S174475

Case No.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SONIC-CALABASAS A, INC.,

Plaintiff and Appellant,

vs.

FRANK MORENO,

Defendant and Respondent.

After a Decision of the Court of Appeal, Case No. B204902,
Second Appellate District, Division Four

Appeal from the Superior Court of Los Angeles County,
Case No. BS107161, Honorable Aurelio N. Munoz, Judge

PETITION FOR REVIEW

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ISSUE PRESENTED

Whether a mandatory employment arbitration agreement can be enforced prior to the conclusion of the Labor Commissioner's administrative "Berman" proceedings on an employee's statutory wage claim, so as to prevent the Labor Commissioner from hearing and deciding the claim, and thereby deprive the employee of the various remedial tools otherwise available to a prevailing employee on an employer's de novo appeal from the Labor Commissioner's order, decision or award, including one-way attorney fee shifting, the right to appointment of counsel, the right to have an interpreter provided, and the requirement that the employer post an undertaking in order to proceed with the appeal.

REASONS FOR GRANTING REVIEW

This case presents an issue of great importance to the multitude of California employees who rely on the office of the California Labor Commissioner and the Berman hearing process as the only effective means of vindicating their statutory rights to payment of wages: whether a mandatory arbitration agreement can be used to cut off pre-arbitration access to the Labor Commissioner, so that the remedial tools that flow from the Berman process will not be available to the employee if and when the dispute proceeds to arbitration.

In recent years, an increasing number of employers have required employees to sign pre-dispute arbitration agreements in order to be hired or remain employed. The body of controlling case law makes clear that these mandatory arbitration agreements are enforceable under the Federal Arbitration Act (9 U.S.C. §1, et seq.), save upon such grounds as exist for the revocation of any contract. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, this Court held that employee claims to enforce unwaivable statutory rights are arbitrable provided the arbitration agreement permits an employee to vindicate his or her statutory rights. Arbitration must be disallowed if it would "in fact compel claimants to forfeit certain substantive rights." (*Id.* at pp. 99-100.) To ensure that these substantive rights are not forfeited, and that the employee can vindicate non-waivable statutory rights in the arbitral forum, arbitration must meet certain minimum requirements, among which: (1) the arbitration agreement cannot limit the remedies that would otherwise be available to enforce the statutory right, and (2) the arbitration agreement cannot impose costs exceeding those that the employee would normally incur in a court proceeding.

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 463, this Court observed that "*Armendariz* makes clear that for public policy reasons we

will not enforce provisions contained within arbitration agreements that pose significant obstacles to the vindication of employees' statutory rights." This Court then applied the *Armendariz* principles to hold that an arbitration agreement cannot bar class-wide relief whenever class arbitration would provide a significantly more effective way of vindicating employee rights than individual arbitration.

Neither *Armendariz* nor *Gentry* specifically considered whether an arbitration agreement that purports to deny employees access to the Labor Commissioner's wage adjudication procedures "pose[s] significant obstacles to the vindication of employees' statutory rights" by depriving them of essential remedial tools that are only available through and at the conclusion of the Berman process. In this question of first impression, the Court of Appeal held that *Armendariz* and *Gentry* do not stand in the way of the enforcement of such an arbitration agreement. Rather, the Court of Appeal concluded that such an arbitration agreement can be enforced while a wage claim is pending before the Labor Commissioner, so as to require dismissal of the wage claim prior to the issuance of the Labor Commissioner's order, decision or award. Even though dismissal of the Berman claim necessarily deprives the employee of the panoply of remedial tools that are made available, under the Labor Code, to an employee who

prevails in the Berman hearing, the Court of Appeal concluded that *Armendariz* does not categorically bar the enforcement of a Berman waiver contained within a mandatory arbitration agreement.

This Court has recognized time and time again that "[t]he Berman hearing procedure is designed to provide a speedy, informal and affordable method of resolving wage claims." (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 858-859; *Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 947; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115.) Typically these are claims for relatively modest amounts. This Court has previously noted that during the period from 2000 to 2005, the average Berman hearing award was just $6,038. (*Gentry, supra,* 42 Cal.4th at p. 458.) Also, typically, the employees filing these claims lack the financial resources to hire private counsel. The Berman process was established precisely to provide such employees with a means of pursuing their claims – and a means of continuing to pursue their claims if the employer avails itself of the right to file a de novo appeal from a Labor Commissioner order, decision or award in the employee's favor, providing such employees with essential remedial tools to enforce their rights in the de novo arena. These remedial tools include one way attorney fee shifting under Labor Code §98.2(c), the right to an attorney appointed by the Labor

Commissioner to represent the claimant in the de novo proceedings pursuant to Labor Code §98.4, the right to interpreter services pursuant to Labor Code §105(b), and the requirement that the employer post an undertaking in the amount of the Labor Commissioner's award pursuant to Labor Code §98.2(b).

Without one-way fee shifting provided by Labor Code §98.2(c), the the right to recover attorney fees and costs in a claim for vacation pay would be governed by section 218.5, a two-way fee provision that prescribes that fees and costs are to be awarded to the prevailing party. Section 98.2, subdivision (c) displaces section 218.5 when an employee invokes the Berman process. Under section 98.2, subdivision (c), if an employer appeals an adverse Labor Commissioner decision, attorney fees and costs in the de novo forum can only be awarded in favor of the employee. If the employee prevails in the employer-initiated de novo proceeding by recovering any amount at all, fees and costs are awarded in the employee's favor. Conversely, if the employer prevails, the employee is shielded from any award of fees or costs.

Employees with small or medium-sized individual wage claims are likely to be dissuaded from pursuing those claims where the risk of losing the claim carries with it a commensurate risk of liability for the employer's

attorneys fees.[1] Depriving employees of the benefits of a one way fee shifting statute, and instead subjecting those employees to a two way statute is bound to discourage such employees from seeking to vindicate their statutory rights.

Like the one-way fee shifting provisions of section 98.2(c), the right to representation by an attorney appointed by the Labor Commissioner in any employer initiated de novo proceedings is designed to enable low and moderate income wage earners to vindicate their rights to payment of wages under California law. Labor Code §98.4 provides that the Labor Commissioner shall represent a claimant financially unable to afford counsel in the de novo proceedings provided by Section 98.2 if the claimant is attempting to uphold the amount awarded by the Labor Commissioner and is not objecting to any part of the Labor Commissioner's order, decision or award. Without this right to no-cost legal representation, the employee is faced with the choice of proceeding without representation against an employer that is typically represented, or somehow paying for private counsel. This latter option has little practical value, as these claimants

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[1] See, e.g., *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 375-376 [award to plaintiff of $8,878.57 for unpaid vacation wages, unlawful wage deductions, unreimbursed business expenses and interest, with defendant seeking $32,000 in attorney's fees in de novo proceedings].

typically cannot afford to pay an hourly rate to retain counsel, and the relatively small size of their individual claims make it decidedly unlikely that private counsel would take such cases on a contingency basis.

For individual employees with small to medium-sized wage claims, it is the simplicity of the Berman process, and the fact that this simplicity permits a claimant to effectively prosecute a claim before the Labor Commissioner without representation by counsel, that makes the Berman process so superior to the option of by-passing the Labor Commissioner and filing a lawsuit for the recovery of the unpaid wages. In Berman proceedings, "the pleadings are limited to a complaint and an answer ... and there is no discovery process." (*Cuadra, supra,* 17 Cal.4th at p. 858.) Labor Code §98.4 ensures that prevailing claimants will not be disadvantaged by the daunting procedural complexities that result from a forum shift away from the Labor Commissioner's office with the employer's filing of a de novo appeal. These heightened procedural complexities are likely to arise whether the claim is shifted to a judicial or an arbitral forum.[2]

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[2] The instant mandatory arbitration agreement, for example, provides: "To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motion for summary judgment, judgment on the pleadings, and

Depriving employees with statutory wage claims of a right to appointed counsel with expertise in the field of wage and hour law, and instead leaving those employees to represent themselves in complicated proceedings, necessarily "pose[s] significant obstacles to the vindication of [their] statutory rights," and inevitably will discourage these employees from attempting to vindicate those rights.

