S174475

IN THE SUPREME COURT OF CALIFORNIA

SONIC-CALABASAS A, INC.,
Plaintiff and Appellant,

v.

FRANK MORENO,
Defendant and Respondent.

FOLLOWING AN ORDER OF THE U.S. SUPREME COURT (OCT. 31, 2011)
DOCKET NO. 10-1450, 132 S. CT. 496, GRANTING REVIEW, VACATING THE DECISION OF THE CALIFORNIA SUPREME COURT, AND REMANDING FOR FURTHER CONSIDERATION

FOLLOWING A DECISION OF THE CALIFORNIA SUPREME COURT (FEB. 24, 2011)
CASE NO. S174475, 51 CAL.4TH 659, 121 CAL.RPTR.3D 58, 247 P.3D 130

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION IN SUPPORT OF PLAINTIFF SONIC-CALABASAS A, INC.

HORVITZ & LEVY LLP
LISA PERROCHET (BAR NO. 132858)
FELIX SHAFIR (BAR NO. 207372)
JAMES A. SONNE (BAR NO. 250759)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
lperrochet@horvitzlevy.com
fshafir@horvitzlevy.com
jsonne@horvitzlevy.com

ATTORNEYS FOR AMICUS CURIAE
THE CALIFORNIA NEW CAR DEALERS ASSOCIATION

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IN THE SUPREME COURT OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION

Pursuant to California Rules of Court, rule 8.520(f), amicus curiae the California New Car Dealers Association (the CNCDA) respectfully requests permission to file the accompanying amicus curiae brief in support of appellant Sonic-Calabasas A, Inc.

The CNCDA is a California non-profit mutual benefit corporation whose members include more than 1,000 of the 1,200 new car dealers in California.[1] The CNCDA routinely appears as

[1] Appellant Sonic-Calabasas A, Inc. is a member of the CNCDA, but neither it nor any other party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the (continued...)

amicus curiae in cases throughout California involving issues of vital concern to new car dealers.

Like many California employers, CNCDA members enter into employment contracts with their employees. Typical among the terms in these contracts are arbitration provisions designed to permit the expeditious resolution of future disputes between the parties, including disputes over the payment of wages. Because of the efficiencies derived from using arbitration to resolve disputes, CNCDA members who contract for arbitration are able to cut down on costs. This allows new car dealers to pass along the resulting savings to employees in the form of higher wages or other job benefits and to customers in their new car purchases. The predictable ability to arbitrate claims like those at issue here is therefore of enormous interest to CNCDA members, and it affects millions of employment agreements, consumer transactions, and similar contractual relationships involving car dealers and other businesses, large and small, that rely on arbitration to avoid time-consuming and ruinously expensive court litigation.

The CNCDA is thus deeply interested in how this court reconsiders its 2011 opinion—*Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*)—in light of the United States Supreme Court's intervening decision in *AT&T Mobility LLC v.*

(...continued)
proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4)(A).) The CNCDA certifies that no person or entity other than the CNCDA and its counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4)(B).)

Concepcion (2011) 563 U.S. __ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*). In particular, the CNCDA believes this court would benefit from additional briefing on the fundamental question whether, under principles articulated in *Concepcion,* the Federal Arbitration Act (FAA) preempts application of certain California common-law standards on which this court based its 2011 opinion rejecting the parties' arbitration agreement.

Specifically, this court used state-law public policy and unconscionability rules developed in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) and *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*) to determine that the parties' agreement need not be enforced as written. Whether these state-law rules survive *Concepcion* is a recurring and unresolved question that has plagued the lower courts, and interested parties, over the past year. (See, e.g., *Burnett v. Macy's West Stores, Inc.* (E.D.Cal. Oct. 7, 2011, No. 1:11-CV-01277 LJO SMS) 2011 WL 4770614, at p. *4, fn.3 [explaining that courts "have questioned the vitality of [*Armendariz*'s] requirements in light of" *Concepcion*]; *Alvarez v. T-Mobile U.S.A., Inc.* (E.D.Cal. 2011) 822 F.Supp.2d 1081, 1086 ["courts after *Concepcion* are divided over the issue of whether *Gentry* . . . survives *Concepcion*"].) Indeed, it is a pressing matter on which innumerable Californians covered by arbitration agreements need clear and comprehensive guidance.

A related but narrower question presented in this case is whether, even assuming some remnant of *Armendariz* or *Gentry* survives *Concepcion,* this court's earlier 2011 opinion conditioning

the enforcement of agreements to arbitrate statutory wage disputes on the availability to the employee of so-called "Berman hearing" procedures remains viable after *Concepcion*.[2] As we explain below, the answer is no. Indeed, one of the reasons Congress enacted the FAA was to allow parties the freedom to make dispute resolution as streamlined as they liked—the assumption being that, for many types of disputes, procedures commonly followed in court trials are not worth the delay, cost, or confusion they generate. Although states are free to enforce their wage and hour laws through public means—and the enforcement mechanism provided generally to the California Labor Commissioner to receive and prosecute complaints is no exception—grafting individual Berman hearing procedures onto a privately agreed-upon arbitration process that does *not* include them is one example of state law that impermissibly intrudes on the FAA. This court should hold that such state rules are preempted by Congress' considered decision that contracting parties, and not state courts or legislatures, control the terms of agreements outlining the method by which future disputes between those parties are to be resolved.

If arbitration agreements continue to face frequent rejection under California law notwithstanding *Concepcion*, new car dealers and other businesses in this state will in turn face increased costs in what is already a low-margin business, and will suffer a competitive

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[2] Certain procedural mechanisms described in Labor Code provisions relating to the prosecution of employment actions are commonly called "Berman hearing" procedures after Congressman Howard Berman, who sponsored the statutory scheme during his service in the state assembly. (*Sonic I*, *supra*, 51 Cal.4th at p. 672.)

disadvantage relative to out-of-state rivals. This will harm not only the dealers, but also their employees, customers, and the state economy as a whole.[3] The CNCDA therefore joins with the other amici curiae in asking that this court give full effect to the Congressional mandate reflected in the FAA, as discussed in greater detail below.

May 25, 2012

HORVITZ & LEVY LLP
LISA PERROCHET
FELIX SHAFIR
JAMES A. SONNE

By: _____
James A. Sonne

Attorneys for Amicus Curiae
THE CALIFORNIA NEW CAR DEALERS ASSOCIATION

[3] In 2011, California new car dealerships employed over 117,000 full and part time individuals, accounting for 7.3% of statewide retail employment.

AMICUS CURIAE BRIEF

INTRODUCTION

Before *AT&T Mobility LLC v. Concepcion* (2011) [563 U.S. __ 131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*), the enforcement of arbitration agreements governed by the FAA was gradually being eroded, with courts—especially in California—finding ever more circumstances in which contracting parties' agreements to resolve their disputes through arbitration could be discarded once a dispute arose. (*Id.* at p. 1747 ["California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts"], citing Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act* (2006) 3 Hastings Bus. L.J. 39, 54, 66 (hereafter Broome) and Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability* (2004) 52 Buff. L.Rev. 185, 186-187.)

