If not, the case should be set for argument.

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or employment"); *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 282 n.1 (2002) (holding a federal disability discrimination claim subject to an agreement to arbitrate "any dispute or claim concerning Applicant's employment"); see also *Southland*, 465 U.S. at 15 n.7 (holding that an agreement to arbitrate "any controversy or claim arising out of or relating to this Agreement or the breach hereof" is "broad enough to cover" state-law statutory claims); cf. *Perry*, 482 U.S. at 485 (holding employment-related state common-law claims subject to an agreement to arbitrate any "controversy between a registered representative and any member or member organization arising out of the employment or termination of employment").

II. FACTUAL BACKGROUND

1. In 2007, the California law firm where Ms. Harris worked as a lawyer merged with Bingham McCutchen LLP, a Boston-based firm with offices in several states. Bingham offered her a job in Santa Monica. She accepted and signed a letter agreement covering some terms of her new employment.

Two paragraphs of the letter agreement relate to this case. In paragraph 8, Ms. Harris agreed to arbitrate any employment-related dispute she might have with Bingham:

> You and the Firm agree that any legal disputes which may occur between you and the Firm and which arise out of, or are related in any way to your employment with the Firm or its termination, and which disputes cannot be resolved informally, shall be resolved exclusively through final and binding private arbitration before an arbitrator mutually selected by you and the Firm.

Pet. App. 4a. And in paragraph 9, Ms. Harris agreed that the letter agreement "shall be construed in accordance with the internal substantive laws of The Commonwealth of Massachusetts." *Id.* at 5a.

2. Bingham terminated Ms. Harris's employment in February 2011. *Id.* at 4a.

III. THE PROCEEDINGS BELOW

1. In November 2011, Ms. Harris sued Bingham (and two of its partners, Seth Gerber and Jonathan Loeb) in Los Angeles County Superior Court. She alleges that she has a disabling sleep disorder. She claims that Bingham did not accommodate her disorder, discriminated and retaliated against her, and

defamed her; she also claims that the individual partners defamed her during a performance evaluation. All of her claims arise under California law, principally the Fair Employment and Housing Act, Cal. Gov't Code § 12940. See Pet. App. 4a.

2. The superior court denied Bingham's motion to compel arbitration. Pointing to the letter agreement's choice-of-law clause, the court held that Massachusetts law (not federal law) governs the enforceability of the agreement's arbitration clause. The court then held the arbitration clause unenforceable under *Warfield* v. *Beth Israel Deaconess Medical Center, Inc.*, 910 N.E.2d 317 (Mass. 2009)—a case decided about two years after Bingham and Ms. Harris agreed to arbitrate—because the clause does not "clearly and specifically" state that statutory discrimination claims must be arbitrated. The court rejected Bingham's contention that the FAA preempts a state-law rule that, irrespective of the parties' intent, conditions the enforceability of an arbitration agreement on whether it mentions statutory employment-discrimination claims by name. Lastly, the superior court held in the alternative that the arbitration clause was unconscionable under California law. See Pet. App. 15a–16a.

3. The court of appeal affirmed the superior court's holding on the clear-and-specific statement rule without considering its alternative holding on unconscionability. *Id.* at 14a n.1.[2]

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[2] It is not surprising that the court of appeal left the unconscionability holding untouched. It is clearly erroneous. For instance, the superior court faulted the arbitration agreement for binding only Ms. Harris, not Bingham (Pet. App. 16a), even

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On appeal, Bingham argued that the letter agreement's choice-of-law clause does not govern questions of arbitrability; rather, Section 2 of the FAA governs and requires that arbitrability be determined solely in light of the parties' intent. The court treated the argument as an attack on the choice-of-law clause and held that Bingham cannot attack a clause it drafted. *Id.* at 7a–8a.

Bingham next argued that the letter agreement's arbitration clause does not violate the clear-and-specific statement rule of *Warfield* because the rule applies only to arbitration of claims arising under Massachusetts's statutory discrimination laws, whereas Ms. Harris's claims arise under California's. The court of appeal read *Warfield* more broadly, concluding that the clear-and-specific statement rule is "premised on the concept that Massachusetts's antidiscrimination statutes reflect the public policy against workplace discrimination." *Id.* at 9a. Concluding that the same public policies animate California's antidiscrimination laws, the court held that the clear-and-specific statement rule applies to arbitration of Ms. Harris's California statutory claims. Then, because the arbitration clause did not identify California's antidiscrimination statutes by name, the court held that it was unenforceable as to those claims. Nowhere did the court of appeal address the parties' intent, *i.e.*, whether Bingham and Ms. Harris intended to arbitrate statutory employment-discrimination claims—a question that could only be answered in the affirmative, given their express agreement to arbitrate "any legal disputes * * *

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though the operative clause expressly applies to "You [*i.e.*, Ms. Harris] and the Firm." *Id.* at 4a.

which arise out of, or are related in any way to [Ms. Harris's] employment * * * or its termination." *Id.* at 9a–10a.

The court of appeal held that Section 2 of the FAA does not preempt *Warfield*'s clear-and-specific statement rule. *Id.* at 11a–14a. The court reasoned that the rule was saved because it does not prohibit arbitrating employment-discrimination claims outright, and because it applies not just to arbitration agreements, but to any agreement "that purports to waive or limit * * * the employee's otherwise available right to seek redress for employment discrimination through remedial paths set out" in a statute. *Id.* at 12a (citation and internal quotation marks omitted). The court of appeal concluded that the clear-and-specific statement rule was consistent with three decisions of this Court—*14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247 (2009); *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70 (1998); and *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983)—which held that collective bargaining agreements must "clearly," "unmistakably," and "explicitly" state that union members must arbitrate federal employment-discrimination claims. *Id.* at 13a. The court also concluded that the rule was consistent with a requirement that "'class-action-waiver provisions in adhesive arbitration agreements'" be "'highlighted,'" which the Court recently suggested might not be preempted. *Ibid.* (quoting *AT&T Mobility*, 131 S. Ct. at 1750 n.6).

4. The court of appeal denied Bingham's petition for rehearing, and the California Supreme Court declined to review the court of appeal's earlier decision. *Id.* at 1a–2a.

