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 BRIEF ON THE MERITS

FINE, BOGGS & PERKINS LLP
David J. Reese (Bar No. 184682)
John P. Boggs (Bar No. 172578)
2450 So. Cabrillo Hwy., Suite 100
Half Moon Bay, California 94019
(650) 712-8908 tel
(650) 712-1712 fax

Attorneys for Plaintiff and Appellant
SONIC–CALABASAS A, INC.

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(650) 712-8908 tel
(650) 712-1712 fax

Attorneys for Plaintiff and Appellant
SONIC–CALABASAS A, INC.

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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 California 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 potential removal or modification 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 express agreement language authorizing 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.)

In this case, Respondent Moreno entered into an agreement to submit disputes with his employer, Sonic–Calabasas A, Inc. (hereinafter "Sonic"), to binding arbitration in plain and unequivocal language:

> [B]oth [Sonic] and [Respondent] agree that any claim, dispute, and/or controversy . . . that either [Respondent] or [Sonic] may have against the other which would otherwise require or allow resort to any court or other governmental 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.

(*See* CT 9; *see also* Respondent's Opening Brief on the Merits, at p. 8.) Significantly, this is the same operative language as this Court addressed in Little, *supra,* 29 Cal.4th at 1069–70.) While the agreement goes on to

permit certain administrative proceedings for civil rights claims before the federal EEOC or state DFEH, there is no such exception to permit administrative proceedings before the Labor Commissioner. (CT 9.)

As such, the Court of Appeal found that the matter should proceed straight to arbitration, without the delay and expense of first proceeding to an administrative adjudication before the Labor Commissioner. Respondent disagrees. Respondent would have the matter first submitted to the administrative jurisdiction of the California Labor Commissioner, Division of Labor Standards Enforcement, for a nonbinding adjudication prior to any arbitration proceedings. According to Respondent, this is the only way that employees can be assured that their nonwaivable right to the payment of wages can be protected. Specifically, Respondent argues that an agreement to bypass the Labor Commissioner would necessarily effect a *de facto* waiver of "essential remedies and remedial tools." (*See* Respondent's Opening Brief, at 1–4.) Ironically, in support of this conclusion, Respondent relies heavily on the Supreme Court's decision in Gentry v. Circuit City Stores, Inc., a decision that demonstrates the Court's confidence in arbitration by resolving the identified conflict between arbitration and individual employee rights by ***focusing on how*** the arbitration should proceed ***rather than whether*** it should proceed.

In Gentry, this Court was faced with an arbitration agreement that attempted to prevent employees from bringing representative claims in arbitration. "The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action. . . ." (*See* Gentry, *supra,* 42 Cal.4th at 451.) The Court described this as a "class arbitration waiver" provision.

(Id.) Seeking to draw unwarranted parallels between the agreement in this case and that from Gentry, Respondent advocates similar nomenclature, describing the parties' agreement that each would submit all claims to binding arbitration without permitting resort to any court or other governmental dispute resolution forum as a "Berman waiver."

But adopting a similar name cannot mask the stark difference in the result of the challenge to the language. In Gentry, whether the "class arbitration waiver" provision were stricken or permitted to stand meant that the dispute would either be permitted to proceed to arbitration individually or to proceed to arbitration as a potential class action; in either case, arbitration remained the outcome. (*See* Gentry, *supra,*42 Cal.4th at 464.) In this case, whether the so-called "Berman waiver" is stricken or permitted to stand means that the dispute will either be permitted to proceed to arbitration or it will be required to proceed to adjudication before a state administrative agency. Because such an outcome shifts the focus from ***"how arbitration?"*** to ***"whether arbitration?"***, it would be fundamentally antithetical to the Federal Arbitration Act and the federal common law of arbitration as a dispute resolution method that is intended to remain unshackled by state hostility toward alternative dispute resolution, the distinction between the "class action waiver" and the so-called "Berman waiver" means the difference between an outcome that can be reconciled with the Federal Arbitration Act (as in Gentry) and an outcome that is barred by the preemptive effect of the Federal Arbitration Act and the Supremacy Clause of the U.S. Constitution.

But even if federal preemption did not mandate overturning the Superior Court's refusal to grant the petition to compel arbitration in every case, the Court of Appeal decision should be affirmed because

Respondent has failed to show, based on the record, that the agreement as written is unenforceable for public policy reasons. Enforcement of the arbitration agreement would not, as Respondent maintains, subvert this Court's protection of unwaivable statutory rights.

None of the features of the Berman Process trumpeted by Respondent as fundamental and unwaivable rights come close to meeting such a standard. And even if they did, federal and state policy favoring enforcement of arbitration agreements mandates that the Court craft a solution, as it has done in Gentry and Little, that focuses on how to make arbitration work for the affected parties, rather than on subverting the parties' written agreement to submit to binding arbitration. For example, Respondent argues that a one-way fee-shifting provision in the Berman Process (Labor Code section 98.2(c)) is necessary to ensure that vulnerable employees are not afraid to seek enforcement of their right to wages. But the Labor Code already includes asymmetrical fee-shifting treatment for wage claims. For example, under Section 1194, fee-shifting is only available in favor of an employee who successfully brings an action for unpaid minimum wages or overtime premiums; an employer who successfully defends such claims has no such option. And Respondent's claim that the Berman Process equips claimants with a trained DLSE attorney to help them protect a favorable award against further review does not withstand scrutiny. Not only does such a "right" only ever become operative *if* the employee is successful initially, and *if* the claim is appealed, but it also requires that the employee in question meet financial need requirements to be considered for appointed counsel. (*See* Labor Code § 98.4.) In this case, Respondent Moreno made well over $120,000 per year in his position, which he voluntarily resigned to take another position;

there has not even been an attempt to show on the record whether and how he might have qualified under Section 98.4 for no-cost representation.[1]