After *Concepcion*, however, it is no longer debatable that the FAA's mandate requiring courts to enforce arbitration agreements according to their terms preempts not only state public laws that expressly regulate otherwise-valid contracts to arbitrate, but also state laws that are facially neutral to arbitration but nevertheless undermine arbitration as a means for the efficient resolution of disputes. *Concepcion* makes clear that, given the weighing of competing policies and the ultimate determination by *Congress* that

arbitration agreements cannot be targeted as suspect or second-class contracts, contrary *state* policy or unconscionability standards are no longer a relevant basis for refusing to enforce such agreements.

Before *Concepcion,* this court held the parties' agreement could not be enforced as written, relying on state-law public policy and unconscionability tests developed in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) and *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*). (See *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 676-687 (*Sonic I*).) Now, however, this case presents the question whether any aspect of *Armendariz* or *Gentry* survives *Concepcion*, or whether those opinions improperly interfere with the enforcement of arbitration agreements according to their terms and disrupt the agreed-upon mutual intent of the parties. As we describe below, the pertinent tests articulated in *Armendariz* and *Gentry* are no longer good law.

More particularly, in its pre-*Concepcion* opinion, members of this court disagreed whether the FAA would permit the court to condition the enforcement of agreements to arbitrate statutory wage disputes on the availability to the employee of so-called "Berman hearing" procedures otherwise available under state law in the pursuit of statutory wage claims. After *Concepcion*, the matter is no longer in doubt. The judicial precedents this court relied on to impose those provisions—*Armendariz* and *Gentry*—do not survive *Concepcion.*

Moreover, even if *Armendariz* and *Gentry* survive generally, the FAA nonetheless forbids the imposition of Berman procedures on arbitration because these procedures—e.g., a pre-suit hearing before the California Labor Commissioner; a one-way bond requirement for any post-hearing appeal by an employer; treatment of non-appealed awards as binding; state enforcement of awards; the potential for one-way intervention by the Labor Commissioner on behalf of the employee; and one-way attorney fees for employees who prevail on appeal—necessarily alter any contractually-specified arbitration process that does not include such procedures. Because one of the main advantages of arbitration is the opportunity for a process that is more streamlined than would be available in court, any state law rule that so plainly distorts and complicates the process must yield to Congress and the FAA.

This does not mean, of course, that California wage and hour law is no longer subject to enforcement. Indeed, *Concepcion* does nothing to diminish the California Labor Commissioner's authority to receive complaints from employees and others, and to prosecute wage and hour violations to the fullest extent of the law. And, as appellant Sonic-Calabasas A, Inc. (Sonic) aptly pointed out in its answer to opposing amici curiae, the participation of individual wage claimants is not necessary for the Labor Commissioner to pursue wage violations, nor are such claimants limited in their ability to provide information to the Commissioner about supposed violations absent their personal Berman hearing. (See Appellant's Answer to Brief of Amici Curiae Asian Law Caucus, et al. 6-7.) But when it comes to individual employees' prior agreements to

arbitrate such matters for the purpose of obtaining personal redress, the FAA, as applied by *Concepcion*, simply does not allow states to interfere with that freely contracted-for approach between the parties.

ARGUMENT

I. UNDER *CONCEPCION*, THE FAA PREEMPTS STATE PUBLIC POLICY OR UNCONSCIONABILITY RULES THAT INVALIDATE ARBITRATION AGREEMENTS BASED ON PERCEIVED DEFICIENCIES IN THE AGREED-UPON ARBITRATION PROCEDURE.

A. *Concepcion* preempts the public policy test developed in *Armendariz* to defeat enforcement of agreements to arbitrate statutory claims.

In its 2011 opinion, this court relied heavily on the public policy standard articulated in its earlier decision in *Armendariz* to conclude that the arbitration agreement here cannot be enforced as written because it is contrary to California's public policy. (See *Sonic I, supra*, 51 Cal.4th at pp. 676-684.) In *Armendariz*, this court held that state public policy prohibits enforcement of an agreement to arbitrate unwaivable state-law discrimination claims where the agreed-upon arbitration procedures lack "certain minimum requirements." (*Armendariz, supra*, 24 Cal.4th at pp. 90-91, 99-113; see also *Gentry, supra*, 42 Cal.4th at p. 463, fn. 7

["*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" (emphasis added)].) Here, this court equated certain procedures available in court proceedings—in particular, "the right to a *Berman* hearing and the post-hearing protections" provided as a result—with *Armendariz*'s minimum procedural requirements, and thus concluded that state public policy prohibits the enforcement of arbitration agreements that do not afford employees the pertinent Berman procedures. (See *Sonic I*, at pp. 676-684.)

But after *Concepcion*, *Armendariz*'s state public policy standard may no longer be used by courts to invalidate the parties' chosen dispute resolution process on the ground that the process does not include mechanisms that the *courts* believe as a matter of state public policy would best vindicate a plaintiff's state statutory rights. Rather, the FAA, as construed by *Concepcion*, preempts the imposition of such state public policy for several reasons.

First, the United States Supreme Court held in *Concepcion* that where "state law *prohibits outright the arbitration of a particular type of claim*, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*Concepcion*, *supra*, 131 S.Ct. at p. 1747, emphasis added.) This principle applies with full force to *Armendariz*, which "held that an employee can be compelled to arbitrate unwaivable statutory claims *only* if certain minimum requirements are satisfied." (*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 175-176, emphasis added; accord, *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36

Cal.4th 495, 506 (*Boghos*).) Indeed, this court's earlier opinion in the present case proceeded from this very premise. (See *Sonic I, supra*, 51 Cal.4th at p. 677.) Under a straightforward application of *Concepcion*, therefore, *Armendariz*'s public policy standard demanding special scrutiny of arbitration agreements covering statutory claims is preempted by the FAA. (See, e.g., *Marmet Health Care Center, Inc. v. Brown* (2012) __ U.S. __, __ [132 S.Ct. 1201, 1203-1204, 182 L.Ed.2d 42] (*Marmet*) [FAA preempts state judicial precedent that, for public policy reasons, prohibits outright the arbitration of certain claims]; *Kilgore v. KeyBank, National Assn.* (9th Cir. 2012) 673 F.3d 947, 957, 960 (*Kilgore*) [FAA preempts California Supreme Court precedent that " 'prohibits outright the arbitration of a particular type of claim' " because such precedent "does not survive *Concepcion*"].)[4]

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[4] *Concepcion* addressed whether the FAA preempts the application of a defense predicated on California law to a *consumer* contract. (See *Concepcion, supra*, 131 S.Ct. at pp. 1744-1746.) But nothing in *Concepcion* indicates the principles of FAA preemption it articulated are confined to that context. To the contrary, "*Concepcion* is broadly written." (*Coneff v. AT&T Corp.* (9th Cir. 2012) 673 F.3d 1155, 1158 (*Coneff*).) Indeed, federal courts in California have applied *Concepcion* beyond that context, including to employment cases. (See, e.g., *Jasso v. Money Mart Express, Inc.* (N.D.Cal. Apr. 13, 2012, No. 11-CV-5500 YGR) 2012 WL 1309171, at pp. *3-*11 (*Jasso*); *Sanders v. Swift Transportation Co.* (N.D.Cal. Jan. 17, 2012, No. 10-CV-03739 NC) __ F.Supp.2d __ [2012 WL 523527, at pp. *1, *3] (*Sanders*); *Valle v. Lowe's HIW, Inc.* (N.D.Cal. Aug. 22, 2011, No. 11-CV-1489 SC) 2011 WL 3667441, at pp. *1-*3, *6 (*Valle*); *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1140-1142.)