REASONS FOR GRANTING THE PETITION

I. THE OPINION BELOW CONFLICTS WITH MULTIPLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The California courts' hostility to arbitration is hiding in plain sight. So determined was the court of appeal to defeat arbitration in this case that the decision it issued conflicts with decisions of this Court and lower courts on almost every core principle of Section 2 jurisprudence. A court cannot invalidate an arbitration agreement simply because it fails to comply with a state-imposed heightened notice requirement for "waiving" judicial remedies for statutory discrimination claims. Such a requirement ignores the parties' expressed intent to arbitrate "any legal disputes * * * which arise out of, or are related in any way to" the employment or its termination. The requirement stands as a substantial obstacle to the accomplishment of the FAA's objective of "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility*, 131 S. Ct. at 1748 (citation and internal quotation marks omitted). The public policies voiced by the court of appeal in support of the clear-and-specific statement rule are no more than invalid presumptions that arbitration is a second-class form of dispute resolution.

Employees do not need heightened notice that an agreement to arbitrate waives their statutory rights and remedies because an agreement to arbitrate does not waive *any* rights or remedies—except the right to a judicial forum. Nor can the clear-and-specific statement rule be justified as a neutral ground for the revocation of any contract. It is openly hostile to arbitration, both in its purposes and ef-

fects, and it does not apply to "any contract," but at most those involving employment-discrimination claims. This Court's review is needed to resolve the conflicts and preserve rights guaranteed by the FAA.

A. The Opinion Below Conflicts With *Mitsubishi Motors* And Cases On Section 2's Federal Arbitrability Standard.

The court of appeal's decision to apply a clear-and-specific statement rule directly conflicts with *Mitsubishi Motors*. After reaffirming that Section 2 of the FAA creates a federal law of arbitrability, the *Mitsubishi Motors* Court held that a clear-and-specific statement rule—just like the one the court below adopted—is incompatible with Section 2.

In *Mitsubishi Motors*, a party wanting arbitration (Mitsubishi) went to federal court to compel it. 473 U.S. at 618. The party opposing arbitration (Soler) filed counterclaims, including claims under federal and state statutes. *Id.* at 619–620. The district court compelled arbitration of Soler's statutory claims as fitting within the intended scope of the parties' broad arbitration agreement. *Id.* at 617–620 & n.7. The First Circuit affirmed that Soler had to arbitrate its statutory claims even though they were not mentioned by name in the arbitration agreement. "The question * * * is not whether the arbitration clause mentions antitrust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims * * * are within the scope of the arbitration clause, whatever the legal labels attached to those allegations." See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 159 (CA1 1983).

Mitsubishi lost the appeal on other grounds and petitioned for a writ of certiorari. Soler filed a cross-petition on the question whether it could be compelled to arbitrate statutory claims not specifically mentioned in the arbitration agreement. In Soler's view, even though the parties' arbitration agreement covered Soler's statutory claims as a matter of fact, "as a matter of law a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs 'unless [that party] has expressly agreed' to arbitrate those claims." *Mitsubishi Motors*, 473 U.S. at 624–625 (alteration in original). Soler argued that the public policies undergirding state and federal statutes would be well served by a rule that an "arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate." *Id.* at 625.

The Court granted Soler's cross-petition and rejected Soler's arguments. See *id.* at 624–628. Under Section 2 of the FAA, "a court asked to compel arbitration of a dispute" must "apply[] the federal substantive law of arbitrability," which considers *only* "whether the parties agreed to arbitrate that dispute." *Id.* at 626 (citation and internal quotation marks omitted). Because "the parties' intentions control," public policies embodied in state or federal statutes are usually irrelevant; the FAA "itself provides no basis for disfavoring agreement to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *Id.* at 626–627. The one exception is for certain *federal* policies "deducible from text or legislative history" of specific *federal* statutes. *Id.* at 628. "Congress itself" may "evince[] an intention to preclude a waiver of judicial reme-

dies for" specific statutory rights. *Ibid.* But a vague "concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read." *Ibid.* Because a clear-and-specific statement rule operates to defeat arbitration notwithstanding the parties' expressed intent to arbitrate, Section 2 of the FAA does not tolerate it.

The court of appeal's departure from *Mitsubishi Motors* is stark. The court adopted, as a matter of state law, the same clear-and-specific statement rule this Court rejected as a matter of federal law. This Court's decisions interpreting collective bargaining agreements (see Pet. App. 13a) have not undermined *Mitsubishi Motors*. Those cases had nothing to do with state-law arbitrability rules, and the FAA barely even surfaced in the decisions. See, *e.g.*, *Wright*, 525 U.S. at 77 n.1 ("declin[ing] to consider the applicability of the FAA to the present case"). The decisions simply express reluctance to read grievance-arbitration provisions in collective bargaining agreements as extending to employees' federal statutory rights. See *id.* at 80–81 (contrasting "an individual's waiver of his own rights" with "a union's waiver of the rights of represented employees"). Here, the FAA and Section 2 are the focus; there is no collective-bargaining overlay; and the statutory rights are state employment laws, not federal.

Following *Mitsubishi Motors*, lower courts hold that the parties' intent is the sole determinant of arbitrability under Section 2.[3] Even when a cause of

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[3] See, *e.g.*, *Louis Dreyfus Negoce S.A.* v. *Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 224–25 (CA2 2001); *Parfi Holding AB* v. *Mirror Image Internet, Inc.*, 817 A.2d 149, 155 & n.15 (Del. 2002) (collecting cases); see also *Ford* v. *NYLCare Health*

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action is not clearly and specifically named in an arbitration agreement, it is arbitrable as long as the factual allegations "'touch matters'" covered by the agreement. *Simula, Inc.* v. *Autoliv, Inc.*, 175 F.3d 716, 721 (CA9 1999) (quoting *Mitsubishi Motors*, 473 U.S. at 624 n.13). Likewise, lower courts hold that the FAA's intent-based arbitrability standard displaces state law of arbitrability. See, *e.g.*, *Dean Witter Reynolds, Inc.* v. *Howsam*, 261 F.3d 956, 965–967 (CA10 2001), *rev'd on other grounds*, 537 U.S. 79 (2002) ("On the arbitrability issue before us, then, we are not governed by how the New York Court of Appeals construed similar arbitrability language, but are governed instead by the federal law of arbitrability[.]"). Contrary to all those decisions, the court below applied state-law arbitrability standards that ignore the parties' intent. Indeed, the court's decision did not even mention the parties' intent to arbitrate. The Massachusetts Supreme Judicial Court committed the same error in *Warfield*. See *Warfield*, 910 N.E.2d at 330 (Cowin, J., dissenting) (contending that the court majority "pays lip service to the intent of the parties, and then refuses to enforce the clearly stated intent on the basis of its public policy views").

