Case No. S174475

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

OPENING BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY OF ARGUMENT

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."

In this case, we are confronted with a mandatory arbitration agreement that purports to waive the employee's right to have wage claims heard by the State Labor Commissioner. The process whereby the Labor Commissioner holds wage adjudication hearings - the Berman hearing procedure (Labor Code §98 et seq.) - "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.[1]

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 remedies and remedial tools to enforce their rights in the de novo arena.

These remedies and 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

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[1] According to former Division of Labor Standards Enforcment ("DLSE") chief counsels Anne P. Stevason and H. Thomas Cadell, Jr., over 90% of the wage claimants in Berman *de novo* proceedings filed by employers qualify for legal representation by DLSE under Labor Code § 98.4, under which such representation is provided to "a claimant financially unable to afford counsel." (Stevason and Cadell, Amicus Letter In Support of Petition for Review, filed August 7, 2009, p. 5.)

an undertaking in the amount of the Labor Commissioner's award pursuant to Labor Code § 98.2(b). Enforcement of a "Berman waiver" contained in a mandatory arbitration agreement necessarily deprives the employee of these essential remedies and remedial tools.

Applying the principles set out in *Armendariz,* it is our contention that a Berman waiver cannot ever be enforced to defeat an employee's right to have a statutory wage claim heard and decided by the Labor Commissioner. First, the Berman waiver operates to deprive wage claimants of substantive remedies that would otherwise be available to enable the employee to enforce statutory rights. Enforcement of the Berman waiver results in a forfeiture of the remedy of one way fee shifting provided by Labor Code § 98.2(c), and the remedy of a required employer undertaking under Labor Code § 98.2(b). Enforcement of the Berman waiver also forces the employee to bear the cost of obtaining counsel that is typically provided at no cost pursuant to Labor Code § 94, not to mention the cost of an interpreter that is otherwise provided at no cost under Labor Code § 105(b). The Berman waiver thus does exactly what *Armendariz* prohibits: 1) it limits the remedies that would otherwise be available to enforce employees' statutory rights, and (2) it imposes costs exceeding those that the employee would normally incur. For these reasons alone, the

Berman waiver is unenforceable.

Moreover, the deprivation of these remedies and remedial tools will almost invariably pose significant obstacles to the vindication of employees' statutory rights. The overwhelming majority of wage claimants are low or moderate income workers with small to medium sized wage claims. They cannot afford private counsel, and the small amounts at issue will discourage private counsel from providing representation on a contingency basis. Many of these wage claimants will weigh the risks of proceeding without one-way fee shifting, and will conclude that the risk of exposure for the employer's attorney's fees militates against proceeding with their small wage claims.[2] Others will press forward, representing themselves against employers well represented by counsel in arbitration proceedings that are potentially every bit as complex as court proceedings.[3]

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[2] Absent one-way fee shifting pursuant to Labor Code § 98.2(c), employees with statutory vacation pay claims under Labor Code § 227.3, meal and rest period premium pay claims under section 226.7, and claims for reimbursement of unlawful wage deductions under sections 221-224 will be subject to the bilateral attorney's fee provisions of Labor Code § 218.5.

[3] For example, the arbitration agreement at issue in this proceeding provides for arbitral procedures that would pose an insurmountable challenge to virtually any unrepresented wage claimant. The agreement states: "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 judgment under CCP § 631.8." (Clerk's Transcript, hereinafter "CT":9)

It is to deny reality to suggest that all that is going on here is the substitution of one adjudicatory forum for another. The Berman waiver carries with it a deprivation of remedies and remedial tools that are essential for the vindication of employees' statutory rights in either the judicial and the arbitral forum. Our quarrel here is not with arbitration as an institution, but rather with provisions that happen to be contained within a mandatory, pre-dispute arbitration agreement that have the effect (an effect that one must suspect was intended by the drafter of the agreement) of extracting a *de facto* waiver of employees' unwaivable statutory rights, by depriving employees of essential remedies and remedial tools for the vindication of those rights. To ensure that arbitration is not used a vehicle for depriving employees of unwaivable statutory rights, it is necessary to categorically deny enforcement of Berman waivers. In short, arbitration of any statutory wage claim should not be enforced until the completion of the Labor Commissioner's administrative hearing process.