Notably, the United States Supreme Court's order requiring this court to revisit its 2011 holding that gives rise to this briefing alone

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Second, even assuming *Armendariz*'s requirements are not outright prohibitions of arbitration, but instead merely constitute a generally applicable contract defense, they are still preempted by the FAA under *Concepcion* because they interfere with the fundamental attributes of arbitration—namely, the enforcement of arbitration agreements according to their terms and the facilitation of streamlined proceedings to resolve disputes. (See *Concepcion, supra,* 131 S.Ct. at p. 1749 [describing FAA's " 'two goals' "].) Section 2 of the FAA (9 U.S.C.A. § 2) contains a savings clause that "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.' " (*Concepcion,* at p. 1742.) But nothing in section 2's savings clause "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Id.* at p. 1748.) Thus, any state-law rule—even one that is nominally a generally applicable contract defense, like unconscionability—must yield to the FAA if the application of the rule "interferes with fundamental attributes of arbitration." (*Ibid.*)

As the United States Supreme Court emphasized in *Concepcion*, "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' " (*Concepcion, supra,* 131 S.Ct. at p. 1748.) Indeed, the

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establishes *Concepcion* is not limited to consumer contracts since that order vacated this court's earlier judgment and remanded "for further consideration in light of" *Concepcion*, even though this case has nothing to do with consumer arbitration. (See *Sonic-Calabasas A, Inc. v. Moreno* (2011) 132 S.Ct. 496 [181 L.Ed.2d 343].)

Court has repeatedly emphasized this principal FAA objective in post-*Concepcion* precedent. (See *Marmet, supra,* 132 S.Ct. at p. 1203 [FAA "requires courts to enforce the bargain of the parties to arbitrate" (internal quotation marks omitted)]; *CompuCredit Corp. v. Greenwood* (2012) __ U.S. __, __ [132 S.Ct. 665, 669, 181 L.Ed.2d 506] (*CompuCredit*) [FAA "requires courts to enforce agreements to arbitrate according to their terms"].)

In applying this principle, *Concepcion* makes clear that a generally applicable contract defense *that requires parties to adhere to certain arbitration procedures they never agreed to,* by definition, does not ensure the enforcement of the arbitration agreement according to its terms, and therefore "interferes with the fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA." (*Concepcion, supra,* 131 S.Ct. at p. 1748; accord, e.g., *Adams v. AT&T Mobility, LLC* (W.D.Wash. 2011) 816 F.Supp.2d 1077, 1083 [*Concepcion* holds that FAA preempts the application of state unconscionability law in a manner that "interfere[s] with the FAA's fundamental purpose—enforcing arbitration clauses according to their terms"].) *Armendariz*'s public policy standard is just such a preempted rule.

Armendariz's public policy standard is preempted for the additional reason that it disrupts the facilitation of streamlined proceedings. (*Concepcion, supra,* 131 S.Ct. at p. 1748 [FAA is designed to "facilitate streamlined proceedings"].) *Concepcion* held that the FAA preempted a generally applicable contract defense—there, the so-called "*Discover Bank* rule," which invalidated certain agreements directing disputes to be arbitrated individually rather

than on a classwide basis—because the defense's application to arbitration would: (1) "sacrifice[ ] the principal advantage of arbitration—its informality—and make[ ] the process slower, more costly, and more likely to generate procedural morass than final judgment"; (2) "*require*[ ] procedural formality"; and (3) "greatly increase[ ] the risks to defendants." (*Id.* at pp. 1748-1752.)

Armendariz's public policy standard interferes with the FAA's objective of facilitating streamlined proceedings for the same reasons. To wit, *Armendariz* mandates minimum procedural requirements pursuant to which the arbitration must provide for "neutral arbitrators, more than minimal discovery, a written award, and all of the types of relief that would otherwise be available in court," and forbids the imposition of unreasonable fees or costs on employees. (*Boghos, supra,* 36 Cal.4th at p. 506.) Like the *Discover Bank* rule, therefore, *Armendariz*'s public policy standard jeopardizes the informality of arbitration (its "principal advantage") and makes the process slower, costlier, and more likely to cause procedural morass. (*Concepcion, supra,* 131 S.Ct. at p. 1751.) Additionally, the minimum procedural requirements imposed by the *Armendariz*'s public policy standard—particularly those mandating neutral arbitrators, a written award to permit judicial review, and broad discovery—require formality that the parties necessarily did not choose to impose upon themselves. (*Ibid.*) And by insisting that all types of relief otherwise available in court be available in arbitration, *Armendariz* impermissibly ties the parties' hands in deciding what risks they are willing to undertake when entering into a contractual arrangement. (*Id.* at p. 1752.)

The fact that *Armendariz*'s standard is based on state public policy does not permit it to trump the FAA's " 'two goals' " of enforcing arbitration agreements according to their terms and facilitating streamlined proceedings. (*Concepcion, supra,* 131 S.Ct. at p. 1749.) *Concepcion* expressly rejected the argument that, where the FAA applies, state public policy could "require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id.* at p. 1753.) Recently, the Supreme Court has shown that it meant what it said on this subject, unanimously following *Concepcion* to hold that a state judicial precedent was preempted by the FAA because, notwithstanding state public policy, the plain text of the FAA " 'requires courts to enforce the bargain of the parties to arbitrate.' " (*Marmet, supra,* 132 S.Ct. at pp. 1203-1204.)

Armendariz suggested that its state public policy standard could be harmonized with the FAA because several United States Supreme Court cases previously indicated arbitration agreements governed by the FAA could be invalidated if they would prevent a party from vindicating a *congressionally-conferred* statutory right. (See *Armendariz, supra,* 24 Cal.4th at pp. 90-91, 99-102.) United States Supreme Court precedent decided after *Concepcion* confirms, however, that *Armendariz* misconstrued this vindication principle by extending it to defeat arbitration agreements in the name of *state* statutory rights. The Court held just a few months ago that the FAA "requires courts to enforce agreements to arbitrate according to their terms" even when the claims at issue are statutory "unless the FAA's mandate has been 'overridden by a contrary *congressional*

command.' " (*CompuCredit, supra,* 132 S.Ct. at p. 669, emphasis added; accord, *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26 [111 S.Ct. 1647, 114 L.Ed.2d 26] (*Gilmer*), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628 [105 S.Ct. 3346, 87 L.Ed.2d 444] (*Mitsubishi Motors*) ["[h]aving made the bargain to arbitrate, the party should be held to it unless *Congress* itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (emphasis added)].)