The fact that the parties chose Massachusetts law to apply to the agreement provides no support for the lower court's decision. Courts routinely apply Section 2's federal arbitrability standards even when

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Plans of the Gulf Coast, Inc., 141 F.3d 243, 250–251 (CA5 1998) ("Basing the arbitrability of an action merely on the legal label attached to it would allow artful pleading to dodge arbitration of a dispute otherwise 'arising out of or relating to' (or legally dependent on) the underlying contract.").

a choice-of-law clause selects state law. See *Dean Witter Reynolds*, 261 F.3d at 965–967 (citing *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995)); see also *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 996 (CA8 1998) (citing decisions from the First, Second, Fourth, Fifth, and Sixth Circuits); cf. *Mitsubishi Motors*, 723 F.2d at 158–159 (rejecting the proposition that laws preempted by the FAA were selected by a contract provision generally choosing local law). Any holding that the Massachusetts choice-of-law clause in the letter agreement trumps Section 2 of the FAA conflicts with those decisions.[4]

B. The Opinion Below Conflicts With Decisions Rejecting Heightened Notice Rules.

The clear-and-specific statement rule is essentially a heightened notice requirement. It governs the form that agreements to arbitrate statutory employment-discrimination claims must take—in the text of the agreement must be inserted a clear and

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[4] Ms. Harris might argue that the Court cannot consider the lower court's misuse of Bingham's choice-of-law clause because "interpretation of private contracts is ordinarily a question of state law." *Volt Info. Scis., Inc.* v. *Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 474 (1989). But *Volt* was about state-law arbitration *procedures* (Section 4 of the FAA), not state-law rules of *arbitrability* (Section 2). See *Doctor's Assocs.*, 517 U.S. at 688 (discussing *Volt*). *Volt*, in fact, recognizes that arbitrability is exclusively a question of federal law. See 489 U.S. at 476. The Court can review and correct a state court's conclusion that a choice-of-law clause waives Section 2 and authorizes the court to ignore the parties' intent as reflected in the terms of their arbitration agreement. See, *e.g.*, *Nitro-Lift Techs., LLC* v. *Howard*, 133 S. Ct. 500, 502–503 (2012) (per curiam).

specific statement that those claims will be arbitrated. See Pet. App. 12a; *Warfield*, 910 N.E.2d at 326. Several courts, including this one, have held that Section 2 preempts state-law rules conditioning arbitration on heightened notice.

In *Doctor's Associates*, this Court considered a Montana rule that invalidated arbitration agreements that were not typed and underlined on the first page. 517 U.S. at 683. Like the court of appeal below, the Montana Supreme Court characterized Section 2's preemptive effect as depending on whether a state law undermines the goals of the FAA and held that the rule was acceptable because it did not preclude arbitration agreements altogether. Compare *id.* at 684, with Pet. App. 12a–13a. This Court reversed "because the State's law condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." 517 U.S. at 687.

The court of appeal contended that the clear-and-specific statement rule was consistent with a footnote in *AT&T Mobility* (see Pet. App. 13a), where the Court wrote "Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted." *AT&T Mobility*, 131 S. Ct. at 1750 n.6. A state-law rule that requires highlighting a provision governing arbitration procedure is different from a state-law rule that invalidates an agreement to arbitrate because it did not use state-approved words. As the Court noted in the same footnote, whatever steps a state may take to address adhesive contracts, they "cannot * * * conflict with the FAA or frustrate its purpose to ensure

that private arbitration agreements *are enforced according to their terms*." *Ibid.* (emphasis added).

Several courts of appeals have rejected other state-law heightened notice requirements. In *Awuah* v. *Coverall North America, Inc.*, 703 F.3d 36 (CA1 2012), considering a rule that forbade incorporating arbitration agreements by reference in other contracts, the First Circuit rejected "the view that arbitration clauses cannot be enforced unless there is heightened notice to the party sought to be bound." *Id.* at 44–45 (citing *Doctor's Assocs.*, 517 U.S. at 687); see *id.* at 43 (holding that "magic terms" are not required). In *David L. Threlkeld & Co.* v. *Metallgesellschaft Ltd. (London)*, 923 F.2d 245 (CA2 1991), the Second Circuit held that Section 2 preempts a Vermont statute conditioning enforceability on a specific, prominently displayed acknowledgement of arbitration signed by both parties. *Id.* at 249–250. The Third Circuit has held two heightened notice rules preempted. In *Morales* v. *Sun Constructors, Inc.*, 541 F.3d 218 (CA3 2008), a case in which an employee could not read English well, the court of appeals held that "applying a heightened 'knowing and voluntary' standard to arbitration agreements would be inconsistent with the FAA." *Id.* at 224 (citation omitted). In reaching that conclusion, the court reaffirmed *Seus* v. *John Nuveen & Co.*, 146 F.3d 175 (CA3 1998), in which it rejected a contention—like the one the court below accepted—that enforceability can depend on "such matters as the specificity of the language of the agreement." *Id.* at 183–184.

