S174475

IN THE SUPREME COURT OF CALIFORNIA

SONIC–CALABASAS A, INC.,

Plaintiff and Appellant,

v.

FRANK MORENO,

Defendant and Respondent



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

*Appeal from an Order of the Superior Court of California, County of Los Angeles*
*Case No. BS107161, HON. AURELIO N. MUNOZ, Judge*

# ANSWER TO PETITION FOR REVIEW

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## INTRODUCTION

Since August 2000, when the California Supreme Court issued its landmark decision in Armendariz, it has been settled law in this state that where a pre-dispute agreement to submit disputes between an employee and his or her employer to binding arbitration is entered into as a condition of employment, certain minimum standards of fairness must apply in the arbitration proceedings to ensure that unwaivable statutory rights are protected. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83.) Importantly, the Supreme Court in Armendariz did not seek to preclude arbitration of such disputes, but rather imposed minimum standards of fairness for the arbitration proceeding itself, trusting to the process to protect key rights. The Supreme Court found this important enough to restate in no uncertain terms only a few years later: "The object of the Armendariz requirements, however, is not to compel the substitution of adjudication for arbitration, but rather to ensure minimum standards of fairness in arbitration so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum." (Little v. Auto Stiegler, Inc. ((2003) 29 Cal.4th 1064, 1080.)

To ensure this result, the California Supreme Court has made it clear that "when parties agree to arbitrate statutory claims, they also implicitly agree, absent express language to the contrary, to such procedures as are necessary to vindicate that claim." (Armendariz, *supra,* 24 Cal.4th at 105–6 [holding that agreement to arbitrate FEHA claims includes implied consent to "sufficient discovery as a means of vindicating"

civil rights claims]; *see also* Little, *supra,* 29 Cal.4th at 1084–85 [implied agreement by employer to cover costs unique to arbitration, where written agreement silent on cost allocation].) In some cases, the Supreme Court has even authorized the excision of specific contractual language in order to ensure that nonwaivable public rights can be effectively vindicated in arbitration. (*See* Gentry v. Circuit City Stores, Inc. (2007) 42 Cal.4th 443, 466 [remand contemplating invalidation of class action waiver language from agreement, with parties proceeding to class arbitration despite agreement to individual actions only].) But as it had confirmed years before in Little, the choice for the lower court was not ***whether*** the parties would arbitrate their dispute, but rather ***how*** the arbitration would proceed: "Of course, . . . the trial court would be comparing class arbitration with the individual arbitration methods the employer offers, rather than comparing individual with classwide litigation." (Gentry, *supra,* 42 Cal.4th at 464.)

This approach is required under Federal Law, with the preemptive effect of the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) precluding states from undercutting the enforceability of arbitration agreements. (*See, e.g.*. Preston v. Ferrer (2008) 552 U.S. ___, 128 S.Ct. 978, 983; Southland Corp. v. Keating (1984) 465 U.S. 1; Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 272 [FAA displacement of conflicting state law well-established].)

In this case, Respondent Moreno entered into an agreement to submit disputes with his employer, Sonic–Calabasas A, Inc., to binding arbitration. Indeed, the operative language of the agreement was substantially the same as that which was before this Court in Little, *supra.* Neither Respondent Moreno nor the California Labor Commissioner (who had intervened on Moreno's behalf at the Superior Court, but later decided

not to file a brief on appeal) have challenged any specific provision of the arbitration agreement as unconscionable. Rather, they asked the lower courts—first the Superior Court, and then the Court of Appeal—to defer arbitration until after the Labor Commissioner's nonbinding administrative adjudication can take place. (*See, e.g.,* Respondent's Court of Appeal Brief, at p. 1.) While the Superior Court agreed with Respondent and the Labor Commissioner and denied the Petition to Compel Arbitration as premature, the Court of Appeal reversed, holding that the parties' agreement to arbitrate expressly included language requiring wage claims to proceed in binding arbitration and not under the administrative jurisdiction of the Labor Commissioner. (*See* Sonic–Calabasas A, Inc. v. Moreno (May 29, 2009) 174 Cal.App.4th 546, 561.) In doing so, the Court of Appeal specifically rejected Respondent's arguments that anything in Armendariz and Gentry could displace agreed-upon arbitration and require the parties to proceed first to a non-binding, non-arbitral administrative agency prior to arbitration of their dispute.