It is critical to remember that the Supreme Court cases that have addressed the vindication principle involved claims under *federal* laws. (See, e.g., *Green Tree Financial Corp. v. Randolph* (2000) 531 U.S. 79, 82-84 [121 S.Ct. 513, 148 L.Ed.2d 373] [Truth in Lending Act]; *Gilmer, supra,* 500 U.S. at p. 23 [Age Discrimination in Employment Act]; *Mitsubishi Motors, supra,* 473 U.S. at p. 616 [federal antitrust law].) None of these cases held that courts may refuse to enforce arbitration agreements governed by the FAA where the agreement would supposedly prevent a party from vindicating statutory rights under *state* law. Simply put, this vindication principle "applies only to federal, not state, statutes." (*Kilgore, supra,* 673 F.3d at p. 962; accord, *Coneff, supra,* 673 F.3d at pp. 1158-1159, fn. 2 [vindication principles discussed in "*Mitsubishi* [*Motors*], *Gilmer, Green Tree,* and similar decisions are limited to federal statutory rights"].)[5]

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[5] It is unsurprising that the vindication principle is limited to federal law since the FAA is a federal law, and "Congress may, of course, determine that certain claims should not be subject to (continued...)

Finally, *Armendariz*'s public policy standard is preempted for the independent reason that the standard is not merely an arbitration-neutral defense to contract formation, such as would be compatible with section 2 of the FAA. Pursuant to the plain language of the savings clause in section 2 of the FAA, as read in harmony with the plain language of the FAA's other provisions, the FAA "require[s] enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, *such as fraud, duress, or mutual mistake*. [Citation.] Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause." (*Concepcion*, *supra*, 131 S.Ct. at pp. 1754-1755 (conc. opn. of Thomas, J.), emphasis added.)

Armendariz's public policy standard is, by definition, based on public policy concerning the substance of the arbitration process instead of the backdrop against which the parties entered into their agreement. Consequently, this standard, including any minimum

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arbitration and can pass federal legislation that removes such claims from the reach of the FAA." (*Kilgore*, *supra*, 673 F.3d at p. 955.) In contrast, "the very nature of federal preemption *requires* that state law bend to conflicting federal law—no matter the purpose of the state law." (*Id.* at p. 962, original emphasis; see also *Marmet*, *supra*, 132 S.Ct. at pp. 1203-1204 [unanimously following *Concepcion* to hold that West Virginia precedent—which held, as a matter of state public policy, that an arbitration agreement cannot be enforced to compel a party to arbitrate personal injury or wrongful death claims—was preempted because state public policy could not trump the plain text of the FAA, which " 'requires courts to enforce the bargain of the parties to arbitrate' "].)

procedural requirements it mandates, is not a valid ground for refusing to enforce an arbitration agreement governed by the FAA. (*Concepcion, supra,* 131 S.Ct. at p. 1756 (conc. opn. of Thomas, J.) [stating that the "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made" under California law]; see also *Cruz v. Cingular Wireless, LLC* (11th Cir. 2011) 648 F.3d 1205, 1215 [applying Justice Thomas' opinion to affirm an order compelling arbitration, in part because plaintiffs argued the arbitration agreement violated public policy and thus did "not allege any defects in the formation of the contract"].)

In sum, the *Armendariz* public policy test is preempted by the FAA in light of *Concepcion* and other recent United States Supreme Court precedent, whether because it categorically excludes certain types of arbitration, interferes with the objectives and fundamental attributes of arbitration, or fails to act as a defense to contract formation.

B. *Concepcion* preempts the unconscionability test developed in *Armendariz.*

In addition to relying on *Armendariz*'s public policy test, this court's 2011 opinion likewise relied on *Armendariz*'s unconscionability standard to conclude that the arbitration agreement at issue in this case could not be enforced, as is. (See *Sonic I, supra,* 51 Cal.4th at pp. 684-687.) In *Armendariz,* this court indicated that a provision in an employment arbitration agreement is unconscionable and cannot be enforced if (1) the

arbitration agreement is a contract of adhesion, and (2) the agreement is one-sided in that it sets certain arbitration procedures that benefit the employer without mutually benefiting the employee. (*Armendariz, supra,* 24 Cal.4th at pp. 113-117.) Applying that test, the court previously concluded here that an arbitration provision requiring an employee to (implicitly) waive his or her Berman hearing protections is unconscionable. (*Sonic I,* at pp. 685-686.)[6] But after *Concepcion,* the standard for unconscionability set by *Armendariz,* like its public policy test, is preempted by the FAA as to both its adhesion and lack-of-mutuality requirements.

Once again, *Concepcion* addressed FAA preemption as applied to this court's *Discover Bank* precedent. (*Concepcion, supra,* 131 S.Ct. at pp. 1746-1749, 1753.) As *Concepcion* explained, *Discover Bank* applied *Armendariz*'s unconscionability standard to class action waivers in arbitration agreements. (*Id.* at p. 1746.) And, as noted above, while the savings clause in section 2 of the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or

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[6] It is not clear whether this court's 2011 opinion conflated *Armendariz's* unconscionability standard with *Armendariz*'s public policy standard and, in doing so, applied *Armendariz* based solely on public policy considerations. The 2011 opinion indicated "there is sometimes an overlap between" these two standards and concluded, "[s]uch is the case here." (*Sonic I, supra,* 51 Cal.4th at p. 687.) If this court's earlier opinion applied *Armendariz*'s unconscionability standard based on public policy principles, then the FAA would necessarily preempt any such standard for the reasons discussed in the preceding section of this brief.

unconscionability,' " the FAA nevertheless preempts such defenses if they interfere with the fundamental attributes of arbitration, such as the enforcement of arbitration agreements according to their terms. (*Id.* at pp. 1746-1749, 1753.)

In other words, state-law defenses like the unconscionability test applied in *Discover Bank* may be said to fall within an *exception to the exception* to FAA preemption. An arbitration procedure that a state may find objectionable—in *Concepcion*, a class action waiver found in a contract of adhesion—nonetheless warrants FAA protection. As *Concepcion* explained, the times when contracts in modern society "were anything other than adhesive are long past." (*Concepcion, supra*, 131 S.Ct. at p. 1750.) Indeed, "[a]rbitration is a matter of contract, and the FAA requires courts to honor [the] parties' expectations" as reflected in the terms of the arbitration agreement, regardless if the agreement was presented in a "take it or leave it" fashion. (*Id.* at p. 1752.)