In almost the same vein, the Ninth Circuit recently held that Section 2 preempts a Montana rule that invalidated arbitration agreements unless both

sides "voluntarily, knowingly, and intelligently" gave up their right to a jury. See *Mortensen* v. *Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160–1161 (CA9 2013). Under that rule, a consumer was not bound to an arbitration agreement unless he or she was "informed of the consequences" and "personally consent[ed]." *Id.* at 1160. In practice, "only arbitration agreements explained to and initialed by consumers" could be enforced. *Ibid.* The Ninth Circuit concluded that the Montana rule was generally applicable—*i.e.*, that it did not single out arbitration agreements—because it applied to agreements to arbitrate and to agreements to have a bench trial. *Id.* at 1161. Yet, because most of the rule's applications were to arbitration agreements and because courts typically characterized the rule in arbitration-specific terms, the Ninth Circuit held that the rule had a disproportionate impact on arbitration agreements and so failed Section 2. *Ibid.* The decision below conflicts with the Ninth Circuit's logic: even if, as the court of appeal vaguely implied, there are other contract provisions to which the clear-and-specific statement rule might apply, it has been applied only to arbitration clauses, and courts refer to it in arbitration-specific terms.

C. The Opinion Below Conflicts With Decisions Holding That Section 2's Saving Clause Preserves Only State Laws That Apply To "Any Contract."

State law may invalidate an arbitration agreement only if the law comes within the saving clause of Section 2 of the FAA (and even then, it cannot stand as an obstacle to accomplishing the FAA's objectives, see *AT&T Mobility*, 131 S. Ct. at 1748). The saving clause preserves only state-law defenses to

arbitration that exist "at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The key word is "any," and it connotes two distinct prohibitions.

First, Section 2 does not preserve a state-law defense "that exists for the revocation of arbitration provisions" *only*. *Southland*, 465 U.S. at 16 n.11. Defenses do not apply to "any" contract if they "derive their meaning from the fact than an agreement to arbitrate is at issue." *AT&T Mobility*, 131 S. Ct. at 1746. States may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce*, 513 U.S. at 281.

Second, state-law defenses that do not single out arbitration still fail Section 2 if they apply only to agreements on a particular subject matter. Like a defense that applies only to arbitration agreements, a defense that applies only to a subset of contracts does not apply to "any" contract. See *Southland*, 465 U.S. at 16 n.11 (rejecting a state-law defense because it applied only to franchise agreements); *KKW Enters., Inc.* v. *Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 51 (CA1 1999) (rejecting a state-law defense because it was limited "to one type of provision, venue clauses, in one type of agreement, franchise agreements"); see also *Carter* v. *SSC Odin Operating Co.*, 927 N.E.2d 1207, 1218–1219 (Ill. 2010) ("State laws that are applicable to arbitration contracts and some other types of contracts, but not all contracts, are not grounds for the revocation of *any* contract.") (emphasis in original) (citing *Bradley* v. *Harris Research, Inc.*, 275 F.3d 884, 890 (CA9 2001); *OPE Int'l, LP* v. *Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (CA5 2001); *Doctor's Assocs., Inc.* v. *Hamilton*, 150 F.3d 157, 163 (CA2 1998)).

The clear-and-specific statement rule the court of appeal applied conflicts with cases applying both aspects of Section 2's saving clause properly. It impermissibly targets arbitration clauses: "parties seeking to provide for arbitration of statutory discrimination claims must, at a minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause." *Warfield*, 910 N.E.2d at 326. The court of appeal's *ipse dixit* that the rule applies to "some other contract provision[s]" is unpersuasive and irrelevant; arbitration clauses are the obvious—if not sole—means by which parties "'waive or limit * * * remedial paths'" in employment-discrimination statutes. Pet. App. 12a (quoting *Warfield*, 910 N.E.2d at 326). To contend that the clear-and-specific statement rule is neutral or indifferent to arbitration agreements is to blink at reality. In addition, because the clear-and-specific statement rule applies only to statutory employment-discrimination claims, the rule applies to only one subset of contracts—employment-related contracts—and is not a rule of general application, as it must be to fit within Section 2's saving clause.

D. The Opinion Below Conflicts With Decisions Rejecting Public Policies Hostile To Arbitration.

Both *Warfield* and the court of appeal below linked the clear-and-specific statement rule with policies hostile to arbitration. In both courts' views, an agreement to arbitrate waives an employee's statutory rights and remedies. So in order to prevent inadvertent waivers, the courts demanded that employers provide clear and specific statements that an arbitration agreement encompasses statutory antidiscrimination claims. See Pet. App. 9a ("the pre-

sent agreement does not state in clear and unmistakable terms that plaintiff was waiving or limiting any statutory antidiscrimination rights"); *id.* at 12a ("contractual waivers of statutory antidiscrimination litigation rights must be expressly stated to be enforceable"); see also *Warfield*, 910 N.E.2d at 326 (reasoning that the "rule states only that as a matter of the Commonwealth's general law of contract, a private agreement that purports to waive or limit—whether in an arbitration clause or in some other contract provision—the employee's otherwise available right to seek redress for employment discrimination through the remedial paths set out in [state antidiscrimination statutes] must reflect that intent in unambiguous terms"); *id.* at 325 n.13 ("An agreement to arbitrate employment discrimination claims represents a limited waiver of rights under G.L. c.151B. An employee who agrees to arbitrate such a claim of course does not forgo the substantive rights afforded by the statute * * * but does give up the substantial right to seek administrative or judicial remedies.").

This Court repeatedly has held that equating an agreement to arbitrate with a waiver of statutory rights or remedies is an anti-arbitration policy incompatible with the FAA. An agreement to arbitrate waives one right and one right only—the right to seek relief from a court. See *Gilmer*, 500 U.S. at 26; *Mitsubishi Motors*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); see also *EEOC*, 534 U.S. at 295 n.10 ("To the extent the Court of Appeals construed an employee's agreement to submit his claims to an arbitral forum as a waiver of the substantive

statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit, the court obscured this crucial distinction and ran afoul of our precedent."); *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law[.]").