In his Petition to this Court to review and overturn the Court of Appeal decision below, Respondent suggests that by refusing to permit the state agency to exercise its administrative jurisdiction over the parties' claim, the Court of Appeal decision weakens the decisions in Armendariz and Gentry and their protection of unwaivable statutory public rights, such as the right to vacation wages that is at issue between Respondent and his former employer. But the court's extensive reliance on Armendariz and Gentry in reaching the result below confirms the reverence for and fidelity to those decisions by the Court of Appeal. After all, the Court of Appeal did below what this Court did in Armendariz and Gentry: it evaluated whether the employee's fundamental public rights would be trampled by

enforcement of the arbitration agreement and remanded the case with instructions to send the dispute to arbitration with procedures that the court had concluded would be adequate to protect Respondent's fundamental rights.

To the extent that the Court of Appeal decision may weaken key precedential decisions, Appellant submits that it is the U.S. Supreme Court decision in Preston to which the Court of Appeal failed to pay sufficient attention. In Preston, the U.S. Supreme Court referred to the supremacy of the Federal Arbitration Act and held, in no uncertain terms, 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,* 552 U.S. at ___, 128 S.Ct. at 981 [*emphasis added*].) And if any aspect of the Armendariz and Gentry holdings are weakened by the Court of Appeal decision below, it is the insistence by the California Supreme Court in those decisions that the arbitration proceedings go forward, even if adapted to ensure that the appropriate protections are included in the arbitration procedures, that the Court of Appeal failed to properly honor. The Court of Appeal certainly did not shrink from the need to guard against *de facto* waiver of key rights.

While recognizing the breadth of the Preston decision, the Court of Appeal refused to endorse Preston's blanket rejection of administrative jurisdiction over a claim to which an arbitration agreement applies. Instead, the court attempted to distinguish Preston as a case in which there had been no effort made to show that the arbitration provisions were unenforceable because of a generally applicable contract defense, such as fraud, duress, or unconscionability. But this analysis ignores the

undeniable similarity in the results sought in both cases by the parties seeking to avoid arbitration. In both Preston and the case here for which review has been requested, the courts were asked whether administrative jurisdiction could survive preemption. The Preston court held as a matter of law that it could not. The Court of Appeal in this case was not willing to echo that definitive holding. Under the clear language of Preston and its progenitors, such as Perry v. Thomas ((1987) 482 U.S. 483, 498 [California statute purporting to preserve judicial jurisdiction notwithstanding arbitration preempted]), the question of whether the parties could be required to proceed before the Labor Commissioner should have been answered with a simple "No."

To the extent that the Court of Appeal properly identified a distinction between the arguments presented in this case and the allegations in Preston, it impermissibly evaluated Respondent's proposed "fundamental unwaivable rights" as a question of ***forum***, rather than ***form***. The Court of Appeal should not have cast its analysis in Part IV of the published opinion below as a question of whether the involvement of the Labor Commissioner was needed to ensure that fundamental rights were vindicated, but as a question of whether those procedural features argued by Respondent to be fundamental must be included by implication in the arbitration proceeding. That was the analysis of Armendariz and Little, which found discovery and fee-allocation rights to be included by implication in the parties' arbitration agreements. And it was the analysis in Gentry, where the Court reshaped the arbitration procedures rather than scrap arbitration altogether.

Should this Court grant review of the Court of Appeal decision below, it should do so only for the purpose of reiterating the definitive language of the U.S. Supreme Court that state entities are not

permitted to exert administrative jurisdiction over the adjudication of claims to which an arbitration agreement under the FAA applies. This Court should expressly adopt the key holding of Preston and confirm that FAA preemption requires that the claim proceed to binding arbitration. And it should confirm the conclusion of the Court of Appeal below that the purported fundamental, unwaivable public rights that Respondent believes would be trampled were the case to proceed to arbitration are not, in fact, as fundamental as Respondent would have the Court believe, and—even if they were so critical to the vindication of his claims—they should be grafted in as part of the arbitration procedures rather than serve as an excuse to carve out jurisdiction for the Labor Commissioner in direct contravention of the U.S. Supreme Court decision in Preston v. Ferrer.