Concepcion also determined that "court[s] may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.' " (*Concepcion, supra*, 131 S.Ct. at p. 1747.) As an illustration of such a prohibited unconscionability standard, *Concepcion* disapproved state judicial rules finding unconscionable agreed-upon arbitration procedures that "would be of greater benefit" to the defendant than to the plaintiff. (*Ibid.*) *Concepcion* pointed out that while such a mutuality rule would nominally be a generally applicable contract defense in that it applies to " 'any' contract," the rule would "[i]n

practice . . . have a disproportionate impact on arbitration agreements . . . ." (*Ibid.*) *Concepcion* pointed out that such an example was "not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' " and that "California's courts" in particular "have been more likely to hold contracts to arbitrate unconscionable than other contracts." (*Ibid.*)

These principles of FAA preemption articulated by *Concepcion* cannot be squared with *Armendariz*'s test for unconscionability that allows courts to second-guess the parties' assessment of the relative burdens and benefits of particular terms to an arbitration agreement. Just as *Concepcion* held the *Discover Bank* rule was preempted insofar as it applied *Armendariz* to a particular type of arbitration procedure—there, the class action waiver—any *Armendariz* defense to enforcement of arbitration agreements that turns on finding the agreement "unconscionably" benefits one party over another is likewise preempted. Put simply, *Armendariz*'s unconscionability standard is preempted by the FAA "[b]ecause it 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' " (*Concepcion, supra*, 131 S. Ct. at p. 1753.)

This does not mean, of course, that the FAA preempts California's general unconscionability doctrine. The general rules governing unconscionability continue to apply to all contracts. For example, a state may refuse to enforce an arbitration agreement, like any other contract, because it is written in an unreadable font size. (See, e.g., *Conservatorship of Link* (1984) 158 Cal.App.3d 138,

141, fn. 1 [citing examples of font-size rules for contracts under the Civil Code]; see also *Concepcion, supra,* 131 S.Ct. at p. 1750, fn. 6 [permitting states to regulate the format of contracts]; *Ilkhchooyi v. Best* (1995) 37 Cal.App.4th 395, 410 [clause in commercial contract found procedurally unconscionable where it was "buried in diminutive print in the middle of one of five lengthy paragraphs"].) It is only those specific unconscionability rules that " 'rely on the uniqueness of an agreement to arbitrate' " that are preempted by the FAA. (*Concepcion,* at p. 1747.)

In short, *Armendariz* is exactly the type of proscribed unconscionability rule that relies on the uniqueness of an agreement to arbitrate because its specific standard for evaluating unconscionability turns on whether "the *arbitration agreement* is adhesive" and whether there is a " 'modicum of bilaterality' in an *arbitration agreement*' " such that the limitations set by "the *arbitration system* established by the employer" are not too one-sided. (*Armendariz, supra,* 24 Cal.4th at pp. 114-115, 117-118, emphases added.)[7] Accordingly, in light of *Concepcion, Armendariz*'s unconscionability standard is preempted by the FAA.

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[7] Based on his empirical study of California's unconscionability jurisprudence—a study and corresponding conclusions that were cited by the United States Supreme Court (see *Concepcion, supra,* 131 S.Ct. at p. 1747)—one commentator has explained that "California courts are clearly biased against arbitration as an alternative means of dispute settlement" and "[t]heir disdain manifests" in the standard they apply to assess whether arbitration agreements are enforceable. (Broome, *supra,* 3 Hastings Bus. L.J. at p. 41.) This study confirms that the unconscionability standard set by *Armendariz* imposes "arbitration-specific" requirements and

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C. *Concepcion* preempts the public policy test developed in *Gentry* for the arbitration of employment claims under agreements containing a class waiver.

Another decision on which this court's 2011 opinion relied was *Gentry, supra,* 42 Cal.4th 443. (See *Sonic I, supra,* 51 Cal.4th at p. 677 [noting that *Gentry* provides applicable public policy standards beyond those in *Armendariz*].) In *Gentry*, this court held that, as a matter of state public policy, class-action waivers of statutory claims in employee arbitration agreements can be invalidated, notwithstanding FAA preemption, based on the assessment of various factors, including the likelihood and size of recovery on a non-class basis, the risk of retaliation against individual class members, and the sophistication of individual class members about their rights. (*Gentry,* at p. 463.) Like *Armendariz,* however, *Gentry* does not survive *Concepcion.*

The FAA preempts *Gentry* in light of *Concepcion*'s express holding that the FAA preempts the *Discover Bank* rule, which had classified as unconscionable most class action waivers in consumer arbitration agreements. (*Concepcion, supra,* 131 S.Ct. at pp. 1746, 1753.) Indeed, *Gentry* simply extended the preempted *Discover Bank* rule from consumer arbitration agreements to employment arbitration agreements. (*Gentry, supra,* 42 Cal.4th at pp. 452-466

(...continued)
that, under California's jurisprudence predating *Concepcion*, " 'unconscionable' means something quite different when the validity of an arbitration agreement is at issue." (*Id.* at pp. 53-55, 60-63, 67-68.)

[observing that the court had granted review in *Gentry* "to clarify [its] holding in *Discover Bank*," and following *Discover Bank* repeatedly to hold that class action waivers in arbitration agreements can be unenforceable as contrary to public policy]; *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1285 [*Gentry* "extended the rationale of *Discover Bank*" to the employment context].)

Concepcion thus overrules *Gentry* just as it overruled *Discover Bank*. (See, e.g., *Sanders, supra,* 2012 WL 523527, at p. *3 [*Gentry* "is no longer good law"]; *Lewis v. UBS Financial Services Inc.* (N.D.Cal. 2011) 818 F.Supp.2d 1161, 1167 ["Like *Discover Bank*, *Gentry* advances a rule of enforceability that applies specifically to arbitration provisions, as opposed to a general rule of contract interpretation. As such, *Concepcion* effectively overrules *Gentry*"]; *Valle, supra,* 2011 WL 3667441, at p. *6 ["*Gentry* is no longer good law"]; *Murphy v. DIRECTV, Inc.* (C.D.Cal. Aug. 2, 2011, No. 2:07-CV-06465-JHN-VBKx) 2011 WL 3319574, at p. *4 ["[I]t is clear . . . *Concepcion* overrules *Gentry*"].)

Simply put, there is "no principled basis to distinguish between the *Discover Bank* rule and the rule in *Gentry*, given the broad language used by the Supreme Court in *Concepcion* [in setting the scope of FAA preemption]." (*Jasso, supra,* 2012 WL 1309171, at p. *5). *Discover Bank* and *Gentry* each improperly justified rejection of the parties' arbitration agreements by pointing "to the modest size of individuals' potential recovery, unequal knowledge and bargaining power in the contractual relationship,

and 'other real world obstacles' to vindication of the individuals' rights."[8] (*Id.*)

Like *Discover Bank*, *Gentry* is no longer good law because its invalidation of terms prohibiting "classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Concepcion*, *supra*, 131 S.Ct. at p. 1748; see also *Coneff*, *supra*, 673 F.3d at p. 1158 [under *Concepcion*, "individualized proceedings are an inherent and necessary element of arbitration," and "[b]y requiring arbitration to maintain procedures fundamentally at odds with its very nature, a state court impermissibly relies on the 'uniqueness of an agreement to arbitrate' to achieve a result that the state legislature cannot"].)[9]

In arguing that *Gentry* survives *Concepcion*, certain amici have cited *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 (*Brown*). (See Amicus Brief of California Employment Lawyers Association and Consumer Attorneys of California 8.) But the Court

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[8] The fact that *Gentry*'s public policy standard is founded on the principle that it helps employees vindicate their statutory rights under *state* law (see *Gentry*, *supra*, 42 Cal.4th at p. 463) does not immunize it from FAA preemption, because the vindication principle upon which it relies applies *only* to the vindication of *federal* statutory rights, as noted previously. (*Ante*, pp. 15-16.)