Similar obstacles to the vindication of statutory rights result from depriving employees of the right to the no-cost services of an interpreter, and instead requiring non-English speaking wage claimants (or, for that matter, any wage claimant in a case where a witness is non-English speaking) to procure and pay for needed interpreters. During both the Berman hearing process and in any de novo appeal of a Berman award, Labor Code §105(b) requires the Labor Commissioner to provide such needed interpreters. Here too, this remedial tool is particularly invaluable for low and moderate wage employees.

Lastly, there is the right under section 98.2 (b) to require the employer to post an undertaking in the amount awarded by the Labor Commissioner. This provision is designed to make the exposed security a factor in the litigation and to insure that at the end of the day, wage earners

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judgment under Code of Civil Procedure Section 631.8." (CT: 9)

do not face enforcement and collection problems. It is a remedial tool of particularly great significance during an economic downturn. Depriving employees of the right to require an undertaking increases the uncertainty that unpaid wages will ever be collected, and thus discourages employees from vindicating their statutory rights.

All of these remedial provisions, which flow from the Berman process, were enacted for the very purpose of aiding employees in enforcing their rights to payment of wages required under the various substantive provisions of the Labor Code. By denying the needed protections afforded by the Berman process, Berman waivers necessarily exact a de facto waiver of employees' statutory rights. The rationale behind *Armendariz,* when applied to the question of the enforceability of Berman waivers, should categorically prohibit the enforcement of such waivers in cases where employees seek to vindicate statutory wage claims. But the Court of Appeal minimized the value of the critical protections provided by the Berman process, and instead concluded that Berman waivers should always be enforced, absent extraordinary case-specific circumstances that would somehow establish that the particular employee challenging the Berman waiver lacks the ability to vindicate his or her rights in an arbitral forum without the remedial tools otherwise available through the Berman process.

This case-by-case approach will only ensure that no Berman waiver will ever be challenged, because the typical wage claimants who are most in need of the remedial protections provided by the Berman process are the least able to mount any sort of challenge to an employer's efforts to enforce the waiver.

The Court of Appeal decision undercuts *Armendariz* in a way that will pose a terrible harm to the overwhelming number of employees whose only real hope for the enforcement of statutory claims for unpaid wages rests with the State Labor Commissioner and the Berman process. For these reasons, this Court should grant review.

STATEMENT OF THE CASE

Frank Moreno was employed by Sonic-Calabasas A, Inc. (hereinafter "Sonic") at its automobile dealership in Los Angeles County, California. (Clerk's Transcript, hereinafter "CT": 6) On July 14, 2002, as a requirement of his employment, Moreno executed an agreement which contained an arbitration clause. (CT: 7) The clause reads in relevant part as follows:

> [B]oth the Company and I agree that any claim, dispute, and/or controversy...that either I or the Company may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum...shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in

> conformity with the procedures of the California Arbitration Act.

(CT: 9) This arbitration agreement was required of all Sonic employees, and was a condition of Moreno's employment. (CT: 18-19)

After voluntarily leaving Sonic's employ on July 15, 2006, Moreno filed a claim for unpaid wages with the Labor Commissioner; specifically, Moreno asserted that Sonic had failed to pay him all of his accrued vacation pay to which he was entitled pursuant to Labor Code §227.3. (CT: 7)

On February 2, 2007, Sonic responded to Moreno's claim by filing a petition to compel arbitration with the Los Angeles County Superior Court. (CT: 6-9). Contending that Moreno was required to arbitrate his claim pursuant to the parties' arbitration agreement, Sonic asked the court to issue an order (1) compelling Moreno to arbitrate his claim, and (2) directing him to dismiss the wage claim he had filed with the Labor Commissioner. (CT: 8) The parties subsequently submitted a joint stipulation for an order authorizing the Labor Commissioner to intervene in the proceeding and file a response to the petition; the order authorizing this intervention was signed and entered on March 9, 2007. (CT: 35-38) Moreno and the Labor Commissioner filed their response to the petition on May 15, 2007. (CT: 40-44; 69-73) Moreno's response, as well as the Commissioner's, asserted (1) that under California law Moreno was entitled to an arbitral forum in

which he could fully and effectively vindicate his statutory wage rights, (2) that he would be denied such a forum if the arbitration agreement prohibited him from initially resorting to the nonbinding administrative remedy afforded by the Labor Commissioner, (3) that properly construed in accordance with California law the agreement should be read to permit him to initially resort to the Commissioner's remedy, and (4) that, although Sonic had a right to compel arbitration, the right would not arise until after the Labor Commissioner issued a nonbinding Berman decision and either party filed a de novo appeal, at which point Sonic would be entitled to a de novo determination through arbitration. (CT: 42-43; 71-72)

The petition was heard and argued on October 16, 2007 (RT: 81-83), and on November 2, 2007 the court entered its order denying the petition as premature (CT: 375-376). Specifically, the court found that Moreno was entitled to a preliminary nonbinding hearing and decision by the Labor Commissioner, and that thereafter, if either party filed a *de novo* appeal from the Commissioner's decision, Sonic was entitled to invoke the right to arbitrate. (CT: 376) On December 31, 2007, Sonic filed its appeal from that order to the Court of Appeal. (CT: 382).

On May 29, 2009, the Court of Appeal issued a published decision, acknowledging that the right to vacation pay is an unwaivable statutory

right, and thus, a claim for vacation pay under is subject to *Armendariz.* Nonetheless, the Court of Appeal reversed the trial court's order denying Sonic's petition to compel arbitration, and directed the trial court to enter a new order granting the petition and dismissing the administrative proceedings before the Labor Commissioner. (Slip. Op., attached hereto.) Moreno did not file a petition for rehearing.

The Court of Appeal held that a pre-dispute "Berman waiver" contained in an arbitration agreement is not unenforceable under the public policy grounds enunciated in *Armendariz* and *Gentry,* notwithstanding that dismissal of a pending Berman claim necessarily deprives the employee of various remedies (including one-way attorney fee shifting under Labor Code §98.2(c), the employer undertaking required under Labor Code §98.2(b), and the right to counsel provided by the Labor Commissioner under Labor Code §98.4) that would otherwise be available to a prevailing employee in an employer's de novo appeal of the Labor Commissioner's order, decision or award.

LEGAL DISCUSSION

The Court of Appeal decision sets out four reasons for its conclusion that *Armendariz* permits the enforcement of a "Berman waiver" contained within a mandatory arbitration agreement. None of these reasons withstand

critical analysis. Each proffered reason misapplies *Armendariz* to the Berman process, and effectively eviscerates *Armendariz* as a source of protection to wage earners most in need of the Labor Commissioner's office and procedures as a vehicle for vindicating their statutory wage and hour rights.

1. The Court of Appeal Decision Weakens *Armendariz* By Holding That It Does Not Protect An Employee's "Contingent Rights"

The Court of Appeal is certainly correct when it states that the rights to one way fee shifting under Labor Code §98.2(c), to appointed counsel under Labor Code §98.4, and to an employer posted undertaking under Labor Code §98.2(b), "are only available *if and when* an employer appeals from an adverse administrative ruling." (Slip. Op. at 18.) But that is *precisely* why enforcement of a petition to compel arbitration is premature until the Berman process runs its course and the Labor Commissioner issues an order, decision or award. Enforcing a "Berman waiver" by compelling arbitration during the pendency of an employee's Berman claim, and ordering dismissal of proceedings before the Labor Commissioner, ensures the employee will not prevail in the Berman proceedings, and thus, ensures the denial of the statutory protections available to an employee who prevails before the Labor Commissioner.