## ISSUE PRESENTED

Respondent asks the Court to review the decision below to determine whether the California Labor Commissioner should be permitted to exert jurisdiction over a claim for unpaid vacation wages notwithstanding the existence and applicability of an agreement to submit the dispute to binding arbitration under the Federal Arbitration Act, to avoid depriving Respondent of procedural remedial tools that might become available to Respondent if he were first permitted to bring his claim before the Labor Commissioner. This issue was decided by the Court of Appeal, and there is no basis for Supreme Court review thereof. Respondent has not identified any conflicting decisions for which a Supreme Court decision is needed to secure uniformity across the state. And Respondent has not described an important-but-unsettled issue of law for which Supreme Court guidance is greatly needed. As such, the

Supreme Court should reject Respondent's Petition for Review of the Court of Appeal decision.

Should the Supreme Court decide otherwise and grant review of the decision below, then it should do so to correct the misapplication of established law by the Court of Appeal by answering the following issue in the affirmative:

> Under the Federal Arbitration Act and its preemption of state laws purporting to vest jurisdiction in a state judicial or administrative body of disputes subject to binding arbitration under the FAA, must an evaluation of purportedly unwaivable, fundamental statutory rights focus on whether the arbitration must include protections for such rights, as opposed to whether the state may exercise administrative jurisdiction over the claim notwithstanding the agreement to submit to binding arbitration?

## LEGAL DISCUSSION

### I. Review Of The Decision Below As Requested By Respondent Is Not Justified Under Rule 8.500(B) Of The California Rules Of Court, As A Supreme Court Decisions Is Not Required To Secure Uniformity Of Decision Or To Settle An Important Unresolved Question Of Law.

Rule 8.500(b) enumerates several situations where Supreme Court review of a lower-court decision may be appropriate. Subsection (b)(1) is the only one potentially implicated here. It provides that review may be ordered "(1) When necessary to secure uniformity of decision or to settle an important question of law." Neither of these disjunctive criteria are met in this case.

Respondent's Petition for Review makes no effort to suggest that there is a lack of uniformity among lower courts on the issues addressed in the Court of Appeal decision. Indeed, it was a lack of any Court of Appeal authority on the issue that prompted the Labor

Commissioner to intervene on Respondent's behalf at the Superior Court, opposing the Petition to Compel Arbitration the denial of which led to this appeal. As such, the only basis upon which Respondent would have this Court exercise is discretionary jurisdiction is the suggestion that there is an important-but-unresolved question of law involved.

But there is no such issue that requires this Court's attention on these facts. The Court of Appeal made a factual evaluation of the parties arbitration agreement and concluded, as a matter of law, that it reflected an agreement by the parties to forego administrative adjudication of claims before the Labor Commissioner. (*See* Sonic–Calabasas A, Inc. v. Moreno, *supra,* 174 Cal.App.4th at 561.) And it went on to determine that under the facts presented, the absence of certain statutory rights alleged by Respondent to be fundamental and unwaivable would not significantly impair Respondent's ability to vindicate his wage rights in arbitration. (Id., 174 Cal.App.4th at 565–66.)

Just because Respondent disagrees with the result at which the Court of Appeal arrived does not make an issue addressed below an unsettled important question of law. The Court of Appeal expressly rejected many of Respondent's arguments as unsupported in the record. For example, while Respondent speculated at the Court of Appeal and in the Petition for Review (*e.g.,* at p. 4) that wage claimants lack the knowledge, skills, abilities, or resources to vindicate statutory wage rights in an arbitral forum, the Court of Appeal found that Respondent had "failed to persuade" the court that sending his claim to arbitration would deprive him of rights necessary to vindicate his wage claim, much less support the premise raised in the Petition for Review that an entire class of wage claimants may be at risk of a *de facto* waiver of their wage rights if they can

be compelled to arbitrate without the option of first seeking an administrative adjudication of their wage claims:

> 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.