[9] *Gentry* is also preempted for the independent reason that, like *Armendariz*, it is not a defense to contract formation. As this court's 2011 opinion confirmed, the *Gentry* standard is based on public policy. (See *Sonic I*, *supra*, 51 Cal.4th at p. 677.) The savings clause in section 2 of the FAA permits a state's contract defenses to bar the enforcement of an arbitration agreement governed by the FAA *only* if they are defenses to contract formation—and public policy is not a defense to contract formation. (*Ante*, pp. 17-18.)

of Appeal in *Brown* expressly declined to address whether the FAA as construed in *Concepcion* preempts state law as applied in *Gentry*, holding only that the plaintiff there did not provide evidence to show invalidity under the multi-factor test in *Gentry* in any event. (*Brown*, at pp. 497-498.) Likewise, the Court of Appeal in *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506 recently declined to decide whether *Concepcion* overrules *Gentry*, instead holding that the plaintiff had failed to satisfy the *Gentry* standard even if that precedent survived *Concepcion*. (*Id.* at p. 516 ["A question exists about whether *Gentry* survived the overruling of *Discover Bank* in *Concepcion,* but it is not one we need to decide."].)

In short, like the public policy and unconscionability standards articulated in *Armendariz*, the public policy test set in *Gentry* cannot stand after *Concepcion*.[10]

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[10] *Armendariz* and *Gentry* are not the only California Supreme Court precedents swept away by *Concepcion*. Not only did *Concepcion* expressly hold that this court's *Discover Bank* precedent was preempted by the FAA, *Concepcion*'s landmark FAA preemption standards equally did away with this court's decisions in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, which barred as a matter of state public policy the enforcement of agreements to arbitrate certain statutory claims for injunctive relief. (See *Kilgore, supra*, 673 F.3d at p. 960 ["the *Broughton-Cruz* rule does not survive *Concepcion*"].)

II. *CONCEPCION* MAKES CLEAR THAT PARTIES TO ARBITRATION AGREEMENTS GOVERNED BY THE FAA CANNOT BE FORCED TO INCLUDE BERMAN HEARING PROVISIONS IN THOSE AGREEMENTS.

A. Imposing Berman hearing provisions onto agreements to arbitrate violates the FAA's requirement that such agreements must be enforced according to their terms.

Even assuming some remnant of *Armendariz* or *Gentry* survives *Concepcion*, any imposition of Berman hearing provisions on agreed-upon arbitration procedures that do not contain them is foreclosed by the FAA under *Concepcion*. As explained above, *Concepcion* emphasizes that the FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms. As a matter of federal law, therefore, the FAA forecloses efforts by courts to add, delete, or otherwise alter the terms of parties' agreements to arbitrate.

This principal that agreements must be enforced according to their terms squarely precludes the imposition of Berman hearing provisions for wage disputes onto arbitration agreements that do not already contain such provisions—e.g., a pre-suit hearing before the California Labor Commissioner; a one-way bond requirement for any post-hearing appeal by an employer; treatment of non-appealed awards as binding; state enforcement of awards; the potential for one-way intervention by the Labor Commissioner on behalf of the employee; and one-way attorney fees for employees who prevail on

appeal (Lab. Code, § 98 et seq.). Consequently, this court's earlier determination conditioning the enforceability of agreements to arbitrate statutory wage disputes on the availability of Berman hearings and the post-hearing protections afforded by California law to court litigants is no longer viable after *Concepcion.*

The California Labor Commissioner remains free to receive complaints and enforce all wage and hour laws to the fullest extent of the law. (See, e.g., Lab. Code, § 90.5.)[11] But after *Concepcion,* California courts can no longer refuse to enforce arbitration agreements according to their terms on the ground that an arbitration agreement expressly or implicitly waives a Berman hearing and its corresponding post-hearing protections.

The forced imposition of Berman terms on private parties is particularly pernicious in existing employment contracts where the parties have been performing their respective obligations based on the relative value of the contract to each—which value includes the balance of benefits and burdens from incorporating the arbitration

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[11] Amici Curiae Asian Law Caucus, et al., claim that "waiver of the Berman process divests the Division of Labor Standards Enforcement . . . of its important prosecutorial role in enforcing wage and hour laws for the benefit of the public." (Amici Curiae Brief of Asian Law Caucus, et al. 1.) But, as Sonic described in its answer to these amici curiae, an employee's implied waiver of the individual Berman hearing process does nothing to diminish the Labor Commissioner's authority under the Labor Code to prosecute wage and hour violations, nor does it prevent any employee from making a complaint or otherwise providing information to the Labor Commissioner without fear of retaliation. (See Appellant's Answer to Brief of Amici Curiae Asian Law Caucus, et al. 6-7; see also Lab. Code, §§ 90.5, 1102.5, subd. (a).)

agreement as written. For example, employees arguably benefit from the cost savings of immediate arbitration, in that the employer is able to offer higher wages; perhaps the very existence of the job is owed to the ability of the employer to count on arbitration rather than facing the risk of court litigation. "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." (*Concepcion, supra,* 131 S.Ct. at p. 1752; accord, *CompuCredit, supra,* 132 S.Ct. at p. 669 [FAA "requires courts to enforce agreements to arbitrate according to their terms"].)

Applying Berman hearing provisions to arbitration adds costs to the parties' agreement by requiring employers who are unsuccessful in the administrative hearing to post a bond before exercising their contractual right to arbitrate under the parties' agreement (see Lab. Code, § 98.2, subd. (b)). Similarly, imposing the Berman provisions causes any arbitration between the parties to be altered to permit the Labor Commissioner to intervene on behalf of any award made at the prior hearing (*id.* § 98.2, subd. (i)), thus altering the parties' expectations as to how, and with whom, their arbitration should be conducted. Finally, imposing on arbitration the cost-shifting and one-way attorney-fee provisions available for "appeals" arising from Berman hearings (see *id.* § 98.2, subd. (c)) necessarily shifts the prior understanding of the parties as to how such substantive matters should be addressed in arbitration and the corresponding bargain those parties struck in the exchange of employment terms. In no way can the imposition of these various Berman provisions be considered enforcing the terms of the parties' agreement to arbitrate as written, as required by *Concepcion.*

Whether Berman hearing provisions constitute a substantive right under California law—as this court previously suggested (see *Sonic I, supra,* 51 Cal.4th at pp. 678-680)—is irrelevant to the principle outlined in *Concepcion* that arbitration agreements must be enforced according to their terms. As the Supreme Court held, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Concepcion, supra,* 131 S.Ct. at p. 1753; accord, *Marmet, supra,* 132 S.Ct. at p. 1203 [state public policy cannot trump the plain text of the FAA, which " 'requires courts to enforce the bargain of the parties to arbitrate' "]; *Coneff, supra,* 673 F.3d at p. 1159 [state "policy concerns, however worthwhile, cannot undermine the FAA"].) To the contrary, "federal preemption *requires* that state law bend to conflicting federal law—no matter the purpose of the state law." (*Kilgore, supra,* 673 F.3d at p. 962; see also *Moses H. Cone Memorial Hosp. v. Mercury Const.* (1983) 460 U.S. 1, 24 [103 S.Ct. 927, 74 L.Ed.2d 765] [describing the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state *substantive* or *procedural* policies to the contrary" (emphasis added)].)