In his Brief on the Merits, 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 extensive reliance by the Court of Appeal on Armendariz and Gentry in reaching the result below confirms the reverence for and fidelity to those decisions. 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

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[1] Indeed, the only attempt to address this gaping hole in Respondent's argument is found in footnote 1 of Respondent's Opening Brief, where Respondent relies on an unsubstantiated assertion in an Amicus Letter supporting the Petition for Review in this action. Respondent relies on this letter for the factual proposition that "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. . . ." First, it is improper for Respondent to seek to augment the record with such an unsubstantiated assertion. (*See* Professional Engineers in California Government v. Kempton (2007) 40 Cal.4th 1016, 1047 [improper to attempt to expand the appellate record through amicus papers].) Second, Respondent has misrepresented even the contents of the Amicus Letter. What Amicus stated—in a parenthetical, no less—was that "(over 90% of all employees who request counsel are provided counsel)". There is no attempt to provide background on this assertion (*e.g.,* What percentage of employees request counsel? What is the cut-off for financial need under Section 98.4?), making this statistical assertion entirely unreliable.

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 v. Ferrer to which the Court of Appeal failed to pay sufficient attention. ((2008) 552 U.S. 346, 128 S.Ct. 978.) 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 346, ____, 128 S.Ct. at 981 [*emphasis added*].) Respondent's position—that California law can require a litigant to first proceed to a state-created administrative adjudication before it can enforce an arbitration agreement under the FAA—is inconsistent with Preston and the significant body of federal and state authorities that recognize that such state laws hostile to arbitration are preempted by the FAA and the Supremacy Clause of the U.S. Constitution.

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 at bar, 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's forum 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. Again, the Supreme Court's focus here should be as it was in Little and in Gentry: concerns about protection of fundamental rights should be addressed in ***how*** the arbitration proceeding can proceed rather than ***whether*** the dispute may go forward in arbitration.

Having chosen to review the decision below, this Court should take the opportunity to reiterate 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.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Frank Moreno ("Respondent Moreno") was employed by Appellant / Petitioner Sonic–Calabasas A, Inc. ("Sonic") and agreed, in writing, to submit all claims against his employer to binding arbitration. (CT 183–84 [Petition, dated August 14, 2007, at ¶¶ 2–5]; CT 186 [written agreement]; *see also* CT 271 [Response to Petition, at ¶ 5, admitting contract formation as stated in Petition].) Following his voluntary resignation to take a position with another dealership, Respondent Moreno filed a wage claim against Petitioner with the California Labor Commissioner, Division of Labor Standards Enforcement. (CT 184 [Petition, at ¶ 6].) Petitioner brought this action to secure enforcement of the arbitration agreement. The merits of Respondent's wage claims were not before the Superior Court or Court of Appeal, and they are not at issue now.

Following the filing of the initial Petition in this action, the Labor Commissioner ("Intervenor"), acting through an attorney in its Division of Labor Standards Enforcement, contacted the Petitioner seeking to intervene to challenge the enforceability of the arbitration agreement where a claimant has sought to use the administrative adjudicatory process administered by the Labor Commissioner through the Division of Labor Standards Enforcement. (CT 208–09 [Reese Decl., at ¶ 9].) The parties stipulated to the intervention (CT 35–38 [Stipulation and Order]), and the case was briefed and argued to the Superior Court.

It was against this procedural backdrop that the parties briefed the issues in this case. Pursuant to stipulation of the parties and order of the Court, briefing below was extensive, including extra briefs from both Petitioner and Respondents to ensure that the matter would be well addressed. (CT 180–82 [Stipulation].) At oral argument, recognizing that the parties both anticipated an appeal to generate a published decision upon which they and other litigants could rely in this and future matters, the Superior Court denied the Petition to Compel, sending the matter to the Labor Commissioner's non-binding process for primary jurisdiction. (CT 375–76 [Order]; RT at B-1 through B-3.). The appeal to the Court of Appeal followed.

While the appeal was pending, the U.S. Supreme Court issued its decision in Preston v. Ferrer, *supra,* in which the High Court unequivocally rejected the California Labor Commissioner's assertion of primary jurisdiction over a claim, notwithstanding the existence of an arbitration agreement under the FAA. (*See* Preston, *supra,* 552 U.S. 346, 128 S.Ct. 978.) Following this decision, and after Appellant Sonic had filed its opening brief to the Court of Appeal, the Labor Commissioner

announced that it would not be filing a brief on appeal. (*See* Court of Appeal decision below, Sonic–Calabasas A, Inc. v. Moreno (2009) 174 Cal.App.4th 546, 554.) Respondent Moreno found other counsel and the case was briefed and argued to the Court of Appeal.