In the proceedings below, the Court of Appeal correctly ruled that *Preston v. Ferrer* is not dispositive, and should not be construed to mandate arbitration of unwaivable statutory claims in situations where the arbitration agreement contains provisions that violate public policy, and where the enforcement of those provisions would deprive employees of otherwise

available remedies or impair the employees' ability to vindicate their unwaivable statutory rights. *Preston* did not raise or address any sort of *Armendariz* public policy defense to the enforcement of an arbitration agreement. It merely and unsurprisingly held that Federal Arbitration Act ("FAA") preemption applies equally to judicial and administrative proceedings. (*Preston, supra,* 128 S.Ct. at p. 987.) Section 2 of the FAA makes clear that states have the power to invalidate arbitration contracts "upon such grounds as exist at law or in equity for the revocation of any contract" and that is the basis upon which this Court has denied enforcement of provisions in arbitration agreements that violate public policy or that are unconscionable. Construing *Preston* to preempt the Labor Commissioner from exercising jurisdiction over a wage claim without regard to whether the arbitration agreement runs afoul of *Armendariz* would be tantamount to reading Section 2 out of the FAA. There is nothing whatsoever in *Preston* that suggests such a result.

FACTUAL AND PROCEDURAL BACKGROUND

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

In proceedings before the Court of Appeal, Sonic argued that any "attempt to assert the jurisdiction of the Labor Commissioner runs afoul of the Federal Arbitration Act and its preemption of state law requirements that would restrict (or delay) the enforcement of arbitration agreements." (Appellant's Opening Brief, hereinafter "AOB," p. 2) Sonic also argued that the recent U.S. Supreme Court decision in *Preston v. Ferrer, supra,* 128 S.Ct. 978, mandates reversal of the trial court's order denying the petition to compel arbitration. (AOB, p. 2)

On May 29, 2009, the Court of Appeal issued a published decision, holding that *Preston* does not compel the conclusion that the Labor Commissioner's jurisdiction over Moreno's statutory wage claim was preempted by the Federal Arbitration Act. The Court of Appeal also held that the right to vacation pay is an unwaivable statutory right founded upon Labor Code §227.3, and thus, a claim for vacation pay is subject to *Armendariz.* Nonetheless, the Court held that a pre-dispute "Berman

waiver" contained in an arbitration agreement is not necessarily unenforceable under the public policy grounds enunciated in *Armendariz,* and that such a Berman waiver is enforceable absent specific evidence of factors unique to the wage claimant or the arbitration agreement that render the arbitral forum inadequate for vindicating the wage claimant's non-waivable statutory rights. The Court concluded that the denial of the various remedies and remedial protections that flow from the Berman process – one way fee shifting under Labor Code §98.2(c), the right to appointed counsel under Labor Code §98.4, the employer undertaking required under Labor Code §98.2(b), and the right to interpreter services under Labor Code §105(b) – do not warrant a categorical rule denying enforcement of Berman waivers covering statutory wage claims, and that such waivers do not necessarily pose significant obstacles to the vindication of employees' statutory rights.

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.

Moreno filed a timely petition for review. On September 9, 2009, review was granted.

DISCUSSION

I. Mandatory Employment Arbitration Agreements Cannot Be Enforced Prior to the Labor Commissioner's Conclusion of Administrative Proceedings on an Employee's Pending Statutory Wage Claim

The Court of Appeal decision sets out four reasons for its conclusion that *Armendariz* does not require the categorical denial of 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.

A. The Court of Appeal Decision Subverts *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.*

B. The Court of Appeal Decision Subverts *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.

C. The Court of Appeal Decision Subverts *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. The possibility that arbitration may result in more expeditious dispute resolution cannot justify "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.

D. The Court of Appeal Decision Subverts *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*.

The Court of Appeal's failure to adopt a categorical rule precluding Berman waivers in the context of unwaivable statutory age claims cannot be reconciled with this Court's categorical rule that "an arbitration agreement may not limit statutorily imposed remedies such as punitive

damages and attorney fees" (*Armendariz, supra,* 24 Cal.4th at p. 103), and the categorical rule that a mandatory employment arbitration agreement "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,* at p. 110.) This Court deliberately decided not to require a particularized inquiry of each employee's ability to pay a portion of the cost of an arbitrator in order to excuse the employee from bearing that expense. In instead adopting a categorical rule prohibiting such costs, this Court observed: "This rule will ensure that employees bringing FEHA claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer." (*Armendariz, supra,* at p. 111.)