Where the application of state policy would alter the terms of an arbitration agreement, *Concepcion* requires that the FAA preempt such policy in favor of the parties' agreement. This court's pre-*Concepcion* proposal to apply Berman provisions to such arbitration agreements is therefore barred by the FAA.

Imposing Berman provisions on the parties' agreed-upon arbitration process in contravention of the FAA's directives affording parties the freedom to agree "to arbitrate according to

specific rules" (*Concepcion, supra,* 131 S.Ct. at pp. 1748-1749) is especially unnecessary where, as here, employees' rights continue to be protected by the state. California law not only permits the Labor Commissioner to pursue claims within his or her "police power" but the Labor Code expressly authorizes the Commissioner to take assignments of wage claims, prosecute these claims, and collect unpaid wages and remit them to affected employees. (See, e.g., Lab. Code, §§ 90.5, 96, 98.3.) In fact, the Commissioner also has the right to prosecute employee wage claims and collect wages (and remit the entire amount to the employee) even without an assignment of such claims by the employee. (See e.g., Lab. Code, §§ 96.7, 98.3; see also Lab. Code, § 96.6 [establishing Industrial Relations Unpaid Wage Fund to provide Commissioner with special resources to independently pursue employees' wage claims].)

Plaintiff Moreno contends the Berman hearing provisions are so important that permitting arbitration to proceed based on the terms he agreed to with Sonic that do not incorporate such provisions would eviscerate an unwaivable state right. Moreno, however, ignores that the Labor Commissioner has the right to pursue such claims if the employee cannot or chooses not to do so through private litigation or binding arbitration. For that matter, nothing stops an employee who has agreed to arbitrate his or her wage claims from instead assigning those claims to the Labor Commissioner, who in turn could then exercise his or her independent authority to prosecute the claims, collect the wages owed, and remit them to the employee—all outside the Berman process. (See, e.g., Lab. Code, §§ 96, 98.3.) Thus, an employee's

state rights would not be eviscerated. In any event, as explained above, courts cannot refuse, as a matter of state public policy, to enforce arbitration agreements governed by the FAA on the ground arbitration would not vindicate a *state* statutory right since state law must bend to the federal FAA. (*Ante*, pp. 10-13, 15-16.)

B. Imposing Berman hearing provisions onto agreements to arbitrate violates the FAA's goal of facilitating the streamlined resolution of disputes.

Imposing Berman hearing provisions onto arbitration agreements that do not otherwise include such provisions is barred for the independent but related reason that the Berman hearing provisions would disrupt the streamlined resolution of the parties' wage disputes in contravention of the FAA's goals, as outlined in *Concepcion*. (See *Concepcion, supra*, 131 S.Ct. at p. 1748 [FAA is designed to "facilitate streamlined proceedings"]; see also *ante*, pp. 13-15.)

For example, even if arbitration pursued after the conclusion of a Berman hearing would be a de novo proceeding (see Lab. Code, § 98.2, subd. (a)), first pursuing a Berman hearing would inevitably delay the start of arbitration and thus discourage the efficient and speedy resolution of the dispute at hand. Likewise, requiring the participation of the Labor Commissioner in the arbitration under certain circumstances (see, e.g., *id.* §§ 98.2, subd. (i), 98.4) would necessarily complicate the process, make it more formal, and slow it down. Finally, the fact that the pertinent Berman hearing could be

triggered whenever a dispute involves wages (see *id.*, § 98, subd. (a)) suggests that arbitration under the parties' agreement could be delayed, or at least complicated by bifurcation, simply by the presence of an isolated wage claim in what might otherwise be a dispute focused on another matter for which the need for speed is particularly acute—e.g., an employment termination for safety violations.

None of these results is compatible with the goal of achieving efficiency through arbitration. (See, e.g., *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 268 [129 S.Ct. 1456, 173 L.Ed.2d 398] ["that arbitration procedures are more streamlined than . . . litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration"].)[12]

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[12] In 2011, members of this court disagreed whether the United State Supreme Court's emphasis on streamlined proceedings in *Preston v. Ferrer* (2008) 552 U.S. 346 [128 S.Ct. 978, 169 L.Ed.2d 917] (*Preston*) precluded the imposition of Berman hearing provisions onto agreements to arbitrate. (Compare *Sonic I, supra,* 51 Cal.4th at pp. 692-693 with *id.* at pp. 708-709 (dis. opn. of Chin, J.).) After *Concepcion*, however, there should no longer be any debate whether *Preston*'s rationale in rejecting administrative exhaustion requirements as unduly interfering with the streamlined nature of arbitration applies equally here. In *Concepcion*, the Court expressly applied its streamlining analysis in *Preston* to the arbitration-specific *Discover Bank* rule. That rule was preempted, said the Supreme Court, because, like the administrative exhaustion requirement rejected in *Preston*, the class-waiver prohibition it imposes would interfere with the FAA's "prime objective" of "streamlined proceedings and expeditious results." (*Concepcion, supra,* 131 S.Ct. at pp. 1749-1750, internal quotation marks omitted.) Like the class-action waiver rule rejected

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Parties can certainly agree to arbitrate pursuant to burdensome procedures if they want to do so, but that would not be "arbitration as envisioned by the FAA, lack[ing] its benefits, and therefore may not be *required by state law*." (*Concepcion*, *supra*, 131 S.Ct. at pp. 1752-1753, emphasis added.)

C. The FAA forbids engrafting Berman hearing provisions onto agreements to arbitrate under the guise of state unconscionability law.

In its 2011 opinion, a majority of this court concluded that the arbitration agreement at issue in this case is unconscionable, and therefore unenforceable, absent employee protection through the Berman hearing procedures. (*Sonic I*, *supra*, 51 Cal.4th at pp. 684-687.) In particular, the court, relying on *Armendariz*, found the arbitration agreement here unconscionable both because the agreement was a contract of adhesion and because the agreement's failure to include Berman hearing protections resulted in a one-sided process that favored the employer over the employee. (*Ibid.*) After *Concepcion*, however, neither of these stated unconscionability grounds represents a viable basis for refusing to compel arbitration,

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in *Concepcion* and the administrative-exhaustion requirement rejected in *Preston*, therefore, imposing the Berman hearing provisions on arbitration here would hamper the resolution of wage disputes in a speedy and efficient manner, as agreed to in advance by the parties. (See *Concepcion*, at p. 1751.)

as each would unduly interfere with the parties' express agreement in violation of the FAA's goal of streamlined dispute resolution.