The Court of Appeal reversed the decision of the Superior Court, noting that the agreement in question unequivocally precluded the employee from proceeding before the Labor Commissioner in a Berman Hearing; that was not among the limited exceptions to the parties' agreement to submit to arbitration in lieu of any governmental dispute resolution forum. The Court found that Respondent had failed to show that the arbitral forum would not be sufficient to protect his statutory claims. But the Court stopped short of declaring that the preemptive power of the Federal Arbitration Act was sufficient to declare, as a matter of law, that the Labor Commissioner was always without jurisdiction to address wage claims that were subject to an agreement covered by the FAA. Instead, the Court of Appeal found it a case-by-case analysis in which Respondent had failed to make his case.

LEGAL DISCUSSION

I. The Court Must Approach This Controversy Against The Backdrop Of The Strong Factual And Legal Presumption That The Arbitration Agreement Between The Parties Should Be Enforceable.

A. Arbitration Is Strongly Favored By Both Federal And California Public Policy, Such That Every Intent Should Be Made To Enforce Arbitration.

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.,* supports a strong public policy favoring the enforcement of arbitration agreements for dispute resolution. The FAA declares a national policy favoring arbitration when the parties have so contracted, and this policy applies both in federal

and state courts, displacing state laws to the contrary. (*See* Southland Corp. v. Keating (1984) 465 U.S. 1, 16; Buckeye Check Cashing, Inc. v. Cardegna (2006) 546 U.S. 440, 445–46; Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 272 [displacement of conflicting state laws "now well-established"].)

California's public policy also strongly favors arbitration. (Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951.) Any opposition to arbitration must be examined against a presumption in favor of arbitrability. (Engalla, supra, 15 Cal.4th at 971–72 ["California law incorporates many of the basic policy objectives contained in the Federal Arbitration Act, including a presumption in favor of arbitrability"].) Doubts regarding the enforcement of arbitration must be decided in favor of sending the parties to arbitration. (Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 9; United Transp. v. Southern Cal. Rapid Transit Dist. (1992) 7 Cal.App.4th 804, 808; Pacific Inv. Co. v. Townsend (1976) 58 Cal.App.3d 1 [courts should indulge every intent to give effect to arbitration].)

The effect of these strong and repeated policy pronouncements favoring enforcement of arbitration agreements is that the Court should approach this controversy with a presumption that the parties' agreement is enforceable. While the Court reviews de novo the determinations made by trial court, it must do so with a recognition that the federal substantive law of arbitrability of which the Southland court spoke is the law of the land. (*See* Southland, *supra,* 465 U.S. at 16.)

B. The Parties' Broad Agreement That Petitioners Have A Right To Arbitrate The Dispute Adds To The Presumption Favoring Enforcement Of The Parties' Agreement To Arbitrate, Narrowing The Scope Of The Issues On Appeal.

While the parties to this appeal have markedly different interpretations of the preemptive effect of the Federal Arbitration Act and the federal substantive law of arbitrability, there is essentially no dispute over many of the foundational factual and legal questions relating to the existence and general enforceability of the arbitration agreement between Petitioner and Respondent Moreno. The parties have an agreement to submit "any claim, dispute and/or controversy" to binding arbitration, and the parties have just such a claim brought by Respondent Moreno against Petitioner. (CT 183–84 [Petition, at ¶¶ 3–6.)

Importantly, the agreement to submit to arbitration does not include, on its face, onerous or one-sided terms that would taint the agreement. The operative language of the agreement mimics that approved by the California Supreme Court in Little v. Auto Stiegler, Inc. (*supra,* 29 Cal.4th 1069–70.) Indeed, in one respect, this agreement exceeds the standards set by the Court in Little, as the agreement in this case does not include the qualified appeal provision that the Court found asymmetrical and severed from the Little agreement before enforcing it. (*See* CT 186 [Agreement].)

In the proceedings below, Intervenor and Respondent both acknowledged expressly that Petitioner has a right to (ultimately) have the dispute resolved in arbitration:

> The issue in this case is not whether petitioner is entitled to arbitration. As respondent and the Labor Commissioner acknowledge, petitioner is most

> assuredly entitled to arbitration—a right secured to petitioner by the Federal Arbitration Act [citation] and the terms of its arbitration agreement.

(*See* CT 280 [Opposition Brief, at 1:7–10; *see also* CT 268 [Respondent Moreno expressly joins in and adopts Intervenor's Opposition Memorandum].) This acknowledgment and admission is significant, in that it confirms the parties' joint position that (a) the agreement was validly formed; (b) the terms of the agreement are not generally unconscionable; and (c) the Federal Arbitration Agreement applies to this agreement between the parties.

II. The U.S. Supreme Court Decision In Preston v. Ferrer Resoundingly Overturned The Keystone Of Respondent's Argument, Definitively Rejecting The Idea That The Labor Commissioner's Administrative Jurisdiction Could Survive Preemption Under The FAA.