The Supreme Judicial Court in *Warfield* (but not the court below) at least recognized that an agreement to arbitrate does not waive statutory *rights*, but asserted that it does waive statutory *remedies*. See *Warfield*, 910 N.E.2d at 325 n.13. This Court has already rejected that distinction; an agreement to arbitrate waives neither rights nor remedies. In *Gilmer*, it was "argued that arbitration procedures cannot adequately further the purposes of the ADEA, because they do not provide for broad equitable relief and class actions." *Gilmer*, 500 U.S. at 32. The Fourth Circuit disagreed, making clear that "[a]rbitrators enjoy broad equitable powers" and "may grant whatever remedy is necessary to right the wrongs within their jurisdiction." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 895 F.2d 195, 199 (CA4 1990), *aff'd*, 500 U.S. 20 (1991). The Fourth Circuit noted further, and this Court affirmed, that "any lack of congruence which may exist between the remedial powers of a court and those of an arbitrator is hardly fatal to arbitration." *Ibid.* Similarly, in *Mitsubishi Motors*, this Court acknowledged the importance of antitrust remedies—especially treble damages—yet concluded that the importance of those remedies did not compel the conclusion that

they may not be sought in arbitration. See *Mitsubishi Motors*, 473 U.S. at 635.

In the opinion below, the court of appeal did not identify any particular statutory remedy that Ms. Harris waived by agreeing to arbitrate her employment-discrimination claims with Bingham. The court vaguely worried that she had lost some unspecified statutory remedies (or rights—the court of appeal referred to both). The judgment below nakedly "rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Rodriguez de Quijas* v. *Shearson/Am. Express Inc.*, 490 U.S. 477, 481 (1989). "Such generalized attacks on arbitration * * * are 'far out of step with [this Court's] current strong endorsement of the federal statutes favoring'" arbitration. *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas*, 490 U.S. at 481).

Even if Ms. Harris's arbitration agreement gave up a statutory remedy, non-federal public policies in favor of a particular remedy cannot overcome the FAA's policy that agreements to arbitrate be enforced according to their terms. Thus, parties to a run-of-the-mill bilateral arbitration agreement cannot be forced to participate in class arbitration simply because the class-action remedy is good policy. See *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–687 (2010). While the Court has suggested that it might decline to enforce an arbitration agreement that operates "as a prospective waiver of a party's right to pursue statutory remedies," *Mitsubishi Motors*, 473 U.S. at 637 n.19, no arbitration agreement before the Court has ever been so draconian, including one that expressly precluded remedies prescribed by federal statute. See *Am. Ex-*

press Co. v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (citing *Gilmer*, 500 U.S. at 32). Bingham's arbitration agreement waives none of Ms. Harris's statutory remedies; indeed, it is no different from arbitration agreements the Court has enforced in other statutory employment-discrimination cases. See *supra*, p.4 n.1. What's more, the Court's concern for preserving statutory remedies extends only to federal statutes: the federal policy favoring arbitration might need to be balanced against remedial policies expressed in other federal statutes, but it certainly preempts state remedial polices that state courts might cite to invalidate arbitration agreements. See *Am. Express*, 133 S. Ct. at 2312 n.5.

II. IMMEDIATE REVIEW IS WARRANTED.

The decision below is not a one-off from a state appellate court undeserving of this Court's time. The clear-and-specific notice rule applied by the California court of appeal is not unique. Its genesis is the Massachusetts Supreme Judicial Court's *Warfield* decision, which created the clear-and-specific notice rule and thereby created all the conflicts the lower court exacerbated. While the rule for a time seemed limited to employment-discrimination claims arising under Massachusetts law, the decision below evidences that the rule can metastasize in the hands of another state's anti-arbitration court. That, in turn, presents a serious, nationwide threat to arbitration agreements. Drafters cannot reasonably be expected to run a fifty-state survey to find, then list within the text of their arbitration agreements, all potentially applicable state employment-discrimination laws.

The extent to which the decision below, like *Warfield* before it, conflicts with elementary princi-

ples of the FAA and with decisions of this Court and courts of appeals is a factor weighing in favor of immediate review. The degree of conflict is a particularly important factor in arbitration cases. The FAA's *raison d'être* is curbing judicial hostility to private arbitration arrangements, so the greater a lower court's departure from the norm, the greater the urgency to correct it.

The California Supreme Court's decision not to review the judgment below should not weigh against this Court's review. As this Court recently noted, California is a hotbed of anti-arbitration hostility. See *supra*, p.4. And the California Supreme Court—the author of anti-arbitration rules recently struck down, see *AT&T Mobility*, 131 S. Ct. at 1753 (preempting *Discover Bank* v. *Superior Court*, 30 Cal. Rptr. 3d 76 (2005))—cannot be confused with a pro-arbitration court. Denying certiorari here simply because that court did not affirm the lower court's judgment would encourage it and other state supreme courts that oppose arbitration not to wade into cases where their intermediate appellate courts have done the dirty work. Thus, an intermediate appellate court as far out of line as the court below deserves review as much as a state supreme court. See, *e.g.*, *KPMG LLC* v. *Cocchi*, 132 S. Ct. 23 (2011) (per curiam) (vacating anti-arbitration decision of Florida District Court of Appeal, Fourth District).

This Court has reviewed intermediate appellate decisions from California before, including decisions by this court of appeal. See *supra*, p.4. The court of appeal below has jurisdiction over cases from Los Angeles, Ventura, Santa Barbara, and San Luis Obispo counties. More people live and work in those counties than in entire states whose anti-arbitration

decisions this Court has recently reversed. See *Nitro-Lift*, 133 S. Ct. 500 (Oklahoma); *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201 (2012) (per curiam) (West Virginia). Review by this Court, then, would have a significant practical effect.

CONCLUSION

The decision of the California court of appeal departs from several decisions of this Court and conflicts with several decisions of the federal courts of appeals. The Court should grant the petition and either reverse or set the case for argument.

Respectfully submitted,

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September 17, 2013

Court of Appeal, Second Appellate District, Division Five – No. B240522

S210570

IN THE SUPREME COURT OF CALIFORNIA

En Banc

HARTWELL HARRIS, Plaintiff and Respondent,

v.

BINGHAM MCCUTCHEN et al., Defendants and Appellants.

The petition for review is denied.

SUPREME COURT
FILED

JUN 19 2013

Frank A. McGuire Clerk
Deputy

CANTIL-SAKAUYE
Chief Justice

From: Nolan, Dru [mailto:Dru.Nolan@jud.ca.gov]
Sent: Monday, April 29, 2013 1:19 PM
To: tf@freezelawoffice.com; Fischer, Debra; Brundage, Robert A.; Boar, Jessica S.; Salmons, David B.
Subject: B240522 - Harris v. Bingham McCutchen LLP et al.