As explained above (*ante,* pp. 20-21), the fact that an arbitration agreement is a contract of adhesion is no longer a basis for invalidating the agreement on unconscionability grounds.[13] Moreover, notwithstanding the FAA's savings clause, states may not refuse to enforce arbitration agreements as written using unconscionability rules that depend on an assessment of whether one party benefits at the expense of another from the agreed-upon arbitration procedure because such rules would "[i]n practice . . . have a disproportionate impact on arbitration agreements . . . ." (*Concepcion, supra,* 131 S.Ct. at p. 1747; see also *ante,* pp. 21-22.)

In sum, *Concepcion* forbids the imposition of Berman hearing provisions on parties to arbitration agreements governed by the FAA where the parties did not decide to impose those provisions on themselves as part of those agreements.

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[13] Even opponents of broad arbitration enforcement understand that *Concepcion* adopted a narrow view of unconscionability, particularly where contracts of adhesion are concerned. For example, legislation has recently been introduced in the California state senate seeking to overcome *Concepcion* by declaring that adhesion contracts that include class-action waivers necessarily lack mutual consent. (See Green, *State Bill Tries to Skirt Concepcion,* L.A. Daily J. (Apr. 30, 2012) p. 1.) Whatever their merits, such proposed legislation would be unnecessary if existing policy priorities—e.g., a prohibition on adhesive class-action waivers, or, for that matter, adhesive Berman hearing waivers—were already considered to be sufficient to avoid arbitration after *Concepcion.*

CONCLUSION

Based on the foregoing and the arguments put forth by Sonic and its other supporting amici, the CNCDA urges this court to directly address the impact of *Concepcion* and post-*Concepcion* precedent on the public policy and unconscionability tests developed in *Armendariz* and *Gentry,* to bring California law back in line with the broad Congressional mandate expressed in the FAA and to forestall the inevitable litigation that will follow if this court offers only a very narrow opinion dealing with the presence or absence of Berman hearing provisions in agreements to arbitrate employment disputes. CNCDA further urges that, at a minimum, this court reverse course from its 2011 approach and enforce the arbitration agreement at issue here notwithstanding the absence of Berman hearing provisions among its terms.

May 25, 2012

HORVITZ & LEVY LLP
LISA PERROCHET
FELIX SHAFIR
JAMES A. SONNE

By: _____
James A. Sonne

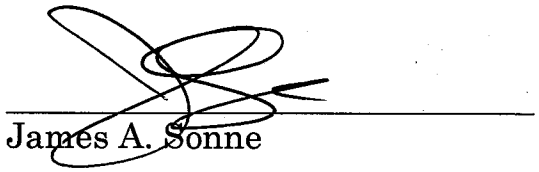
Attorneys for Amicus Curiae
THE CALIFORNIA NEW CAR DEALERS ASSOCIATION

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 7,728 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: May 25, 2012



James A. Sonne

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

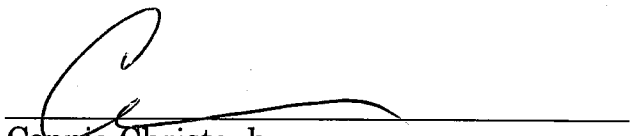
On May 25, 2012, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION IN SUPPORT OF PLAINTIFF SONIC-CALABASAS A, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on May 25, 2012, at Encino, California.



Connie Christopher

SERVICE LIST
Sonic-Calabasas A, Inc. v. Frank Moreno
CASCT Case No.: S174475

Attorney	Party Represented
David John Reese, Esq. John P. Boggs, Esq. Jennifer Michelle Schermerhorn, Esq. Fine, Boggs & Perkins LLP 80 Stone Pine Road, Suite 210 Half Moon Bay, CA 94019	Plaintiff and Appellant Sonic-Calabasas A, Inc.
Miles E. Locker, Esq. Locker Folberg, LLP 235 Montgomery Street, Suite 835 San Francisco, CA 94104	Defendant and Respondent Frank B. Moreno
Hina B. Shah, Esq. Women's Employment Rights Clinic Golden Gate University School of Law 536 Mission Street San Francisco, CA 94105	Amici Curiae Asian Law Caucus, Asian Pacific American Legal Center, Bet Tzedek Legal Services, California Rural Legal Assistance, Icn., Centro Legal de La Raza, Garment Worker Center, Hastings Civil Justice Clinic, Katharine & George Alexander Community Law Center, La Raza Centro Legal, Lawyers' Committee for Civil Rights of the San Francisco Bay, Legal Aid Foundation of Los Angeles, Legal Aid Society - Employment Law Center, Maintenance Cooperation Trust Fund, National Employment Law Project, Neighborhood Legal Services of Los Angeles County, Wage Justice Center, Women's Employment Rights Clinic, Worksafe Law Center ,
Keith Ehrman, Esq. Cliff Palefsky, Esq. McGuinn Hillsman & Palefsky 535 Pacific Avenue San Francisco, CA 94133	Amicus Curiae California Employment Lawyers Association

Attorney	Party Represented
Valerie Tallant McGinty Smith & McGinty 220 16th Avenue, Suite 3 San Francisco, CA 94402	Amici Curiae California Employment Lawyers Association, Amicus Curiae Consumer Attorney Attorneys of California
Cynthia L. Rice, Esq. California Rural Legal Assistance, Inc. 631 Howard Street, Suite 300 San Francisco, CA 94105-3907	Amicus Curiae California Rural Legal Assistance, Icn.
Miye Ann Goishi, Esq. Hastings Civil Justice Clinic UC Hastings College of Law 100 McAllister Street, Suite 300 San Francisco, CA 94102-4929	Amicus Curiae Hastings Civil Justice Clinic
Silas Marvin Shawver Legal Aid Society Employment Law Center 600 Harrison Street San Francisco, CA 94107	Amicus Curiae Legal Aid Society - Employment Law Center
Jose Oliverio Tello Neighborhood Legal Services of Los Angeles County 9354 Telstar Avenue El Monte, CA 91731-2816	Amicus Curiae Neighborhood Legal Services of Los Angeles County
Brian James Wong 12214 Greenwich Drive Glen Allen, VA 23059-7023	Amicus Curiae Chamber of Commerce of the United States of America
Donald M. Falk Mayer Brown, LLP 2 Palto Alto Square, Suite 300 Palo Alto, CA 94306	Amicus Curiae Chamber of Commerce of the United States of America

Attorney	Party Represented
Matthew Martin Sonne Sheppard Mullin Richter et al 650 Town Center Dr 4th Fl Costa Mesa, CA 92626 Matthew Martin Sonne Sheppard Mullin Richter et al 333 South Hope Street Forty-Third Floor Los Angeles, CA 90071	Amicus Curiae Employers Group
Anne Hipshman DIR/Division of Labor-Standards Enforcement 455 Golden Gate Ave., 9th Floor San Francisco, CA 94102	Amicus Curiae California Labor Commissioner, Julie A. Su Department of Labor Standards Enforcement 1901 Rice Avenue, Suite 200 Oxnard, CA 93030
Clerk of the Court California Court of Appeal Second Appellate District • Division 4 300 S. Spring Street, 2nd Floor North Tower Los Angeles, California 90013 1213	Case No. B204902
Clerk of The Superior Court Los Angeles County Superior Court 111 North Hill Street Los Angeles, California 90012	Case No. BS107161