In the Superior Court proceedings below, Respondent and Intervenor relied heavily on the Court of Appeal decision in Ferrer v. Preston. ((2006) 145 Cal.App.4th 440, *review denied* Ferrer v. Preston (Feb. 14, 1997), No. S149190, 2007 Cal. LEXIS 1539, *reversed by* Preston v. Ferrer (2008) 552 U.S. 346, 128 S.Ct. 978.) In Ferrer, the state court concluded that the FAA did not preempt a state statute granting the Labor Commissioner jurisdiction over a claim involving the Talent Agencies Act. Indeed, that appellate panel (in a 2-1 decision) distinguished controlling U.S. Supreme Court authority, claiming that the Talent Agencies Act vested exclusive original jurisdiction in the Labor Commissioner which could not be displaced by an arbitration agreement. (Ferrer, *supra,* 145 Cal.App.4th at 447 [distinguishing Buckeye Check Cashing, *supra*].) After the California Supreme Court denied review of Ferrer v. Preston (*see* Ferrer v. Preston (Feb. 14, 1997) No. S149190, 2007 Cal. LEXIS 1539), the U.S.

Supreme Court granted *certiorari* specifically to decide "whether the FAA overrides a state law vesting initial adjudicatory authority in an administrative agency." (*See* Preston, *supra,* 128 S.Ct. at 982–83.)

In an eight-to-one decision, the U.S. Supreme Court held very clearly that state obstructions to arbitration enforcement will not be tolerated, whether judicial or administrative in nature:

> Does the FAA override not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency? ***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 v. Ferrer (2008) 522 U.S. 346, 128 S.Ct. 978, 981 [*emphasis added*].) This is a flat rejection by the highest court in the land of the position taken by Respondent at the Superior Court. This unequivocal holding is succinct and important, because the rationale expressed by Justice Ginsberg in the Preston opinion clarifies that Respondent's desired outcome is unconstitutional. And to underscore that point, several of the key arguments raised by Respondent in seeking to delay arbitration until the Labor Commissioner can adjudicate the claim are expressly rejected by the U.S. Supreme Court.

For example, like Ferrer to the Supreme Court, Respondent argued that permitting the Labor Commissioner to exercise jurisdiction over the claim for a nonbinding administrative proceeding merely postpones arbitration; it would not unseat it entirely. (*See* CT 282 [Opposition Brief, at 3:17–22].) The High Court made short work of that proposition: "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.'" (Preston, *supra,* 128 S.Ct. at 985–86 [*quoting* Moses H. Cone Memorial Hospital v. Mercury Constr. Corp. (1983) 460 U.S. 1, 22].) The Supreme Court continued to note that even if the party could compel arbitration in lieu of the *de novo* Superior Court review, the "prime objective" of "'streamlined proceedings and expeditious results'" would be frustrated because requiring initial reference of the dispute to the Labor Commissioner would "at the least, hinder speedy resolution of the controversy." (Preston, *supra,* 128 S.Ct. at 986 [*quoting* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985) 473 U.S. 614, 633].)

This rationale was echoed by the Court of Appeal in the present case which noted that "[t]he record in this case is devoid of any evidence that the Berman process will save employees time or money" and that because the *de novo* review essentially starts the process fresh, "Berman hearings may result in no cost savings to the employee." (*See* Sonic–Calabasas A, Inc., *supra,* 174 Cal.App.4th at 567, *citing* Preston, *supra.*) First, the delay involved in requiring initial resort to the Labor Commissioner before permitting arbitration is antithetical to the very idea of a prompt resolution of a claim. Indeed, Intervenor below specifically acknowledged that the nonbinding process will dilute the goals of "simplicity, informality, and expedition" otherwise available through arbitration. (*See* CT 323 [Supp. Opp. brief at 9:20–22].) Second, the *de novo* appeal provisions in this case, as in Preston, require an employer seeking review of an adverse administrative decision to post a bond as a condition of obtaining further review of the controversy, adding to the

expense and inefficiency. (*Cf.* Labor Code § 98.2(b) [appeal bond for wage claims] *with* Preston, *supra,* 128 S.Ct. at 985, n. 5 [noting appeal bond requirement under Talent Agencies Act].)

After Preston, Respondent changed his tune. Instead of trumpeting Ferrer as an "analogous context[ ]," Respondent argues that the subsequent Preston decision was "not on point." (*See* Respondent Brief on Appeal, at 39.) Indeed, Respondent argues that because Preston did not address questions of unconscionability or public policy as set forth in Armendariz, it does not bear on this case. But such a short-sighted reading of Preston should not be adopted by this Court. Even if the Court were to overturn the determinations of the Court of Appeal and accept Respondent's position that the Berman Process is indispensable to the vindication of Respondent's right to vacation wages, the Preston decision precludes the Labor Commissioner from having anything to do with it.

Under Preston, the Labor Commissioner does not retain any jurisdiction to hear any aspect of the dispute, even in a non-binding way subject to a *de novo* review. (*See* Preston, 128 S.Ct. at 985 [determination by Labor Commissioner under Talent Agencies Act subject to *de novo* review in Superior Court.) In Preston, the Court specifically noted that the role Ferrer wished to retain for the Labor Commissioner—that of a tribunal charged to consider evidence and argument and make a determination—was the very same role reserved for the arbitrator under an FAA-governed arbitration agreement. (Preston, *supra,* 128 S.Ct. at 987.) This is the exact same role Respondent would reserve for the Labor Commissioner under the Berman Process. Preston rejected such a residual role for the Labor Commissioner there and would clearly reject Respondent's attempt on the same ground. Just as the Preston court rejected such a retention of

jurisdiction in the case before it, the existence of FAA preemption in this case means that the Labor Commissioner has no jurisdiction to conduct a Berman hearing. Just as the TAA determination in Preston fell to an arbitrator, any handling of necessary procedural features in the present case—as Respondent would have the Court describe the Berman Process—must fall to the arbitrator, not the agency.