Please see attached order.

Dru Nolan, Deputy Clerk

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 5

ALL PARTIES

HARTWELL HARRIS,
Plaintiff and Respondent,

v.

BINGHAM MCCUTCHEN LLP et al.,
Defendants and Appellants.

B240522
Los Angeles County No. BC474009

THE COURT:

Appellant's petition for rehearing is denied.

cc: File

Filed 3/29/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HARTWELL HARRIS, Plaintiff and Respondent, v. BINGHAM MCCUTCHEN et al., Defendants and Appellants.	B240522 (Los Angeles County Super. Ct. No. BC474009)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Bingham McCutchen, Debra L. Fischer, Robert A. Brundage and Jessica S. Boar for Defendants and Appellants.

Law Offices of Tamara S. Freeze, Tamara S. Freeze, Robert Odell and Allison Lin for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Bingham McCutchen LLP, Seth Gerber and Jonathan Loeb, appeal from an order denying their petition to compel plaintiff, Hartwell Harris, to arbitrate her California employment discrimination and wrongful termination claims. We

affirm because the trial court did not err in concluding the arbitration provision was unenforceable under Massachusetts law, which the parties agreed applied to the employment relationship.

II. BACKGROUND

On November 21, 2011, plaintiff filed the complaint against Bingham and two individuals. She alleged defendants wrongfully terminated her in February 2011, after she requested reasonable accommodations for a disabling sleep disorder. The complaint alleged nine causes of action: six for violations of the California Fair Employment and Housing Act (Gov. Code, § 12940); and additional claims for a termination in violation of public policy, Business and Professions Code Section 17200 et seq. and defamation.

Defendants petitioned to compel arbitration of the claims based on a letter agreement between plaintiff and Bingham dated April 25, 2007. Paragraph 8 of the letter agreement contains the following arbitration provision: "You and the Firm agree that any legal disputes which may occur between you and the Firm and which arise out of, or are related in any way to your employment with the Firm or its termination, and which disputes cannot be resolved informally, shall be resolved exclusively through final and binding private arbitration before an arbitrator mutually selected by you and the Firm. If you and the Firm are unable to agree upon an arbitrator within twenty-one (21) days after either you or the Firm has made a demand for arbitration, the matter will be submitted for arbitration to the Santa Monica office of the Judicial Arbitration & Mediation Services ('JAMS'), and shall be administered by [Judicial Arbitration & Mediation Services] pursuant to

its rules governing employment arbitration in effect as of the date of this letter agreement. Judgment upon the award of the arbitrator may be enforced in any court having jurisdiction thereof."

Plaintiff opposed the arbitration petition on the ground the provision was unenforceable under the letter agreement's choice-of-law provision applying Massachusetts law to the employment relationship. The choice-of-law provision provides in part: "This letter agreement * * * shall be construed in accordance with the internal substantive laws of The Commonwealth of Massachusetts." Plaintiff asserted that Massachusetts substantive law as stated in *Warfield* v. *Beth Israel Deaconess Medical Center, Inc.* (Mass. 2009) 454 Mass. 390, 398 (*Warfield*), precluded arbitration of her statutory discrimination claims. This was because *Warfield* required agreements to arbitrate statutory discrimination be in clear and unmistakable terms. As an alternative argument, plaintiff asserted the arbitration clause was not enforceable because it was substantively and procedurally unconscionable.

Defendant replied *Warfield* was inapplicable because plaintiff's claims were brought for violations of California's statutes. And, *Warfield* was preempted by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) as articulated in the United States Supreme Court's decision in *AT&T Mobility* v. *Concepcion* (2011) 131 S. Ct. 1740, 1743 (*Concepcion*).

The trial court denied the arbitration petition on the grounds: the provision was not enforceable under Massachusetts law; *Warfield* does not interfere with fundamental attributes of arbitration as articulated in *Concepcion* and, the arbitration agreement

was unconscionable. Defendants filed a timely notice of appeal from the order denying the petition.

III. DISCUSSION

Defendants contend that plaintiff Harris's California statutory claims are governed by California rather than Massachusetts law. That may or may not be true as Harris's lawsuit progresses in the superior court. The issue at hand is whether Harris has properly resorted to the superior court in the first place. To make that determination, defendants would have us conclude that the employment agreement's choice-of-law provision does not govern questions of arbitrability.

Neither party challenges the validity of the choice-of law-provision, which, as noted above, applies "the internal substantive laws of the Commonwealth of Massachusetts" to any disputes arising out of the employment relationship. Defendants cite *Samaniego* v. *Empire Today, LLC* (2012) 205 Cal. App. 4th 1138 (*Samaniego*), in support of their contention that California statutory claims, if they survive the choice-of-law provision, are "necessarily" governed by California law. *Samaniego* is distinguishable. It held that California law governed the enforceability of an arbitration clause in an otherwise unconscionable employment agreement which contained an Illinois choice-of-law provision. (*Id.* at p. 1148.) In rejecting the employer's attempt to enforce the choice-of-law provision, the court noted, "the same factors that render the arbitration provision unconscionable warrant the application of California law * * * [E]nforcing [defendant's] choice-of-law provision would result in substantial injustice." (*Id.* at p. 1149.) As noted in *Samaniego*, in California the weaker party to an adhesion contract may

avoid enforcement of a choice-of-law provision therein where enforcement would result in substantial injustice, as defined by California law. (*Washington Mutual Bank* v. *Superior Court* (2001) 24 Cal. 4th 906, 918, citing *Nedlloyd Lines B.V.* v. *Superior Court* (1992) 3 Cal. 4th 459, 464 (*Nedlloyd*).)

In the present case, the stronger party attacks its own choice-of-law provision, and makes no claim that plaintiff used improper means or that the contract is unconscionable. Indeed, defendants make no argument against the choice-of-law provision, except as to the arbitrability issue. They also contend that the employment agreement is not unconscionable.