(*See* Sonic–Calabasas A, Inc., *supra,* 174 Cal.App.4th at 567.)

Despite the absence of a record upon which to make an individual showing—much less a general showing applicable to all wage claimants—Respondent seeks review by the Supreme Court in an effort to obtain a blanket rule precluding Berman waivers as a matter of law and policy. Because this result cannot be justified by the facts in this records or squared with the Federal Arbitration Act and its preemption of state administrative and judicial jurisdiction over claims subject to binding arbitration, these is no basis upon which to provide Respondent with the decision he seeks, so there is no basis upon which to grant the review he requests.

## II. Respondent's Concerns That The Court Of Appeal Decision Weakens Armendariz And Its Protection Of Employee Rights Reflect A Fundamental Failure To Appreciate The Federal Arbitration Act And California Supreme Court Authority Ensuring That Arbitration Agreements Are Enforced And Endowed With Procedural Requirements Necessary To Vindicate Important Rights.

The incongruity of Respondent's reliance on Supreme Court decisions in which the Court enforced arbitration agreements to support his argument that the arbitration agreement in this case should not be enforced

will not be lost on this Court. In both Armendariz and Gentry, the Supreme Court concluded that the statutory claims at issue should be sent to binding arbitration consistent with the parties' agreements. The Court did not displace arbitration because of articulated concerns that fundamental rights could not be vindicated. Rather, it incorporated procedures (*i.e.,* discovery provisions in Armendariz) or eliminated restrictions (*i.e.,* class arbitration waiver in Gentry) as necessary to ensure that all unwaivable statutory rights could be vindicated. In so doing, the Court maintained fidelity with federal authority precluding states from interfering with enforcement of arbitration agreements except on bases applicable to contracts generally.

This fidelity is required. Preston v. Ferrer confirmed the supremacy of the Federal Arbitration Act and the inability of states to carve out exclusive administrative jurisdiction over claims subject to binding arbitration agreements. And in doing so, the U.S. Supreme Court reiterated again that the preemption of state administrative jurisdiction did not fundamentally alter the underlying rights, only the forum in which they would be addressed. Rejecting fears by the party seeking to avoid arbitration that the underlying statutory protections afforded artists in dealing with talent agents would be lost in arbitration, the Court was very clear: "The FAA plainly has no such destructive aim or effect. Instead, the question is simply who decides whether Preston acted as personal manager or talent agent." (Preston, *supra,* 522 U.S. at ___, 128 S.Ct. at 983; *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985) 473 U.S. 614, 628 [substantive rights not foregone in arbitration, only forum changes].)

The Court of Appeal found nothing in the record that would suggest that Respondent or other wage claimants would be unable to

vindicate their statutory wage rights in binding arbitration. Both federal and state decisions require the inclusion into arbitration proceedings of all necessary procedural features (*e.g.,* discovery, fee-shifting, neutrality of decision-maker, *etc.*) without which substantive rights would be lost. They do not authorize or permit arbitration itself to be delayed or foregone in order to first require parties to the arbitration agreement to submit first to the jurisdiction of the Labor Commissioner.

## III. To The Extent That The Court Of Appeal Erred In Its Published Decision, It Did So By Failing To Unequivocally Confirm The Preemptive Effect Of The Federal Arbitration Act Over State Laws That Would Condition Arbitration Enforcement On First Submitting To State Administrative Jurisdiction For A Nonbinding Adjudication Of The Claim.

As noted above, Respondent has failed to articulate any valid basis upon which this Court should grant the review or the relief he seeks. He has not explained how there is any significant unsettled issue of law that is presented. And the absence of record evidence to support the relief he seeks both for himself and for anyone else who would seek to avoid his or her arbitration to submit to binding arbitration by attempting to invoke the administrative jurisdiction of the Labor Commissioner shows why the Supreme Court will be unable to grant Respondent the relief which he now seeks.