The Preston decision also did more than just conclusively hold that the Labor Commissioner must stay out of the matter once FAA arbitration preempts its jurisdiction. The Preston decision expressly rejected one of Respondent's central arguments: decrying the idea that the permitting a non-binding agency process to delay the eventual arbitration of the parties' disputes could be acceptable. Like Respondent in this case, Ferrer had argued to the Supreme Court that the administrative review "merely postpones arbitration," but the Court found this to be an unacceptable delay. (Preston, *supra,* 128 S.Ct. at 986 ["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'"] [*quoting* Moses H. Cone Mem. Hosp., *supra,* 460 U.S. at 22.) Reiterating the oft-repeated principle that arbitration is intended to achieve streamlined and expeditious results, the Court flatly held that this would be frustrated even if Preston could compel arbitration in lieu of *de novo* Superior Court review. (Preston, *supra,* 128 S.Ct. at 986.)

Respondent attempts to ignore the Preston mandate by suggesting that the Preston court was never faced with an unconscionability argument founded in Armendariz, claiming that Ferrer never argued that arbitration without opportunity to first put the matter before the Labor

Commissioner would deprive him of indispensable remedial tools needed to effectively vindicate his statutory rights. (*See* Opening Brief on Appeal, at 26–30.) But that argument relies on a incorrect and self-serving reading of the Preston decision. Ferrer did, in fact, argue that bypassing the Labor Commissioner would have adverse affects to Ferrer and others. Preston reports that Ferrer specifically argued that sending the case to arbitration in the first instance would "undermine the Labor Commissioner's ability to stay informed of potentially illegal activity" and "would deprive artists protected by the TAA of the Labor Commissioner's expertise." (Preston, *supra,* 128 S.Ct. at 986.) This argument—that the Labor Commissioner's involvement is important to ensure that the full protections of the TAA are available to claimants—directly parallels Respondent's argument in this case that the Berman Process is necessary to the effective vindication of his right to recover vacation wages. Preston rejected the argument, and this Court should follow suit.

III. 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. The Gentry court focused, as it was required to, on ***how*** the claim(s) can be protected in arbitration, not ***whether*** the rights can be protected in arbitration.

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,* 552 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 in this case 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.

A. Respondent's Contention That The Decision Below Subverts Armendariz By Not Protecting Contingent Rights Fails Because The "Rights" In Question Are Not Vested, Substantive, And Nonwaivable.

As the Court of Appeal recognized, the "rights" which Respondent claims are only available through the Berman process are not vested rights at all. (*See* Sonic–Calabasas A, Inc., *supra,* 174 Cal.App.4th at 365-66.) These statutory protections are only available *if and only if* there is an employer appeal from an adverse administrative finding. (Id.) In this same context, it is important to note that the Berman process is not required at all. Employees are free to skip this altogether, even in the absence of an arbitration agreement.[2] If these so-called remedial tools were so needed to effectively protect the rights of wage earners, then it would make little sense to permit aggrieved employees to head off to battle in civil court or elsewhere without them.

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[2] This fact underscores Petitioner's earlier point that reliance on the unsupported statistics offered by Respondent by reference to the Amicus Letter is inappropriate. (*See, supra,* at fn.1.) Wage claimants have the option to proceed directly to an individual determination and forego the Berman process. Thus, even if Amicus could be taken at its word that 90 percent of those who request it are provided with counsel, this 90 percent figure only applies to (a) the subset of claimants who request counsel; from (b) the subset of claimants who are faced with an appeal by the employer; from (c) the subset of claimants who are successful in the administrative forum; from (d) the subset of claimants who choose to bring their claim to the Labor Commissioner initially, rather than choose civil litigation or arbitration.

The reason these remedial tools are not ***necessary*** is because they are procedural features of the administrative process, not substantive, unwaivable rights in their own right. Respondent argues that the right to recover vacation wages is not subject to contractual waiver. (*See* Labor Code § 227.3 [". . . an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination"]; Labor Code § 219 [". . . no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied"].) Respondent suggests that these statutory prohibitions against forfeiture of wages are what makes the right to recover vacation wages a fundamental, nonwaivable statutory right.

In this context, however, it is important to understand that the wages sought by Respondent in his claim against Appellant do not involve minimum wages or overtime. This Court has previously distinguished claims that involve "unwaivable statutory claims for federally mandated overtime and minimum wage payments" from other compensation claims. (Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal.App.4th 1276, 1290 [claim for bonus and severance under employment contract].) In Giuliano, this Court refused to consider claims not based on overtime or minimum wage obligations as fundamental, unwaivable rights that would trigger the heightened protections set out in Armendariz (*supra,* 24 Cal.4th 83.) While the deferred bonus and severance compensation are necessarily considered wages (*see* Labor Code § 200 [defining "wages" as "all amounts for labor performed by employees of every description"]), this Court recognized that they were not as fundamental as overtime and minimum wage obligations for lower-paid wage earners. (*Compare also* Labor Code § 1194 *with* Labor Code § 218.5 [additional protections afforded by

California lawmakers for minimum wage and overtime claimants, as compared to other wage claimant].) As such, this Court in Giuliano refused to hold the arbitration agreement to the Armendariz standards.