California strongly favors enforcement of choice-of-law provisions (*Nedlloyd*, *supra*, 3 Cal. 4th at pp. 464–465.), and its courts have upheld application of other states' internal statutes, rules and laws to arbitration contracts. (See *Peleg* v. *Neiman Marcus Group, Inc.* (2012) 204 Cal. App. 4th 1425, 1467 (*Peleg*) [applying Texas savings clause to California statutory claims with respect to arbitration agreement between the parties]; *Guerrero* v. *Equifax Credit Info. Servs.* (C.D. Cal. Feb. 24, 2012) 2012 U.S. Dist. LEXIS 150428, 17–19 [applying South Dakota credit card statute, S.D. Codified Laws Section 54-11-10, to California parties to arbitration contract which invoked South Dakota choice-of-law provision].) The *Peleg* court's ultimate conclusion on the issue before us reads as follows: "Under California choice-of-law rules, Texas law governs whether the Agreement is enforceable because the Agreement's choice-of-law clause adopts Texas law." (*Peleg*, *supra*, at p. 1467; see also *Volt Information Sciences, Inc.* v. *Board of Trustees* (1989) 489 U.S. 468, 476–477 [affirming lower court's decision hold-

ing that parties incorporated the California rules of arbitration into their arbitration agreement when they agreed to California choice-of-law]; *Cronus* v. *Investments, Inc.* (2005) 35 Cal. 4th 376, 387 [California choice-of-law provision incorporated California rules of arbitration into the contract, including the California Arbitration Act ("CAA")]; *Mount Diablo Medical Center* v. *Health Net of California, Inc.* (2002) 101 Cal. App. 4th 711, 722 (*Mount Diablo*) [the choice-of-law provision that specifically mentions that "enforcement" of the Agreement shall be governed by California law incorporates California rules of arbitration into the contract].)

We agree with the reasoning of the court in *Peleg*, and conclude that Massachusetts law governs the enforceability of the arbitration clause in the employment agreement at issue here.

Next we examine the general nature of Harris's claim, without regard to its statutory basis, then turn to Massachusetts law for guidance on whether the claim must be arbitrated.

The gist of Harris's claim is for discriminatory wrongful termination in retaliation for her request to accommodate her sleep disorder. The applicable law is the decision of the Massachusetts Supreme Judicial Court in *Warfield*, *supra*, at page 400, where, as here, the employment agreement was governed by Massachusetts law. In *Warfield*, the Massachusetts Supreme Judicial Court ruled that a doctor who had been hired as head of anesthesiology at a hospital could proceed with a sexual discrimination lawsuit in court because she was not barred by a mandatory arbitration clause in her employment contract. (*Id.* at p. 392.) The court found the arbitration clause unenforceable because the employment agreement

did not explicitly cite gender discrimination as an issue to be decided by arbitration. The court stated, "parties seeking to provide for arbitration of statutory discrimination claims must, at minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause." (*Id.* at p. 400.)

The arbitration clause in this case is strikingly similar to the one in *Warfield*, which generally stated that "[a]ny claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration." (*Warfield*, *supra*, at p. 392.) The agreement between plaintiff and defendant reads, "You and the Firm agree that any legal disputes which may occur between you and the Firm * * * shall be resolved exclusively through final and binding arbitration." Like the hospital's contract in *Warfield*, the present agreement does not state in clear and unmistakable terms that plaintiff was waiving or limiting any statutory antidiscrimination rights. Accordingly, pursuant to *Warfield*, it is not enforceable under Massachusetts law. Likewise, plaintiff's remaining claims are "so integrally connected" to the antidiscrimination claims, under Massachusetts law, they must "be resolved in one judicial proceeding." (*Id.* at pp. 403–404.)

Defendants' contention that *Warfield* should be narrowly construed to apply only to violations of Massachusetts's antidiscrimination statutes and not to any violations of California antidiscrimination statutes is not persuasive. *Warfield's* holding is premised on the concept that Massachusetts's antidiscrimination statutes reflect the public policy against workplace discrimination. (*Warfield*, *supra*, at pp. 398–399.) Likewise, California's antidiscrimi-

nation statutes address public policies against workplace discrimination. (*Yanowitz* v. *L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1054, fn. 14; *Commodore Home Systems, Inc.* v. *Superior Court* (1982) 32 Cal. 3d 211, 220; see also *Warfield*, *supra*, at pp. 398–399 [basing its holding on the New Jersey case of *Garfinkel* v. *Morristown Obstetrics & Gynecology Assocs., P.A.* (2001) 168 N.J. 124, 130–132 [dealing with New Jersey antidiscrimination law in the workplace].) Defendant's interpretation would give defendant the benefit of applying its choice-of-law provision to any employment relationship disputes while depriving plaintiff of Massachusetts law addressing statutory rights against discrimination in the workplace. Defendants cannot have it both ways while claiming the employment agreement is not illusory.

Further, defendants were the drafters of a document which required a California employee to be bound by substantive Massachusetts law. Any ambiguity is to be construed against defendants' interest. (*Peleg*, *supra*, 204 Cal. App. 4th at p. 1445.) The Restatement Second of Contracts, section 206, comment a, provides: "Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party." (Rest.2d Contracts (1979) § 206, com.

a, p. 105; *Mastrobuono* v. *Shearson Lehman Hutton* (U.S. 1995) 514 U.S. 52, 62–63.)

The trial court correctly concluded the arbitration agreement was not enforceable under Massachusetts law as to the claims brought by plaintiff in this case.

But, the question remains whether defendant is correct that Massachusetts law is preempted because it is inconsistent with the Federal Arbitration Act's purposes under standards articulated by the United States Supreme Court in *Concepcion*, *supra*, at page 1749. In *Concepcion*, the Court determined the Federal Arbitration Act preempted California law that class-action waivers in commercial adhesion contracts were unconscionable as stated in *Discover Bank* v. *Superior Court* (2005) 36 Cal. 4th 148. *Discover Bank's* rule was preempted because it interfered with the Federal Arbitration Act's purposes and was not applicable to contracts generally. (*Concepcion*, *supra*, at p. 1749.)