If the Court of Appeal erred, it was in insufficiently underscoring the federal and state policies favoring the enforcement of arbitration agreements. Rather than distinguishing the Preston decision as procedurally distinct, the Court of Appeal should have embraced the holding of the U.S. Supreme Court and confirmed that there is no room under the FAA for the state Labor Commissioner to maintain jurisdiction over Respondent's wage claim. It should then have gone on to address any

concerns that the arbitral forum might be unable to effectively vindicate the rights of Respondent or other employees with wage claims, ensuring as the California Supreme Court in Armendariz, Little, and Gentry did that procedures necessary to the vindication of statutory rights were included, and limitations that might preclude effective vindication of rights were carved out. This is the only issue which the Supreme Court should consider reviewing in this case.

## CONCLUSION

Respondent properly notes that the California Supreme Court is fiercely protective of employee rights and access to justice. But Respondent's myopic view of arbitration as unable to provide a forum for the effective vindication of these rights is outdated. As the U.S. Supreme Court wrote more than twenty years ago, "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitrable tribunals inhibited the development of arbitration as an alternative means of dispute resolution." (Mitsubishi Motors, *supra,* 473 U.S. at 626–27.)

Plaintiff was unsuccessful in articulating to the Court of Appeal any fundamental right that Respondent or others would miss out on in arbitration. But even if the procedural features of the administrative process could fairly be described as sufficiently fundamental such that their absence might risk a *de facto* inability for Respondent to obtain a fair adjudication of his right to vacation wages, the only approach permitted under the Federal Arbitration Act and the pro-arbitration Armendariz and Gentry decisions is to reaffirm the enforcement of the arbitration agreement, albeit with appropriate procedural assurances that all

fundamental rights would be protected within the arbitration proceeding. This is the sole issue on which the Court should consider granting review. There is no call for permitting the state agency to exercise jurisdiction over the claim, and no reason to grant review on the issue raised by Respondent.

Respectfully submitted,

July 28, 2009
Date

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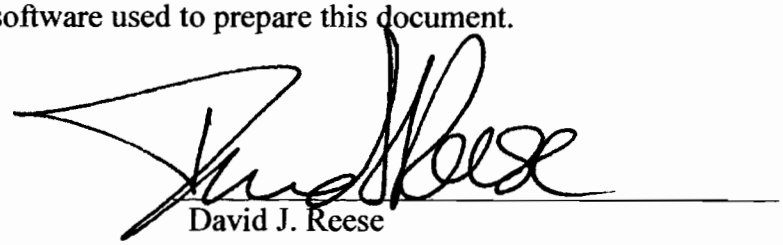
## CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d), undersigned counsel certifies that the text of this Answer consists of 3513 words, as calculated by the word count feature of the Microsoft Word 2003 word processing software used to prepare this document.



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## PROOF OF SERVICE

I, David J. Reese, hereby declare and state:

1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 330 Golden Shore, Suite 410, Long Beach, California, and I am not a party to the cause, and I am over the age of eighteen years.

2. On the date hereof, I caused to be served the following document:

**ANSWER TO PETITION FOR REVIEW**

on the interested parties in this action by addressing true copies thereof as follows:

- **MILES E. LOCKER, ESQ.**
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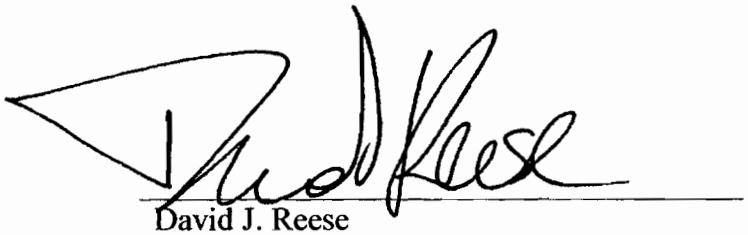
- **CLERK OF THE SUPERIOR COURT**
  Los Angeles County Superior Court
  111 North Hill Street
  Los Angeles, California 90012

**BY FIRST-CLASS MAIL.** I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.

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

4. Executed at Long Beach, California, on Tuesday, July 28, 2009.



David J. Reese