For all his protestations, Respondent Moreno is much more akin to Mr. Giuliano than he is to a minimum- or lower-wage earner. (*See* CT 178 [Respondent's wage claim, showing daily earnings of $441.29].) As such, the Giuliano decision prompts a finding that the Armendariz requirements should not apply to Respondent at all. At the very least, they should not apply to the procedural features that Respondent argues should be considered as fundamental and unwaivable as a claim for minimum wage or overtime. Respondent takes pains in his brief to portray his wage claim as a David-versus-Goliath fight by a mere mortal against a well-funded corporate behemoth. He would have the Court view his individual claim for more than $40,000 (when penalties are included) as simple claim for a more modest sum. (*See* Respondent Brief, at 32–33 [*citing* Gentry v. Superior Court (Circuit City) (2007) 42 Cal.4th 443, which highlights low average value of overtime claims]; *but see* Gentry, *supra,* 42 Cal.4th 443, at 457–58 [noting that minimum-wage and overtime claims are almost always on the low end of the scale, as higher paid workers are typically exempt from overtime and minimum wage].) In this case, Respondent Moreno is pursuing a claim 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.

B. Review Of The Individual "Rights" Claimed By Respondent Illustrates That They Are Not Necessary For The Effective Vindication Of Respondent's Rights.

Respondent argues that the proceeding before the Labor Commissioner provides an otherwise-unavailable right: a one-way fee-shifting statute in favor of the employee. However, because of the type of claim brought by Respondent in this action (a claim for unpaid vacation pay), an employee who files a civil action seeking unpaid wages is still subject to the provisions of Section 218.5 which provides for fee-shifting in favor of the prevailing party if fee-shifting is requested at the outset of the claim. But, importantly, this section does not apply to claims likely to be brought by the low-wage-earning workers with whom Respondent would have the Court associate him. Section 218.5 expressly defers to Section 1194 when the latter applies. (Labor Code § 218.5.) Section 1194, in turn, provides that in actions for minimum wage or overtime, the employee may recover his or her reasonable costs, including attorneys fees. There is no authorization for fee-shifting in favor of the employer under Section 1194. And because fee-shifting is only a creature of statute, without such authorization, there is no spectre of an adverse fee-shifting award hanging over the head of a claimant seeking minimum wage or overtime compensation.

This asymmetrical treatment of fee-shifting in Section 1194 and Section 218.5 reflects a legislative determination to place minimum-wage and overtime claims on a higher plane of importance than other wage claims. (*See also* Giuliano, *supra,* and related discussion, *supra.*) By denying statutory one-way fee-shifting to claimants not seeking minimum wage or overtime compensation, lawmakers have demonstrated that such insulation from the consequences of bringing an improper claim is not a

fundamental, unwaivable right of claimants such as Respondent Moreno, whose claim is not for unpaid overtime or minimum wages. As such, it is not ***necessary*** to the vindication of his rights.

Important to note in this context is that Respondent does not lose his right to recover his reasonable costs and attorneys fees under Section 218.5. If he prevails in his claim, then he is entitled to recover those expenses. This provision of the statutory framework is sufficient to protect his right to receive vacation wages.

Respondent argues the right to free legal counsel (the Labor Commissioner) is a non-waivable right. Initially, it should be noted that the fee-shifting statute that applies to the underlying claim for wages would effectively accomplish the same thing—ensure that his legal expenses are covered. Moreover, it is well-known that wage claims are consistently taken on a contingency basis with the opportunity to seek fees as a prevailing party. Thus, Respondent's argument that he runs the risk of paying for his legal counsel is unavailing.

Second, Respondent argues that the opportunity to request representation by the Labor Commissioner's office is fundamental to the vindication of his right to receive vacation wages. It bears repeating that this is not a fundamental right. Were that so, then the Labor Code would provide this right to every wage claimant. But this right is not expressly offered to every wage claimant. This absence of comprehensive availability is enough to confirm that its importance is overstated in Respondent's arguments.

Review of Labor Code section 98.4 in the context of this case further emphasizes how this "right" is not necessary to the effective vindication of the rights of Respondent. Section 98.4 provides that "[t]he

Labor Commissioner may, upon the request of a claimant financial unable to afford counsel, represent such claimant in the *de novo* proceedings provided for in Section 98.2." Nothing in the record below suggests that the enormous qualifier in this statute—that only claimants who are financial unable to afford counsel may seek and obtain this representation by the Labor Commissioner—is met in this case. Here, Respondent Moreno claims earnings in excess of $440 per day, or more than $13,000 per month. (*See* CT 178 [wage claim].) This is not an individual claimant who comes across as "financially unable to afford counsel." Moreover, there is ***nothing*** in the record to suggest that Respondent would meet the financial straits requirement. Because there is no indication that Respondent would qualify for this benefit, it cannot be considered essential to the vindication of his statutory right to unpaid vacation wages. Moreover, Respondent cannot show that there is anything stopping the Labor Commissioner's attorneys from representing Respondent's interest in arbitration, just as it did before the Superior Court in this action.