The Court of Appeal reasoned: "[I]t is impossible to determine

whether Moreno will prevail at the administrative hearing. Accordingly, it is impossible to determine whether Moreno will lose any statutory protections if the Berman waiver is enforced." This reasoning reverses cause and effect. It is indeed impossible to predict whether an employee who filed a wage claim with the Labor Commissioner would have prevailed in that claim when the employer files, and the court grants a petition to compel arbitration before the Labor Commissioner has an opportunity to hear the wage claim and issue a ruling. Denial of the petition to compel arbitration until conclusion of the Berman proceedings makes predictions unnecessary, and allows the employee, if he or she prevails, to obtain the benefits of the remedial tools made available to an employee who prevails in the Berman process.

Armendariz and *Gentry* make plain that the fact that a critical remedy may be contingent on other factors has no bearing on whether that remedy provides a substantially more effective way of vindicating an unwaivable statutory right, and thus, on whether an arbitration agreement will not be enforced if it purports to waive that remedy. For example, in *Gentry* the remedy at issue was the procedure of class arbitration of statutory wage claims. Class arbitration is of course contingent on meeting the "community of interest" prerequisites for maintaining a class action.

Nonetheless, this Court had no trouble concluding that when class arbitration is a substantially more effective means of vindicating statutory rights, a class action waiver in an arbitration agreement will not be enforced. And the fact that the class action waiver is not enforced *then* allows the employees to prove that they satisfy the "community of interest" contingency. The "community of interest" contingency does not make the class action waiver enforceable, any more than the Berman prevailing party contingency should make a Berman waiver enforceable.

The contingent nature of the post-Berman rights available under Labor Code §98.2(b) and (c), and Labor Code §98.4, are wholly irrelevant to a determination of the enforceability of an arbitration provision that purports to waive those rights. By making the contingent nature of such rights a determinative factor in deciding whether to Berman waivers are enforceable, the Court of Appeal weakens the protections provided by *Armendariz* and *Gentry*.

2. The Court of Appeal Decision Weakens *Armendariz* By Holding That Because There Is No Statutory Authority Making the Berman Protections Available In Arbitrations, These Protections Are Only Available In De Novo Judicial Proceedings

The Court of Appeal reasoned: "The statutory scheme provides for de novo review only in a judicial, not arbitral, forum. The relevant statutes do not require an arbitrator to provide Moreno with the same protections

that might be available to him in a de novo review in superior court." (Slip. Op. at 19.) Here too, the Court of Appeal focused on an irrelevant consideration and failed to adhere to the teaching of *Armendariz* and *Gentry*, which hold that where an employees is compelled to arbitrate a claims for non-waivable statutory rights, the employee must be afforded certain remedial protections that enable the employee to effectively vindicate those statutory rights in the arbitral forum. Under *Armnendariz* and *Gentry,* the source of the right to these remedial protections that ensure an adequate arbitral forum is not a statute but rather the fundamental public policy of the state, which bars employers from using any contract, including an arbitration agreement, to undermine the ability of employees to effectively enforce their unwaivable statutory rights.

In *Armendariz,* the issue was the right of employees to recover attorney's fees and punitive damages where the arbitration agreement waived those remedies. There was no statute mandating the availability of those remedies in the arbitral forum. This Court held, however, that "an agreement to arbitrate a statutory claim implicitly incorporates 'the substantive and remedial provisions of the statute' so the parties to the arbitration would be able to vindicate their 'statutory cause of action in the arbitral forum.'" (*Armendariz, supra,* 24 Cal.4th at 103.)

Likewise, in *Gentry* the issue was the enforceability of a class action waiver contained within an arbitration agreement. There was no statute authorizing the use of the class action procedure in arbitration. This Court held, however, that the employees could pursue their claims through a class-wide arbitration if that procedure provided the more effective way of vindicating their unwaivable statutory rights.

It follows that public policy considerations set out in *Armendariz* and *Gentry* are the source of the right to invoke the Berman procedural remedies in arbitration, and that the absence of a statute making such remedies available in the arbitral forum is irrelevant.

3. The Court of Appeal Decision Weakens *Armendariz* By Holding That The Delay of Arbitration That Would Result From Allowing the Claim to First Be Heard and Decided by the Labor Commissioner Justifies Dismissal of the Berman Proceedings

The Court of Appeal decision is founded upon its view that the Berman process confers no worthwhile benefits to employees: "The record in this case is devoid of evidence that the Berman process will save employees time or money." (Slip. Op. at 20.) As for the monetary benefits to an employee that result from invoking the Berman process, the court's assertion is patently wrong. It is plain that the one-way attorney's fee provision at Labor Code §98.2(c), and the provision for free representation by a Labor Commissioner attorney at Labor Code §98.4, "save employees ...

money" they would otherwise risk or expend in order to vindicate their statutory rights in the absence of these remedial provisions.

As for the question of whether the Berman process "will save employees time," this is an issue that is of no relevance to the determination of whether courts should enforce Berman waivers and thereby deprive employees of the remedial tools that flow from prevailing in the Berman process. Regardless of whether "a nonbinding Berman process . . . could take months or even years to complete" (Slip. Op. at 19), or as this Court noted in *Cuadra v. Millan* (1998) 17 Cal.4th 855, 860, claims before the Labor Commissioner are typically heard within four to six months after the claim is filed, *Armendariz* and its progeny make clear that an employer cannot misuse a mandatory arbitration agreement to impose an inadequate arbitral forum that prevents employees from effectively vindicating their statutory rights. Employers cannot proclaim an unquenchable desire for expedition as a basis for justifying "terms, conditions and practices that undermine the vindication of unwaivable rights." *Little v. Auto Stiegler, Inc.* (2003) 19 Cal.4th 1064, 1079.

In *Gentry,* this Court held that employers will not be permitted to enforce class action waivers that serve to undermine the ability of employees to effectively vindicate their unwaivable rights in the arbitral

forum. Of course, the availability of class arbitration procedures necessarily imposes significant delays on the resolution of wage claims subject to arbitration. Before the parties can even proceed to the merits of the dispute, lengthy proceedings must be conducted to determine whether class arbitration is a significantly more effective way of vindicating wage claims than individual arbitrations, and also, whether the "community of interest" factors are met so as to make the claims suitable for classwide litigation. Despite these substantial delays and their impact on the asserted desire for expedition and simplicity of individual arbitrations, *Gentry* leaves no doubt that such considerations cannot be invoked by the employer to justify the imposition of a class action waiver that will deprive employees of an adequate arbitral forum in which they can effectively arbitrate their unwaivable statutory rights.

Likewise, in *Armendariz* this Court held that courts should not enforce arbitration provisions that do not allow adequate discovery or that do not provide for a written decision so as to allow judicial review. These requirements, deemed by this Court to be necessary for an employee to vindicate his or her statutory rights, may of course delay the resolution of the claim. Whatever delay is occasioned by requiring these procedures is necessary to ensure that the employee has an effective means of pursuing

the claim.