Title 9 United States Code, section 2 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." (9 U.S.C. § 2.) The Federal Arbitration Act "preempts a state law that withdraws the power to enforce arbitration agreements * * *." (*Southland Corp.* v. *Keating* (1984) 465 U.S. 1, 16, fn. 10.) But, to the extent a state law is not inconsistent with the Federal Arbitration Act's policies, choice-of-law clauses are interpreted to incorporate the chosen state's laws governing the enforcement of arbitration agreements. (*Mount Diablo*, *supra*, at p. 725; see also *Peleg*, *supra*, at pp. 1466–1467 [under California choice-of-law rules, the agreement's choice-of-law

clause governs whether the agreement is enforceable under chosen state].)

The Massachusetts Supreme Judicial Court has concluded that requiring a clear and unmistakable limitation or waiver of statutory antidiscrimination rights does not interfere with the purposes of the Federal Arbitration Act. (*Warfield*, *supra*, at p. 399; accord *Joule, Inc.* v. *Simmons* (2011) 459 Mass. 88, 96.) *Warfield* noted that both federal and Massachusetts law have strong public policies favoring arbitration as a speedy and relatively inexpensive means to resolve disputes. (*Warfield*, *supra*, at pp. 398–399; accord *Joule, Inc.* v. *Simmons*, *supra*, 459 Mass. at pp. 94–95; see also *Concepcion*, *supra*, at pp. 1742, 1745.) More specifically, *Warfield* explained its rule is consistent with federal law. (*Warfield*, *supra*, at p. 399.) *Warfield* stated in this regard: "[The] rule states only that as a matter of the Commonwealth's general law of contract, a private agreement that purports to waive or limit—whether in an arbitration clause or in some other contract provision—the employee's otherwise available right to seek redress for employment discrimination through the remedial paths set out in [Massachusetts General Law chapter] 151B, must reflect that intent in unambiguous terms." (*Id.* at pp. 399–400, fn. omitted.) The Massachusetts Supreme Judicial Court further stated: "In relation to an arbitration clause, the rule continues to uphold the language and generous spirit of the [Federal Arbitration Act] and the Commonwealth's own public policy in favor of arbitration agreements: parties to an employment contract are free to agree on arbitration of statutory discrimination claims, and the presumption of arbitrability is in effect." (*Id.* at p. 400.)

Warfield further stated its holding was supported by United States Supreme Court authority in *14 Penn Plaza LLC* v. *Pyett* (2009) 556 U.S. 247, 258–259. (See *14 Penn Plaza LLC* v. *Pyett*, *supra*, 556 U.S. at pp. 258–259 ["an agreement to arbitrate statutory antidiscrimination claims" in a collective bargaining agreement must be "'explicitly stated'"]; see also *Wright* v. *Universal Maritime Service Corp.* (1998) 525 U.S. 70, 79–80 ["union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination" must be clear and unmistakable]; *Metropolitan Edison Co.* v. *NLRB* (1983) 460 U.S. 693, 708, fn. 12 [union could waive statutory right under section (a)(3) of National Labor Relations Act, 29 United States Code section 158(a)(3), to be free of antiunion discrimination but "waiver must be clear and unmistakable"].)

In addition, we note that the *Concepcion* opinion itself contains language supportive of the *Warfield* court's conclusion on the preemption issue. Footnote six of Justice Scalia's majority opinion reads as follows: "Of course states remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." (*Concepcion*, *supra*, 131 S. Ct. at p. 1750.) This language suggests the Supreme Court would approve of the requirement at issue here, that contractual waivers of statutory antidiscrimination litigation rights must be expressly stated to be enforceable.

Given these standards, *Warfield's* holding does not interfere with the fundamental attributes of arbitration as stated in *Concepcion*.

Thus, plaintiff was not required to arbitrate her antidiscrimination claims.

IV. DISPOSITION

The order denying the petition to compel arbitration is affirmed.[1] Plaintiff Hartwell Harris is awarded her costs on appeal.

CERTIFIED FOR PUBLICATION

O'NEILL, J.*

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.

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[1] In light of our resolution of the issues discussed above, we need not consider plaintiff's contention that the instant employment agreement is unenforceable because it is unconscionable.

* Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article I, section 6, of the California Constitution.

CALIFORNIA SUPERIOR COURT
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT 45

ORIGINAL FILED
MAR 29 2012

LOS ANGELES
SUPERIOR COURT

Harris v. Bingham McCutchen LLP
Case#BC474009 3.27.12

ORDER

Defendant's motion to compel plaintiff to arbitrate her claims is DENIED as the agreement on which defendant seeks to compel the arbitration states Massachusetts law applies. The case of *Warfiled* v. *Beth Israel* 454 Mass 390 @ 398 indicates that to require arbitration of statutory discrimination claims, the agreement "must at a minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause". Because the contract at issue in Warfield did not specifically contain a clause dealing with employment discrimination the motion to compel was denied. The court does not find that holding of *Warfield* "interferes with the fundamental attributes of arbitration" to be invalidated by *AT&T* v. *Concepcion* (2011) 131 S. Ct. 1740 @ 1743)

Additionally, plaintiff is not attempting to enforce the contract. Plaintiff has pled California state statutory violations for alleged improper employment practices.

Having considered the pleadings submitted by the parties and oral arguments of counsel, the Court finds the lack of opportunity to negotiate or "opt out", failure to supply plaintiff with the full terms and rules of the binding arbitration process, the take or leave it posture by defendant to be procedurally unconscionable. There is lack of mutuality since the arbitration provision only applies to plaintiff as any dispute arising out of employment or termination are certainly to be brought by plaintiff against defendant. However, the associate agreement does not contain any specific language binding defendant to arbitrate such claims. The associate agreement specifically refers to JAMS Rules which provide in Rule No.3 that "JAMS may amend these Rules without notice." Consequently, plaintiff is deprived of the right to have reasonable notice of change and consent before a modification of an employment contract is effective. Thus, it is substantively unconscionable.

IT IS SO ORDERED.

Dated: March 29, 2012

/s/ Mel Red Recana

MEL RED RECANA
Judge