Respondent also contends that the administrative process would entitle him to a no-cost interpreter, if necessary. However, this contention does not appear to be founded in the statute. Section 105(b) of the Labor Code does require the Labor Commissioner to provide an interpreter for "all hearings and interviews," but there is nothing in the statute to suggest that this obligation would carry over post-hearing to a *de novo* review. Section 98.4 is entirely silent on such a question. But more fundamentally, this claim suffers the same fatal flaw as discussed above: Respondent Moreno would not qualify for interpreter services, as they are unnecessary. There is nothing in the record to suggest that Respondent has any need or use for an interpreter in pursuing his rights in this action. As

the Court below noted, arbitration should not be dislodged unless Respondent can make a showing that he would be deprived of key rights in arbitration, not hypothetical rights. (*See* Sonic–Calabasas A, Inc., *supra,* at 567 ["Moreno has failed to persuade us that enforcing the Berman waiver in this case would deprive ***him*** of rights"], *emphasis added.*)

Even more significantly, the arbitrator or this Court could require the services of an interpreter, as necessary, free of charge to Respondent, as a condition of the arbitration. As such, this is not an indispensable feature of Respondent's effort to secure payment of unpaid vacation. It is not critical that he be statutorily entitled to ask for that for which he is not financially qualified or in need of linguistically.

Section 98.2(b) requires an employer seeking *de novo* review of an adverse decision following a Berman hearing to post an undertaking with the tribunal as a condition of seeking the review. Respondent argues that this feature is designed to ensure that a successful wage claimant does not face enforcement or collection problems if he or she prevails. In addition, Respondent argued below that putting up the undertaking "is designed to make the exposed security a factor in the litigation. . . ." (*See* Respondent Brief, at 23.) That description is nothing more than a fancy way to say that the statute is designed to chill the exercise of the employer's right to appeal an adverse decision.

Again, had the legislature considered this right to secure a potential wage claim award a fundamental necessity in the effective adjudication of an employee's rights, it would have seen fit to establish the undertaking requirement in every case. It chose not to do so. Moreover, in the present case, there is nothing in the record to suggest that there may be difficulty in achieving collection of any award of unpaid wages.

Respondent has made no effort to suggest that Appellant is not sufficiently solvent to satisfy its obligations. Without providing any evidence as to how a pre-arbitration attachment is essential to vindication of his rights in this case, there is no basis upon which the Court could conclude that a pre-arbitration undertaking is essential to protect Respondent's rights. (*See* Green Tree Financial v. Randolph (2000) 531 U.S. 79, 90–91 [potential financial impact too speculative to justify invalidation of arbitration agreement with agreement silent thereon and nothing on the record to suggest that claimant will bear inequitable costs]; Rutter v. Darden Restaurants, Inc. (C.D. Cal., Nov. 18, 2008), Case No. CV 08–6106 AHM, 2008 U.S. Dist. LEXIS 96170, at **17–19 [failure to provide evidence of practical application of discovery limitations to his particularly case precludes finding that Armendariz standards not met].)

Moreover, even in arbitration, the undertaking protections can be obtained. The California Arbitration Act specifically authorizes provisional remedies to secure the efficacy of any subsequent arbitration award. (*See* Code Civ. Proc. § 1281.8.) And there is nothing stopping the arbitrator or this Court from making the arbitration proceeding contingent upon an undertaking as though this matter were proceeding before the Labor Commissioner.

Finally, at least one *amicus* who supported the Petition for Review notes that a wage claimant who proceeds to the Berman process need pay no filing fee at all. (*See* Palefsky letter, dated July 29, 2009.) He argues that even under Armendariz and its protections for the employee against fees unique to arbitration, the employee could be required to pay some hundreds of dollars akin to a civil filing fee. This argument should not trouble the Court, as even a brief review of the Armendariz rule—that

an employer be required to bear costs unique to arbitration—demonstrates that if a filing fee is unique to arbitration (*i.e.,* not imposed on a claimant proceeding to the Labor Commissioner for a Berman hearing), then such filing fee must be borne by the employer. Armendariz leaves no room for such hypothetical and insincere handwringing.

C. Where The Component Parts Of The Berman Process Are Not Essential To The Just Adjudication Of Respondent's Wage Claim, Requiring The Berman Process Prior To Arbitration Is An Unnecessary And Unconstitutional Limitation On The Parties' Arbitration Agreement.

As noted above, none of the individual features of the Berman Process rise to the level of a fundamental, unwaivable right that is necessary for the vindication of Respondent's ultimate right to receive unpaid vacation wages. As such, there is no call to require the inclusion of the Berman Process as a whole into the parties arbitration agreement. Indeed, to require the parties to submit first to the jurisdiction of the Labor Commissioner before moving on to binding arbitration would only delay the arbitration process and unnecessarily increase the costs for both parties. That is because the claims will ultimately end up in arbitration so the Labor Commissioner proceeding is a futile step in the process. One must ask how a nonbinding process can be unwaivable? If there is no binding effect, why cannot it be waived?