4. The Court of Appeal Decision Weakens *Armendariz* By Rejecting a Categorical Prohibition of Berman Waivers, and Instead Adopting a Case By Case Approach that Offers No Protection to Employees

The Court of Appeal rejected Moreno's argument that all Berman waivers should be unenforceable on public policy grounds, and instead opined that the critical inquiry is whether "enforcing the Berman waiver in this cased would deprive [this specific claimant] of rights that are necessary to the vindication of a statutory wage claim." (Slip. Op. at 21.) The decision suggests that such an inquiry would focus on whether the "wage claimant lacks the knowledge, skills, abilities or resources to vindicate his or her statutory rights in the arbitral forum," and that in order to defeat an employer's attempt to enforce a Berman waiver, the wage claimant must show "the inadequacy of the arbitral forum provided by his arbitration agreement." (*Id.*)

This case-by-case approach contravenes *Armendariz,* which held that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz, supra,* 24 Cal.4th at pp. 110-111.) In ruling

that courts should never enforce a provision in a mandatory arbitration agreement requiring employees with unwaivable statutory claims to pay any portion of the costs of the arbitration, this Court adopted a uniform approach which does not look to whether the particular employee has the financial resources to bear some portion of these costs. Likewise, this Court adopted an across-the-board prohibition on enforcing any provision in an arbitration agreement that limits remedies otherwise available to employees with unwaivable statutory claims.

To be sure, *Gentry* concluded that a case-by-case approach should be followed in determining the enforceability of a class action waiver contained in an arbitration agreement, with the trial court to decide whether class arbitration is the significantly more effective way of vindicating statutory rights. This case by case approach is well suited for the determination of that question because claimants seeking to pursue a class action are invariably represented by private counsel who handle such cases on a contingency basis. For that reason, the case-by-case approach adopted in *Gentry* does not have the effect of requiring unrepresented employees to litigate the issue of the enforceability of the class action waiver, and does not have the effect of subjecting any individual employee to financial ruin for the attorneys' fees incurred in such litigation. In the context of the

enforceability of class action waivers, a case-by-case approach therefore does not effectively preclude employees from challenging the enforceability of the waiver.

But in the very different context of small to moderate sized individual wage claims – the sort of wage claims that characterize the Berman process – a case-by-case approach for litigating the enforceability of a Berman waiver would effectively preclude these claimants from challenging the enforceability of the waiver. Given the relatively small amounts at issue, these claimants are typically not represented by private counsel – as a general rule, they cannot afford to pay the hourly rates charged by private counsel, and private counsel have very little interest in doing contingency work on individual cases of little worth. By holding that Berman waivers are presumptively valid, and requiring any claimant seeking to challenge such a waiver to litigate enforceability on a case-by-case basis, with the claimant bearing the burden of proving the he or she "lacks the knowledge, skills, abilities or resources to vindicate his or her statutory rights in the arbitral forum," this Court of Appeal decision places an insurmountable barrier to the vindication of the claimant's statutory rights. Ironically, the Court of Appeal decision ensures that the *only* claimants with the means to challenge a Berman waiver will be those who,

in the court's view, can vindicate their statutory rights without recourse to the Berman process; while the overwhelming number of wage claimants that cannot will be denied access to the Berman process precisely because they will be unable to mount any sort of challenge to the Berman waiver under the Court of Appeal's case-by-case approach.

The case-by-case approach adopted by the Court of Appeal functions, in this context, to block access to justice. It leaves the most vulnerable employees without access to critical protections that were built into the Berman process, and thereby contravenes *Armendariz*.

CONCLUSION

As *Armendariz* and *Gentry* make clear, this Court is fiercely protective of employees' access to justice. This Court has repeatedly issued decisions ensuring that mandatory arbitration agreements, which employees must sign as a condition of employment, are not used by employers to extract a de facto waiver of unwaivable statutory rights. The Court of Appeal decision takes an opposite approach, upholding the validity of a mandatory arbitration provision that necessarily imposes an insurmountable obstacle to low and moderate wage workers' efforts to secure their rights under California wage and hour law. Accordingly, the Court should grant review.

Respectfully submitted,

Dated: July 8, 2009

By: _____

Miles E. Locker
Rachel Folberg
Attorneys for Defendant and Respondent

CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.204)

The text of this Petition for Review consists of 5,229 words as counted by the Corel Word Perfect X4 word processing program used to generate this document.

LOCKER FOLBERG LLP

Dated: July 8, 2009

Miles E. Locker
Attorney for Defendant and Respondent

Filed 5/29/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SONIC-CALABASAS A, INC., Plaintiff and Appellant, v. FRANK MORENO, Defendant and Respondent.	B204902 (Los Angeles County Super. Ct. No. BS107161)

APPEAL from an order of the Superior Court of Los Angeles County, Aurelio N. Munoz, Judge. Reversed.

Fine, Boggs & Perkins, David J. Reese, and John P. Boggs for Plaintiff and Appellant.

Rachel Folberg and Miles E. Locker for Defendant and Respondent.

In this case we consider whether an admittedly valid employment arbitration agreement that is governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq. (FAA)) may be enforced to dismiss a former employee's administrative wage claim against his former employer for unpaid vacation pay. The former employee, respondent Frank Moreno, filed an administrative wage claim with the Labor Commissioner according to the "Berman" process provided in Labor Code section 98 et seq.[1] (Added by Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371.) Moreno's former employer, appellant Sonic-Calabasas A, Inc. (Sonic), petitioned the superior court to dismiss the Berman proceeding and compel arbitration in accordance with the parties' arbitration agreement, which Moreno conceded was a valid agreement. The superior court denied the petition as premature. We reverse the order denying Sonic's motion to compel arbitration.

Sonic contends that the Labor Commissioner's jurisdiction over this statutory wage claim was divested by the FAA. Sonic cites as controlling authority the United States Supreme Court's recent decision in *Preston v. Ferrer* (2008) ___ U.S. ___ [128 S.Ct. 978] (*Preston*), in which the Labor Commissioner's original and exclusive jurisdiction was held to be divested by the FAA with regard to a contract dispute arising under the Talent Agencies Act (§ 1700 et seq.) (TAA). Alternatively, Sonic argues that even if the minimum requirements for arbitration set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) apply to this statutory wage claim, a Berman hearing is not a prerequisite to arbitration, either under *Armendariz* or *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*).

We conclude that Moreno waived his right to a Berman proceeding and enforcement of that waiver is not barred by *Armendariz* or *Gentry*.

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

BACKGROUND

The facts are undisputed. Frank Moreno is a former employee of Sonic, which owns and operates an automobile dealership. As a condition of his employment with Sonic, Moreno signed a predispute agreement that required both parties to submit their employment disputes to "binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec. 1280 et seq. . . .)." By its terms, the arbitration agreement applied to "all disputes that may arise out of the employment context . . . that either [party] may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum[,] . . . whether based on tort, contract, statutory, or equitable law, or otherwise."

At some point, Moreno left his position with Sonic. In December 2006, Moreno filed an administrative wage claim with the Labor Commissioner for unpaid vacation pay pursuant to section 98 et seq. Moreno alleged that he was entitled to unpaid "[v]acation wages for 63 days earned 7/15/02 to 7/15/06 at the rate of $441.29 per day."

In February 2007, Sonic petitioned the superior court to compel arbitration of the wage claim and dismiss the pending administrative action. (Code Civ. Proc., § 1281.2.) The parties agreed that the arbitration agreement applied to the wage claim, but disagreed as to whether the arbitration agreement contained a waiver of the right to a Berman proceeding (Berman waiver), which would bar Moreno's administrative wage claim under section 98 et seq. Sonic argued that such a waiver was created by the provision of the arbitration agreement requiring arbitration of all employment disputes that could otherwise be brought in any judicial "or other governmental dispute resolution forum."

The Labor Commissioner intervened below on behalf of Moreno (§ 98.5), who adopted the Labor Commissioner's arguments. The Labor Commissioner argued that nothing in the arbitration agreement precluded Moreno from filing an administrative wage claim under section 98 et seq., which could then be followed by arbitration in lieu of the de novo appeal to superior court that is otherwise available under section 98.2.