The same considerations apply here. The Berman process offers wage claimants a cost-free method of vindicating their statutory wage claims – both during the proceedings before the Labor Commissioner and, if the employee prevails in those proceedings, during the employer's *de novo* appeal from the Labor Commissioner's decision. Anything other than a categorical rule prohibiting Berman waivers, and denying enforcement of a Berman waiver contained in a mandatory arbitration agreement, will necessarily deter employees from bringing statutory wage claims, by

depriving those employees of otherwise available remedies and subjecting those employees to costs that are not present in the Berman and post-Berman hearing *de novo* review process.

E. The Rights Lost By Wage Claimants As the Result of a Berman Waiver Cannot Be Restored On an Ad Hoc Basis By Arbitrators

Sonic will no doubt contend, as it has in the proceedings below, that arbitrators can somehow provide wage claimants with all "necessary procedural features" to ensure that they can vindicate their unwaivable statutory rights. This contention ignores the fact that the remedies and remedial tools at issue herein – the right to one way fee shifting under Labor Code § 98.2(c), the right to appointed counsel under Labor Code § 98.4, the right to free interpreter services under Labor Code § 105(b), and the right to require the employer to post an undertaking under Labor Code § 98.2(b) – cannot be imposed, as a matter of law, unless the Labor Commissioner first holds a Berman hearing and issues a decision in the claimant's favor.

Any attempt to impose these remedies in an arbitratal forum, other than an arbitration resulting from a *de novo* appeal from a Berman decision, would run afoul of the Federal Arbitration Act, which requires courts "to place arbitration agreements upon the same footing as other contracts." (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 24.) For

example, in *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, the Supreme Court held that the FAA preempted a Montana statute which conditioned enforceability of arbitration agreements on compliance with a special notice requirement that was not applicable to contracts generally. The Court explained, "The Act makes any such state policy unlawful, for that policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent." (*Doctor's Associates, supra,* at p. 686.) In other words, "states may not disfavor arbitration agreements" viz-a-viz all other contracts. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1078.)

The remedies and remedial tools at issue herein could not be imposed in any arbitration (other than a *de novo* arbitration on appeal from a Berman decision), as that would disfavor arbitration agreements by subjecting such agreements to requirements that do not apply to employment contracts that do not provide for arbitration. The only means by which employees not covered by arbitration agreements can secure these procedural rights is by filing a wage claim with the Labor Commissioner, and prevailing in a Berman hearing. These procedural rights flow from the Labor Commissioner's decision in the employee's favor.

The only way to place arbitration agreements on the "same footing"

as other employment contracts is to deny enforcement of the arbitration agreement, when Berman proceedings are pending, until the Labor Commissioner issues a decision following the Berman hearing, so as to ensure that the wage claimant will have the procedural rights he is entitled to under state law to vindicate his statutory claim in the arbitral forum, should the employer seek a *de novo* appeal of the Labor Commissioner's decision. Any other approach would run afoul of *Armendariz* or the FAA. Enforcing arbitration while the Berman process is pending would violate public policy by denying the wage claimant critical procedural tools needed for the vindication of unwaivable statutory rights under the Labor Code. Conversely, grafting these post-Berman hearing procedural tools onto an arbitration proceeding, other than a *de novo* arbitration on appeal from a Labor Commissioner decision, would impermissibly subject arbitration agreements to unique requirements not otherwise applicable to employment contracts that do not provide for arbitration.

II. The Labor Commissioner's Jurisdiction Over an Employee's Statutory Wage Claim Is Not Divested by the Federal Arbitration Act Under *Preston v. Ferrer*

Preston v. Ferrer did not involve an employee wage claim and did not present any issue as to the enforceability of an arbitration agreement on public policy or unconscionability grounds. *Preston* did not in any manner

address or implicate the principles set out in *Armendariz*. For those reasons, it has no applicability to the question of whether a Berman waiver contained within an employment pre-dispute arbitration agreement should be enforced to prohibit an employee from having his statutory wage claim heard by the Labor Commissioner.

Preston involved a dispute arising under the provisions of the Talent Agencies Act (Labor Code § 1700, *et seq.*, "TAA"), regarding the validity of a contract between an artist and a "personal manager." The contract contained an arbitration clause. The TAA governs the relationship between artists and talent agents, and vests the Labor Commissioner with exclusive jurisdiction over disputes arising under the TAA, subject to *de novo* review in the superior court. (Labor Code § 1700.44(a); *Styne v. Stevens* (2001) 26 Cal.4th 42.) When the personal manager, Preston, sought to initiate arbitration in order to recover fees due under the contract, the artist, Ferrer, filed a petition to determine controversy with the Labor Commissioner under § 1700.44(a), asserting that the contract was void because Preston had been acting as an unlicensed talent agent.