Respondent attempts to minimize the interminable delays that the Berman Process would create if it were required prior to arbitration of every wage claim, complaining that the goal of expediency does not justify forcing an employee into a forum where his or her rights cannot be adequately vindicated. (*See* Opening Brief, at 17 [saving time is "of no relevance" to the question of whether the arbitration agreement can be

enforced.) But the U.S. Supreme Court in Preston disagreed. Respondent argues that that the Berman Process might briefly delay the binding arbitration of the parties' wage claim. (*See* Opening Brief, at 17; *citing* Cuadra v. Millan (1998) 17 Cal.4th 855, 860 [claims typically heard within four to six months after filing].) But any delay is improper, even a brief delay. And the only evidence in the record in this case is that there can be, in practice, a much more significant delay than Respondent is willing to acknowledge. In the Superior Court, Appellant Sonic cited a series of examples of the significant delay(s) that can be incurred. For example, in one case, a claim was filed on October 17, 2001, and the decision was not released until August 3, 2005—nearly four years later. (*See* CT 350–363; *see also* CT 364–72; *see* also Sonic–Calabasas A, Inc., *supra,* 174 Cal.App.4th at 566 [noting that this evidence of delay was "unrefuted"].) Importantly, the face of the parties' agreement specifically touts increased efficiency as a mutual benefit to both parties through the arbitration agreement. (CT 9.)

In Preston, The U.S. Supreme Court considered and rejected the suggestion that permitting the Labor Commission to assert jurisdiction over the claim notwithstanding the preemptive effect of the Federal Arbitration Act would not be an imposition on the parties. Rejecting the argument that the administrative process "merely postpones arbitration," the Supreme Court noted that "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.'" (Preston v. Ferrer (2008) 552 U.S. 346, 128 S.Ct. 978, 986 [*quoting* Moses H. Cone Mem. Hosp. v. Mercury Constr. Co. (1983) 460 U.S. 1, 22.)

The passage of time alone is an unnecessary delay and deviation from the "increased efficiency" called for by the agreement. But it will cost the parties more than just time if the Berman Process is granted the "unwaivable" status that Respondent would ascribe to it. In addition to the months and months of delay, the effort and expense required to present the case to the Labor Commissioner in the Berman Process will match that required to present the case to an Arbitrator. Thus, the actual presentation of evidence will take twice as long and cost twice as much than if the parties were to go straight to arbitration. It is difficult to see how this is not an unwarranted extension of time and effort and an effort to deliberately chill the right of employers to defend wage claims in arbitration pursuant to the Federal Arbitration Act.

Finally, imposition of the Berman Process requirement on parties to an arbitration agreement will also unnecessarily adversely impact the Labor Commissioner itself and other wage claimants who are not party to an arbitration agreement. In Bell v. Farmers Ins. Exchange ((2004) 115 Cal.App.4th, 715, 746), the Court of Appeal referred specifically to a declaration of a Former DLSE Chief Counsel who warned about a deluge of claims that would "simply outstrip the resources of the DLSE . . . impacting not only these claimants but others unrelated to this suit." (Bell, *supra,* 115 Cal.App.4th at 746 [*ellipses in original*].) While the issue in Bell was whether class treatment would be appropriate for wage claims, the same principle applies here: unnecessarily funneling wage claimants to the Berman Process instead of directly to arbitration pursuant to their agreements has no otherwise-unavailable benefits, but substantial costs on parties and nonparties alike.

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, Little, 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. The approach this Court is mandated to take is to look not at ***whether*** the claims should be ordered to arbitration, but ***how*** the arbitration proceeding must be adapted—either through express language or implied agreement to terms required to protect key rights—to ensure the enforcement of the arbitration agreement while simultaneously protecting the fundamental rights of the parties from *de facto* waiver.

As such, Petitioner/Appellant Sonic–Calabasas A, Inc. respectfully requests that the Supreme Court affirm the decision of the Court of Appeal and remand the case to the lower courts to be ordered to binding arbitration pursuant to the parties agreement in a proceeding designed to ensure that any unwaivable statutory rights are maintained.

12/8/09

David J. Reese
John P. Boggs
Fine, Boggs & Perkins LLP

Attorneys for Plaintiff and Appellant
SONIC–CALABASAS A, INC.

CERTIFICATION OF WORD COUNT

Pursuant to Rules of Court, Rule 8.520(c)(1), I certify that the text of this Answer Brief on the Merits consists of 10,358 words as counted by the Microsoft Word 2007 software program used to generate this document

David J. Reese

PROOF OF SERVICE

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

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

ANSWER BRIEF ON THE MERITS

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

- **MILES E. LOCKER, ESQ.**
  RACHEL FOLBERG, ESQ.
  LOCKER FOLBERG LLP
  235 Montgomery Street, Suite 835
  San Francisco, California 94104

- **WILLIAM REICH, ESQ.**
  Division of Labor Standards Enforcement
  1000 South Hill Road, Suite 112
  Ventura, California 93003

- **CLERK OF THE COURT OF APPEAL**
  California Court of Appeal, Second District, Division Four
  300 South Spring Street, Second Floor
  Los Angeles, California 90013

- **CLERK OF THE SUPERIOR COURT**
  Los Angeles County Superior Court
  111 North Hill Street
  Los Angeles, California 90012

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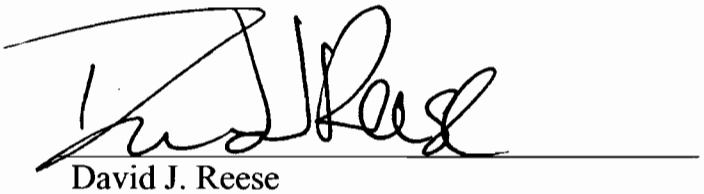

David J. Reese