The Labor Commissioner argued against bypassing the Berman process, claiming that, under *Armendariz*, it is a necessary prerequisite to arbitration. The rationale for this conclusion was that, in the event the employee prevailed in the Berman process and the employer then moved to compel arbitration, the arbitrator would be required to provide the employee with all of the protections that would otherwise be available if the employer had sought a de novo appeal in superior court under section 98.2. However, the Labor Commissioner failed to identify any statutory authority to support this conclusion.

The superior court denied the petition to compel arbitration as premature. Citing *Armendariz*, the superior court stated that, as a matter of "basic public policy . . . until there has been the preliminary non-binding hearing and decision by the Labor Commissioner, the arbitration provisions of the employment contract are unenforceable, and any petition to compel arbitration is premature and must be denied."

Sonic appealed from the order of denial. (Code Civ. Proc., § 1294, subd. (a) [order denying a motion to compel arbitration is appealable].) During the briefing period, the United States Supreme Court decided *Preston*, which held that the Labor Commissioner's original and exclusive jurisdiction was divested by the FAA with regard to a contract dispute arising under the TAA. The Labor Commissioner has not filed a respondent's brief in this appeal.

DISCUSSION

"A petition to compel arbitration is resolved in a summary proceeding with the trial court sitting as trier of fact and weighing declarations, documentary evidence and any oral testimony. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) Pursuant to Code of Civil Procedure section 1281.2, unless the petitioner has waived arbitration, grounds exist for revocation of the agreement, or a party to the arbitration agreement is also a party to a pending matter with a third party and there is a possibility of conflicting rulings on a common issue, the trial court 'shall order' the parties to arbitrate the controversy 'if it determines that an agreement to arbitrate the

controversy exists.'" (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 684.) """Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court."""" (*Id.* at p. 685.)

As there were no disputed facts below, we will exercise our independent judgment on appeal.

I. The Right to Wages and the Berman Hearing Process

In *Cuadra v. Millan* (1998) 17 Cal.4th 855, 858-859 (*Cuadra*) (disapproved on other grounds in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4), the California Supreme Court discussed the employee's right to receive earned wages and engage in the Berman hearing process as follows: "The wage rights of an employee may be provided for in the employment contract between the employee and the employer, whether oral or written, including a collective bargaining agreement. The employee's wage rights are also closely regulated by statute: The Labor Code prescribes such matters as the time and manner of paying wages, minimum wage requirements, and mandatory overtime pay; for certain industries and occupations, minimum wages and overtime pay are also prescribed by administrative regulations known as wage orders, issued by the Industrial Welfare Commission pursuant to statutory authority (see *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700-703). [Fn. omitted.]

"If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options. The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. (§§ 218, 1194.) Or the employee may seek *administrative* relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8. The latter option was added by

legislation enacted in 1976 (Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371) and is commonly known as the "Berman" hearing procedure after the name of its sponsor.[2]

"The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims. [Fn. omitted.] In brief, in a Berman proceeding the commissioner may hold a hearing on the wage claim; the pleadings are limited to a complaint and an answer; the answer may set forth the evidence that the defendant intends to rely on, and there is no discovery process; if the defendant fails to appear or answer no default is taken and the commissioner proceeds to decide the claim, but may grant a new hearing on request. (§ 98.) The commissioner must decide the claim within 15 days after the hearing. (§ 98.1.) Within 10 days after notice of the decision any party may appeal to the appropriate court, where the claim will be heard de novo; if no appeal is taken, the commissioner's decision will be deemed a judgment, final immediately and enforceable as a judgment in a civil action. (§ 98.2.) (See generally, 1 Wilcox, Cal. Employment Law (1997) §§ 5.10 to 5.19, pp. 5-16.2 to 5-52 . . . .)" (*Cuadra, supra*, 17 Cal.4th at pp. 858-859.)

II. The Right to Vacation Pay

Under California law, vacation pay constitutes wages. "The Labor Code defines 'wages' as 'all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.' (§ 200, subd. (a).) Courts have recognized that 'wages' also include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay. (E.g., *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 780; *Department of Industrial*

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2 "Other administrative remedies may also be available, e.g., actions by the commissioner to recover minimum wages and overtime pay on behalf of the employee (§ 1193.6) and to obtain statutory penalties for failure to pay wages (§§ 210, 225.5). They are not at issue in this case."

Relations v. UI Video Stores, Inc. (1997) 55 Cal.App.4th 1084, 1091.)" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.)

The right to a paid vacation is a contract right that, once vested, may not be forfeited upon termination. (§ 227.3.)[3] According to *Suastez v. Plastic Dress-Up Co.*, *supra*, 31 Cal.3d at page 784, "[t]he right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation 'vests' as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay. [Fn. omitted.]"

In the absence of an arbitration agreement, it is clear that an employee may pursue a wage claim for vacation pay in either an administrative (§ 98 et seq.) or judicial (§ 229) forum. Also, it is clear that even with an arbitration agreement, an employee may pursue a wage claim in a judicial forum, provided the agreement is not governed by the FAA. Under California law, section 229 provides that "[a]ctions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. . . ."

However, given that this action is governed by the FAA, we are faced with the following issues: (1) whether *Preston* compels the conclusion that the Labor Commissioner's jurisdiction over Moreno's statutory wage claim was divested by the FAA, and, if not, (2) whether Moreno contractually waived the statutory right to pursue

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[3] Section 227.3 provides: "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination . . . ."

his wage claim in an administrative forum (Berman waiver), and, if so, (3) whether the Berman waiver is unenforceable for public policy reasons under *Armendariz* or *Gentry*.

III. *Preston* Is Not Dispositive of This Case

A. Federal Preemption Generally

Section 2 of the FAA provides in relevant part: "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, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.)

According to *Preston,* "[s]ection 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner. *Southland Corp.* [*v. Keating*], 465 U.S. [1,] 10, 104 S.Ct. 852 [(1984)]. That national policy, we held in *Southland,* 'appli[es] in state as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.' *Id.,* at 16, 104 S.Ct. 852. The FAA's displacement of conflicting state law is 'now well-established,' *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 272, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), and has been repeatedly reaffirmed, see, *e.g., Buckeye* [*Check Cashing, Inc. v. Cardegna*], 546 U.S. [440,] 445-446, 126 S.Ct. 1204 [(2006)]; *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 684-685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Perry v. Thomas,* 482 U.S. 483, 489, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). [Fn. omitted.]" (*Preston, supra,* ___ U.S. at p. ___, 128 S.Ct. at p. 983.)

The FAA "incorporates a strong federal policy of enforcing arbitration agreements, including agreements to arbitrate statutory rights. (See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1074-1075 . . . , and cases cited therein.)" (*Armendariz, supra,* 24 Cal.4th at pp. 96-97.) In light of this strong federal policy, we are required to "'"rigorously enforce agreements to arbitrate."' (*Shearson/American*

Express, Inc. v. McMahon (1987) 482 U.S. 220, 226.) [Fn. omitted.]" (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1117-1118.)

B. Federal Preemption Under Preston

As previously mentioned, *Preston* involved a contractual dispute involving an alleged violation of the TAA. Under California law, the Labor Commissioner has original and exclusive jurisdiction over disputes arising under the TAA, including the validity of personal management contracts between artists and their managers, and their respective liabilities thereunder. (*Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 357; *Styne v. Stevens* (2001) 26 Cal.4th 42, 54 [disputes arising under the TAA "'*must* be heard by the Commissioner, and all remedies before the Commissioner *must* be exhausted before the parties can proceed to the superior court'"].)