In his efforts to oppose arbitration, Ferrer never argued that arbitration would stand in the way of his vindication of any statutory rights under the TAA. Ferrer did not contend that he could not vindicate these

rights without initial access to the Labor Commissioner's adjudicatory process. That is not surprising, as the role of the office of the Labor Commissioner in hearing talent agent disputes under the TAA is qualitatively different and far more limited than its function under the Berman process. Under the TAA, the Labor Commissioner performs the exact function of an arbitrator by holding hearings and issuing decisions, and the Commissioner's role comes to an end once its decision is issued, regardless of whether one party or the other files a *de novo* appeal from that decision. In contrast, under the Berman process, the Labor Commissioner is charged with the obligation to provide legal representation throughout employer initiated *de novo* proceedings to any employee who prevailed in the administrative hearing if that employee is unable to afford private counsel. And unlike the one-way attorney fee shifting statute that benefits an employee who prevails in a Berman hearing when the employer files a *de novo* appeal, there is no fee shifting statute attached to a *de novo* appeal under the TAA.

Consequently, Ferrer presented no *Armendariz* based challenge to arbitration. Instead, he argued that the Labor Commissioner's exclusive primary jurisdiction under the TAA survived Federal Arbitration Act preemption because, in his view, the FAA only preempts state laws that

lodge jurisdiction in a judicial forum, and does not preempt state laws that lodge primary jurisdiction in an administrative forum. The Supreme Court "disapprove[d] the distinction between judicial and administrative proceedings drawn by Ferrer." (*Preston, supra,* 128 S.Ct. at p. 987.)

We have no quarrel with the proposition that FAA preemption does not distinguish between a non-arbitral judicial forum and a non-arbitral administrative forum. But just as FAA preemption does not distinguish one non-arbitral forum from another, the principles set out in *Armendariz* apply to every pre-dispute arbitration agreement, regardless of whether the party seeking to enforce the arbitration agreement is attempting to prevent the other party from proceeding in a judicial or administrative forum.

Under the FAA, states have the power to invalidate arbitration contracts only "upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2; *Armendariz, supra,* 24 Cal.4th at p. 98.) "The *Armendariz* requirements are ... applications of general state law contract principles regarding the unwaivabilty of public rights to the unique context of arbitration, and accordingly, are not preempted by the FAA." (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1079.) "[S]ection 2 of the FAA and cases interpreting it make clear that state courts have no such obligation" to enforce contractual terms that are

unconscionable or contrary to public policy; rather "[a]greements to arbitrate may not be used to harbor terms, conditions and practices that undermine public policy." (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 166, internal citation and quotes omitted.) "The purpose of Congress in 1925 [when it enacted the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so." (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404, n. 12.)

As this Court observed in *Discover Bank, supra,* "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally." (36 Cal.4th at 165.) Here, too, any contract between an employer and its employees that purports to waive the employees' access to the Berman process violates California's public policy, whether that contract is in the form of an arbitration agreement or not. And there is nothing in *Preston* that suggests otherwise.

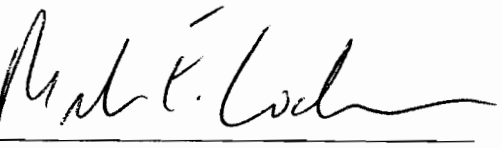
CONCLUSION

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 took an opposite approach, upholding the validity of a mandatory arbitration provision that, through the device of a Berman waiver, necessarily deprives all employees of remedies to which they would otherwise be entitled, subjects employees to costs which they would otherwise not bear, and imposes insurmountable obstacles to low and moderate wage workers' efforts to vindicate their statutory rights under California wage and hour law. Accordingly, we seek reversal of the Court of Appeal decision, on the ground that Berman waivers can never be enforced prior to the conclusion of the Labor Commissioner's administrative proceedings on an employee's statutory wage claim.

Respectfully submitted,

Dated: October 9, 2009

By: 

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

The text of this Opening Brief on the Merits consists of 6,713 words as counted by the Corel Word Perfect X4 word processing program used to generate this document.

Dated: October 9, 2009

By: _____

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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 835, 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):

OPENING BRIEF ON THE MERITS

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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MILES E. LOCKER