In *Preston*, a personal manager instituted an arbitration proceeding against his client, an artist, for breach of contract, but the artist filed an administrative action with the Labor Commissioner, seeking to invalidate the entire contract based on the manager's allegedly unlicensed talent agent activities on the artist's behalf in violation of the TAA.[4] The artist also filed a judicial action for injunctive and declaratory relief. The manager moved to compel arbitration, which the superior court denied, and the manager appealed from the order of denial. The appellate court affirmed the denial of the motion to compel arbitration in a published decision (*Ferrer v. Preston* (2006) 145 Cal.App.4th 440, review denied Feb. 14, 2007), which was reversed by the United States Supreme Court while this appeal was pending.

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[4] As pointed out in *Preston*, under California law, "[c]ourts 'may void the entire contract' where talent agency services regulated by the TAA are 'inseparable from [unregulated] managerial services.' *Marathon Entertainment, Inc. v. Blasi*, [42 Cal.4th 974, 997-998], 174 P.3d 741, 744 (2008). If the contractual terms are severable, however, 'an isolated instance' of unregulated conduct 'does not automatically bar recovery for services that could lawfully be provided without a license.' *Ibid.*" (*Preston, supra*, 128 S.Ct. at p. 984, fn. 4.)

Given that the Labor Commissioner was asked to invalidate the parties' *entire* contract on a TAA-based defense, the Supreme Court concluded the artist had "urged the Labor Commissioner and California courts to override the contract's arbitration clause on a ground that *Buckeye* requires the arbitrator to decide in the first instance." (*Preston*, *supra*, 128 S.Ct. at p. 984.) The Supreme Court pointed out that according to *Buckeye*, *supra*, 546 U.S. 440, "when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court." (*Preston*, *supra*, 128 S.Ct. at p. 981.) "The dispositive issue," the Supreme Court stated in *Preston*, "is not whether the FAA preempts the TAA wholesale. [Citation.] The FAA plainly has no such destructive aim or effect. Instead, the question is simply who decides whether Preston acted as personal manager or as talent agent." (*Id.* at p. 983.)

In rejecting the artist's contentions, the Supreme Court considered whether allowing the administrative hearing to proceed would not violate the FAA because arbitration would merely be postponed until the Labor Commissioner issued a nonbinding ruling on the validity of the artist's TAA-based defense. The Supreme Court concluded that this was not a viable argument, stating: "Nor does Ferrer's [the artist's] current argument—that § 1700.44(a) merely postpones arbitration—withstand examination. Section 1700.44(a) provides for *de novo* review in Superior Court, not elsewhere.[5] Arbitration, if it ever occurred following the Labor Commissioner's decision, would likely be long delayed, in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as

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5 In a footnote, the Supreme Court described the appellate process as follows: "From Superior Court an appeal lies in the Court of Appeal. Cal. Civ. Proc. Ann. § 904.1(a) (West 2007); Cal. Rule of Court 8.100(a) (Appellate Rules) (West 2007 rev. ed.). Thereafter, the losing party may seek review in the California Supreme Court, Rule 8.500(a)(1) (Appellate Rules), perhaps followed by a petition for a writ of certiorari in this Court, 28 U.S.C. § 1257. Ferrer has not identified a single case holding that California law permits interruption of this chain of appeals to allow the arbitrator to review the Labor Commissioner's decision. See Tr. of Oral Arg. 35." (*Preston*, *supra*, 128 S.Ct. at p. 986, fn. 6.)

possible.' *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). If Ferrer prevailed in the California courts, moreover, he would no doubt argue that judicial findings of fact and conclusions of law, made after a full and fair *de novo* hearing in court, are binding on the parties and preclude the arbitrator from making any contrary rulings." (*Preston*, *supra*, 128 S.Ct. at p. 986.)

The Supreme Court pointed out that "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.' *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). See also *Allied-Bruce Terminix Cos.*, 513 U.S., at 278; *Southland Corp.*, 465 U.S., at 7, 104 S.Ct. 852. That objective would be frustrated even if Preston could compel arbitration in lieu of *de novo* Superior Court review. Requiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." (*Preston*, *supra*, 128 S.Ct. at p. 986.)

Before concluding that the Labor Commissioner's jurisdiction was preempted by the FAA, the Supreme Court emphasized that the validity and substantive rights of the arbitration agreement were not in dispute, stating: "Finally, it bears repeating that Preston's petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard. See *supra*, at 983. '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 . . . forum.' *Mitsubishi Motors Corp.*, 473 U.S., at 628, 105 S.Ct. 3346. So here, Ferrer relinquishes no substantive rights the TAA or other California law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum." (*Preston*, *supra*, 128 S.Ct. at p. 987.)

For the above reasons, the Supreme Court concluded that the Labor Commissioner's jurisdiction over the administrative action was divested by the FAA. But it expressed this conclusion in a broadly worded statement: "We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." (*Preston*, *supra*, 128 S.Ct. at p. 981.) By focusing solely on the breadth of

this holding, Sonic argues that, under *Preston*, we are compelled to conclude the FAA preempts the Labor Commissioner's jurisdiction over all wage claims filed under section 98 et seq. We do not read *Preston* so broadly.

As the Supreme Court in *Preston* explained: (1) the artist was seeking to invalidate the *entire* contract based on the personal manager's alleged violations of the TAA, which is an issue that *Buckeye* requires the arbitrator to decide in the first instance; (2) the validity and substantive rights of the *arbitration* clause were not in dispute; and (3) the only issue was whether the fee dispute should be resolved in an arbitral or administrative forum. The parties did not litigate in *Preston* whether there were any generally applicable contract defenses, such as fraud, duress, or unconscionability, which would invalidate or restrict the *arbitration* agreement. "Only 'generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate [or restrict] arbitration agreements without contravening § 2' of the FAA. (*Doctor's Associates*, *supra*, 517 U.S. at p. 687.)" (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 385.)

In this case, the parties disagree as to whether it would be unconscionable under *Armendariz* or *Gentry* to restrict the arbitration clause by invalidating the Berman waiver. Accordingly, the issues in this case are distinguishable from those that were addressed in *Preston.* We therefore disagree with Sonic's position that *Preston* is dispositive of this case.

IV. The Agreement Contained a Berman Waiver

Under California law, an arbitration agreement may not be enforced to preclude an employee from pursuing a statutory wage claim in a judicial forum under section 229. But in *Perry v. Thomas*, *supra*, 482 U.S. at page 492, the United States Supreme Court held that the FAA preempted section 229, thereby denying a judicial forum to those employees whose arbitration agreements are governed by the FAA. Two years after *Perry* was decided, the Labor Commissioner refused to consider an employee's administrative claim for overtime pay in *Baker v. Aubrey* (1989) 216 Cal.App.3d 1259,

on the ground that his statutory jurisdiction under section 98 et seq. was preempted by the FAA. The Labor Commissioner's jurisdictional ruling was upheld by the superior court in a writ of mandate proceeding, which was affirmed on appeal. The employee argued on appeal that because the right to overtime pay is statutory and cannot be waived, it is therefore not subject to arbitration. In rejecting this argument and concluding that the arbitration agreement was enforceable to preclude an administrative forum for the wage claim, the appellate court stated that "[r]esolution of Baker's overtime pay claim by arbitration does not deprive her of her substantive rights. It only changes the forum in which they will be resolved. [Citation.]" (*Id.* at p. 1268.)

In this case, the Labor Commissioner exercised jurisdiction over Moreno's wage claim on the theory that the arbitration agreement did not preclude him from engaging in the Berman process prior to arbitration. Whether the Labor Commissioner's interpretation of the arbitration agreement was correct presents solely a question of law, given that no extrinsic evidence was presented below as to the meaning of the contract. The interpretation of a contract is purely a legal issue for the court "unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, 'An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].' [Citations.]" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866, fn. omitted.)

According to the arbitration agreement, Moreno was precluded from pursuing any judicial "or other governmental dispute resolution forum," with "the *sole* exception" of "claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers Compensation Act[] and Employment Development claims." In addition, the agreement stated that Moreno was allowed to file "administrative proceedings *only* before the California Department of Fair Employment and Housing, or the U.S. Equal Opportunity Commission." (Italics added.)

As shown by the above contractual provisions, the parties contemplated that Moreno could pursue only those administrative remedies that were listed as exceptions to the agreement. Given that neither the Division of Labor Standards Enforcement nor the Labor Commissioner was listed among the stated exceptions, we conclude, as a matter of law, that Moreno was barred from pursuing an administrative wage claim under section 98 et seq. Having concluded that the arbitration agreement contained a Berman waiver, we turn to the issue of whether the waiver is unenforceable for public policy reasons under *Armendariz* or *Gentry*.

V. The Berman Waiver Is Not Unenforceable Under *Armendariz* or *Gentry*

According to *Armendariz*, "arbitration agreements that encompass *unwaivable* statutory rights must be subject to particular scrutiny." (*Armendariz*, *supra*, 24 Cal.4th at p. 100.) "[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights." (*Id.* at p. 101.)

Armendariz enumerated several minimum requirements for arbitration that apply "to unwaivable claims that are 'carefully tethered to statutory or constitutional provisions' (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 508 . . . , such as discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) or wrongful discharge in violation of public policy (i.e., claims under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167)." (*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1280 (*Giuliano*).) The Supreme Court explained in *Gentry*, *supra*, 42 Cal.4th 443, that it imposed the *Armendariz* requirements because they are "'necessary to enable an employee to vindicate . . . unwaivable rights in an arbitration forum.' (*Little* [*v. Auto Stiegler, Inc.* (2003)] 29 Cal.4th [1064,] 1077.)" (*Gentry*, *supra*, at p. 457.) It stated that even though a party who is compelled to arbitrate unwaivable rights "'does not waive them, but merely "'submits to their resolution in an arbitral, rather than a judicial, forum'" [citation], arbitration cannot be misused to accomplish a de facto waiver of these rights.' (*Little*, *supra*, 29 Cal.4th at p. 1079.)" (*Gentry*, *supra*, at p. 457.)

Gentry summarized the *Armendariz* requirements as follows: "'(1) the arbitration agreement may not limit the damages normally available under the statute (*Armendariz, supra*, 24 Cal.4th at p. 103); (2) there must be discovery "sufficient to adequately arbitrate their statutory claim" (*id.* at p. 106); (3) there must be a written arbitration decision and judicial review "'sufficient to ensure the arbitrators comply with the requirements of the statute'" (*ibid.*); and (4) the employer must "pay all types of costs that are unique to arbitration" (*id.* at p. 113).' (*Little v. Auto Stiegler, Inc.*[, *supra*,] 29 Cal.4th [at p.] 1076 . . . .)" (*Gentry, supra,* 42 Cal.4th at pp. 456-457.)

A. The Right to Vacation Pay, Once Vested, Is Unwaivable

Sonic contends that the superior court erroneously applied the *Armendariz* requirements to this case because the right to vacation pay is not an unwaivable right. We disagree.

As previously discussed, the right to a paid vacation is a contract right that, once vested, may not be forfeited upon termination. (§ 227.3; *Suastez v. Plastic Dress-Up Co., supra*, 31 Cal.3d at p. 784.) However, Sonic relies on *Giuliano, supra*, 149 Cal.App.4th 1276, as persuasive authority for its position that vacation pay, like the bonus and severance pay claims that were at issue in *Giuliano*, is not an unwaivable right that is subject to *Armendariz.*

In *Giuliano*, we held that an employee's contract claim for a "$5 million to $8 million bonus and a $500,000 severance payment" was not subject to *Armendariz.* (149 Cal.App.4th at p. 1289.) We distinguished the employee's multimillion dollar contract claim from the more modest claims that generally are involved in minimum wage and statutory overtime pay cases. (*Id.* at p. 1290; see *Gentry, supra*, 42 Cal.4th at pp. 458-459 [employees bringing overtime pay suits typically have modest means and recover modest awards].) We concluded that the plaintiff's multimillion dollar contract claims for bonus and severance pay were not subject to *Armendariz* because they were "not based on the FEHA or a fundamental public policy that is tied to a constitutional or statutory provision. [Citations.]" (*Giuliano*, at pp. 1290-1291.)

Sonic contends that "Moreno is much more akin to Mr. Giuliano than he is to a minimum- or lower-wage earner," but "would have the Court view his individual claim for more than $40,000 (when penalties are included) as [a] simple claim for a more modest sum." Sonic asserts that Moreno's claim is "large enough to provide sufficient individual incentive to vigorously pursue. There is no need to further incentivize his claim by grafting the preempted, nonbinding administrative process into his arbitration agreement by deeming it a fundamental source of unwaivable rights."

Regardless of the size of Moreno's vacation pay claim, section 227.3, which precludes the forfeiture of a vested right to vacation pay, distinguishes this case from *Giuliano*. The right to vacation pay, once vested, is statutorily protected from forfeiture as a matter of public policy. We therefore conclude that Moreno's vacation pay claim is subject to *Armendariz* because it is tied to a statutory provision.

B. Suitability of the Arbitral Forum

Sonic contends that the record fails to show that the Berman waiver is unenforceable for public policy reasons under *Armendariz* or *Gentry*. We agree.

1. *Gentry* and Class Arbitration Waivers

Gentry involved an employee's purported class action lawsuit against his employer for statutory overtime pay under sections 510 and 1194.[6] The employer moved

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[6] "Section 510 provides that nonexempt employees will be paid one and one-half their wages for hours worked in excess of eight per day and 40 per week and twice their wages for work in excess of 12 hours a day or eight hours on the seventh day of work. Section 1194 provides a private right of action to enforce violations of minimum wage and overtime laws. [Fn. omitted.] That statute states: '*Notwithstanding any agreement* to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.' (§ 1194, subd. (a), italics added.) By its terms, the rights to the legal minimum wage and legal overtime compensation conferred by the statute are unwaivable. 'Labor Code section 1194 confirms "a clear public policy . . . that is specifically directed at the

to compel individual arbitration of each claim pursuant to an employment arbitration agreement containing a class arbitration waiver. Although the superior court severed and invalidated two provisions of the arbitration agreement (cost splitting and limitation of remedies), it enforced the remainder of the agreement, including the class arbitration waiver, and required the plaintiff to submit to individual arbitration. After the appellate court denied the employee's writ of mandate petition, the Supreme Court granted review.

Among the issues decided in *Gentry* was "whether a class arbitration waiver would lead to a de facto waiver of statutory rights, or whether the ability to maintain a class action or arbitration is 'necessary to enable an employee to vindicate . . . unwaivable rights in an arbitration forum.' (*Little*, *supra*, 29 Cal.4th at p. 1077.)" (*Gentry*, *supra*, 42 Cal.4th at p. 457.) The Supreme Court concluded these questions must be decided on a case-by-case basis, as there are some circumstances when a class arbitration waiver "would lead to a de facto waiver [of statutory rights] and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." (*Ibid.*)

According to *Gentry*, "when it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the [following] factors . . . : the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration. If it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the

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enforcement of California's minimum wage and overtime laws for the benefit of workers."' (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.)" (*Gentry*, *supra*, 42 Cal.4th at p. 455.)

employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.' (*Little*, *supra*, 29 Cal.4th at p. 1077.) [Fn. omitted.]" (*Gentry*, *supra*, 42 Cal.4th at p. 463.)

2. Denial of Statutory Protections

Moreno contends that unless the Berman waiver is invalidated, he will forgo the following statutory protections afforded by sections 98.2 and 98.4 that will apply in a de novo appeal by Sonic of an adverse administrative ruling: (1) the employer must post an undertaking in the amount of the Labor Commissioner's award (§ 98.2, subd. (b)); (2) if the award is affirmed on appeal, the appellant (presumably, the employer) must pay for costs and attorney fees on appeal of the respondent (presumably, the employee) (§ 98.2, subd. (c)); and (3) if an employee is financially unable to afford counsel for the de novo review, the employee may request counsel from the Labor Commissioner, provided the employee is not objecting to any part of the Labor Commissioner's final order and is seeking to uphold the award (§ 98.4).

We must decide whether the absence of these statutory protections will significantly impair Moreno's ability to vindicate his wage rights in arbitration. According to *Gentry*, "*Armendariz* makes clear that for public policy reasons we will not enforce provisions contained within arbitration agreements that pose significant obstacles to the vindication of employees' statutory rights." (*Gentry*, *supra*, 42 Cal.4th at p. 463, fn. 7.)

Significantly, all of these statutory protections are only available *if and when* an employer appeals from an adverse administrative ruling. Obviously, it is impossible to determine whether Moreno will prevail at the administrative hearing. Accordingly, it is impossible to determine whether Moreno will lose any statutory protections if the Berman waiver is enforced. Unless enforcing the Berman waiver will pose significant obstacles to the vindication of Moreno's statutory wage rights, *Armendariz* does not require us to invalidate the waiver. At most, enforcing the Berman waiver will eliminate

the possibility of receiving statutory protections that are contingent on an administrative ruling in Moreno's favor. We are not persuaded that the loss of what are merely contingent benefits can be equated with the significant obstacle to the vindication of statutory rights that *Armendariz* sought to address.

Moreover, Moreno provided no supporting authority for his assertion that invalidating the Berman waiver will entitle him to these "essential" statutory protections in an arbitral forum. He simply asserts that "the possibility that an employee could access the Berman process remedies without prior recourse to the Labor Commissioner is an illusion. The reality is that there is no statutory authority or basis for providing these remedies to an employee unless and until the Labor Commissioner holds a hearing and issues a ruling favorable to the employee. In other words, without a hearing, there can be none of the essential remedies provided by the Berman process."

However, the statutory scheme provides for de novo review only in a judicial, not arbitral, forum. The relevant statutes do not require an arbitrator to provide Moreno with the same protections that might be available to him in a de novo review in superior court. As far as the Berman process is concerned, the statutory protections are only available, if at all, during a de novo review in superior court.

3. Delay of Arbitration

Sonic objected to postponing arbitration in order to engage in a nonbinding Berman process that could take months or even years to complete. Sonic provided evidence below of the time consumed by the Berman process in several other cases, which it summarized as follows: "(*See* Reese Reply Decl., at ¶¶ 2-4 and Exhibit I [initial claim filed 10/17/2001; hearing held 6/24/2004; decision issued 8/3/2005]; Exhibit J [claim filed 9/4/2002; hearing held 8/1/2003]; Exhibit K [claim filed 9/13/2006; hearing held 7/30/2007; decision issued 8/27/2007].)" This evidence was not refuted.

In *Preston*, the artist, like Moreno, similarly argued that he was entitled to the Labor Commissioner's adjudication of his TAA-based defense, which would then be subject to de novo review in arbitration. In rejecting this argument, the Supreme Court

pointed out that the TAA only "provides for *de novo* review in Superior Court, not elsewhere. [Fn. omitted.] Arbitration, if it ever occurred following the Labor Commissioner's decision, would likely be long delayed, in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.' *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). If [the employee] prevailed in the California courts, moreover, he would no doubt argue that judicial findings of fact and conclusions of law, made after a full and fair *de novo* hearing in court, are binding on the parties and preclude the arbitrator from making any contrary rulings." (*Preston, supra*, 128 S.Ct. at p. 986, fn. omitted.)

We conclude that the same rationale applies here. The record in this case is devoid of any evidence that the Berman process will save employees time or money. As the California Supreme Court pointed out in *Gentry*, "It is true that an employee may seek administrative relief from overtime violations with the Labor Commissioner through a 'Berman' hearing procedure pursuant to sections 98 to 98.8. (Added by Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371.) But a losing employer has a right to a trial de novo in superior court, where the ruling of the Labor Commissioner's hearing officer is entitled to no deference. (§ 98.2, subds. (b), (c); *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1116 . . . .) Thus, Berman hearings may result in no cost savings to the employee." (*Gentry, supra*, 42 Cal.4th at p. 464.) "[E]ven if [Sonic] could compel arbitration in lieu of *de novo* Superior Court review[, r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." (*Preston, supra*, 128 S.Ct. at p. 986.)

4. Public Policy

Moreno contends that Berman waivers should be invalidated as a matter of public policy because forcing employees to undergo a case-by-case determination of each waiver's validity "would completely subvert" the goal in *Gentry* of providing a substantially more effective way of vindicating statutory rights. Moreno argues that

"[i]nstead of a quick cost-free determination of their right to the remedial tools they need in order to meaningfully litigate their claims, employees would now be forced, in every case, to immediately engage in court litigation without the very tools they need in order to conduct litigation."

As we previously stated, however, Moreno has failed to persuade us that enforcing the Berman waiver in this case would deprive him of rights that are necessary to the vindication of a statutory wage claim. Moreover, the record contains no evidence that Moreno or any other wage claimant lacks the knowledge, skills, abilities, or resources to vindicate his or her statutory wage rights in an arbitral forum. Even assuming the arbitral process is more difficult to navigate than the Berman process, there is nothing in this record to indicate that enforcing a Berman waiver will significantly impair the claimant's ability to vindicate his or her statutory rights. In short, Moreno has failed to demonstrate either the inadequacy of the arbitral forum provided by his arbitration agreement or the existence of a factual basis to invalidate all Berman waivers as against public policy.

DISPOSITION

The order denying the petition is reversed with directions to enter a new order granting the petition and dismissing the administrative proceedings. Sonic is entitled to its costs on appeal.

CERTIFIED FOR PUBLICATION

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.

PROOF OF SERVICE AND DELIVERY

I, the undersigned, hereby certify that I am a citizen of the United States, over the age of 18 years, and am not a party to the within action. I am employed in the City and County of San Francisco, California, and my business address is 235 Montgomery Street, Suite 1010, San Francisco, California 94104. I am readily familiar with my business practice for collection and processing of correspondence for mailing with the United States Postal Service. On the date listed below, following ordinary business practice, I served the following document(s):

PETITION FOR REVIEW

on the party(ies) in this action, through his/her/their attorneys of record, by placing true and correct copies thereof in sealed envelope(s), addressed as shown on the attached Service List for service as designated below:

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(X) (By First Class Mail) I placed, on the date shown below, at my place of business, a true copy thereof, enclosed in a sealed envelope, with postage fully pre-paid, for collection and mailing with the United States Postal Service where it would be deposited with the United States Postal Service that same day in the ordinary course of business, addressed to those listed on the attached Service List.

( ) (By Personal Service) Following ordinary business practice, I caused each such envelope, with courier charges prepaid, to be delivered to a courier employed by Western Messenger Attorney Services, who personally delivered each such envelope to the offices of each addressee.

( ) (By U.S. Postal Express Mail) Following ordinary business practice, I caused each such envelope, with Express Mail postage thereon fully prepaid, to be placed in the United States Express Mail depository, at San Francisco, California, for next day delivery.

( ) (By Federal Express) Following ordinary business practice, I caused each such envelope, with shipping charges fully prepaid, to be delivered to a Federal Express agent at Federal Express Corporation at San Francisco, California, for next business day delivery.

( ) (By Facsimile) I caused each such document(s) to be sent by facsimile to all counsel for same day delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Proof of Service was executed on July 8, 2009 at San Francisco, California.

MARY WORKMAN