No. 13-856

In The Supreme Court of the United States

SONIC-CALABASAS A, INC.,

Petitioner,

v.

FRANK MORENO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICUS CURIAE* THE CALIFORNIA NEW CAR DEALERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

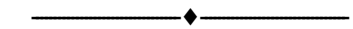
Amicus curiae the California New Car Dealers Association (CNCDA) is a non-profit mutual benefit corporation chartered to protect and advance the interests of California's new motor vehicle dealer industry. The CNCDA's members include over 1,150 of the approximately 1,300 new car dealers in California. The CNCDA files *amicus curiae* briefs before state and federal courts in cases such as this that involve issues of vital concern to its members.

Like many businesses, CNCDA members enter into contracts with their employees and customers. Typical among the terms in these contracts are arbitration provisions governed by the Federal Arbitration Act (FAA) and designed to permit the efficient and cost-effective resolution of future disputes pursuant to rules established in advance by the parties, in a predetermined forum. 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 them to pass along the resulting savings to employees in the form of higher wages or other job benefits, and to customers

[1] This brief was authored by *amicus* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. More than ten days prior to the due date, *amicus* notified the parties of its intention to file this brief. All parties provided written consent to the filing of *amicus* briefs, and this written consent is on file with this Court.

through more competitive vehicle sales and service pricing. The predictable ability to arbitrate claims is therefore of enormous interest to CNCDA members.

Court rulings diminishing this predictability affect 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 litigation. Accordingly, the CNCDA has a significant interest in precedential guidance concerning the proper standard pursuant to which courts must enforce arbitration agreements according to their terms.



SUMMARY OF ARGUMENT

Enacted "in response to widespread judicial hostility to arbitration," the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms," including the terms setting "'the rules under which that arbitration will be conducted.'" *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. ___, 133 S. Ct. 2304, 2308-09 (2013).

The FAA includes a "saving clause" generally permitting state courts to invalidate arbitration agreements on grounds that would apply to all contracts independent of their subject matter, such as where a contract has been procured through coercion or fraud. *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1745-46 (2011). But some state

courts have invoked this saving clause to cloak a hostility to arbitration by declaring that certain arbitration procedures need not be enforced based on a state policy concern for whether the parties' agreed-upon arbitration rules sufficiently mimic court procedures by which a plaintiff may seek to vindicate state statutory rights.

California courts are especially notorious for following this approach to thwart arbitration. The California Supreme Court has a history of masking this arbitration-specific vindication policy in the guise of an unconscionability defense. Consequently, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Id*. at 1746-47.

In *Concepcion*, this Court made clear that the FAA preempts any such approach. Stressing that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'" *Concepcion* holds that even a state-law defense ostensibly applicable to all contracts (rather than solely to arbitration agreements) is preempted where the defense impedes the FAA's overarching objective of enforcing arbitration agreements as written. *Id*. at 1747-48. For example, an arbitration agreement must not be invalidated on the basis of a state contract defense that:

- derives its meaning from the fact an arbitration agreement is at issue;

- relies on the uniqueness of an arbitration agreement;
- has a disproportionate impact on arbitration agreements; or
- is otherwise applied in a fashion that disfavors arbitration.

Id. at 1746-47.

In crafting these broad guidelines, *Concepcion* recognized that doctrines such as "unconscionability" and "public policy" can be twisted to disproportionately invalidate arbitration agreements. *Id.* at 1747. *Concepcion* thus took pains to make clear that California courts cannot refuse to enforce agreements to arbitrate state statutory claims based on a vindication rationale, even where California courts elect to characterize this rationale as an unconscionability defense. Subsequently, *Italian Colors Restaurant* confirmed that *Concepcion* deemed this vindication defense to be preempted in the context of state statutory claims, and imposed stringent restrictions on the application of a vindication defense even as to federal statutory claims.

Courts outside of California have heeded this directive, holding that the FAA precludes sidestepping agreements to arbitrate state statutory claims based on a vindication rationale. In contrast, the California Supreme Court has disregarded this directive.

For over a decade, the California Supreme Court has refused to enforce arbitration agreements by applying the vindication rationale to state statutory claims. When the California Supreme Court last followed that same approach in this very case in 2011, this Court remanded for reconsideration in light of *Concepcion*. But, rather than correcting its course, the California Supreme Court held yet again that California courts could decline to enforce agreements to arbitrate state statutory wage claims based on the vindication rationale.

The FAA was enacted to create "a body of uniform federal law governing contracts within its scope." *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 54 (3d Cir. 2001). This Court should grant certiorari to resolve the conflict in the law created by the California Supreme Court's decision here and to ensure that courts throughout the country are applying a uniform standard in deciding whether and how to enforce agreements to arbitrate state statutory claims. Absent this Court's immediate intervention to resolve this conflict, efforts to enforce such arbitration agreements in California will be governed by an unduly demanding standard – one significantly more hostile to arbitration – than similar efforts in other states that faithfully follow *Concepcion* and *Italian Colors Restaurant*.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION CREATES A CONFLICT IN THE LAW GOVERNING ARBITRATION AGREEMENTS.

A. The California Supreme Court's decision here is the product of a series of pre-*Concepcion* state court cases that departed from this Court's precedent interpreting the FAA.

"[T]he judicial hostility towards arbitration that prompted the FAA ha[s] manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747. California in particular has a history of aggressively refusing to enforce arbitration agreements, notwithstanding this Court's rulings to the contrary. *Id.* To illustrate the point, we provide a brief history of those rulings, and the California Supreme Court's reaction to them.

***The seeds of the vindication principle in United States Supreme Court cases*:** The FAA "mandates enforcement of agreements to arbitrate statutory claims." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Thus, more than a quarter of a century ago, this Court held that the FAA requires employees (like respondent in the present case, Frank Moreno) to arbitrate statutory wage claims brought under California law. *Perry v.*

Thomas, 482 U.S. 483, 486-93 (1987); *accord Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

At the same time, however, this Court in dictum suggested that arbitration agreements might be invalidated where these agreements operated "as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). This dictum later came to be known as the so-called "'vindication exception'" to the FAA. *Italian Colors Rest.*, 133 S. Ct. at 2310.

As articulated by this Court, the vindication exception addressed the "'effective vindication' of a *federal statutory right*" in arbitration and might permit courts to invalidate agreements to arbitrate federal statutory claims if a litigant cannot effectively "'vindicate its statutory cause of action in the arbitral forum.'" *Id.* (emphasis added). But, while this Court has occasionally discussed the vindication exception in cases addressing federal statutory rights, *see*, *e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000); *Gilmer*, 500 U.S. at 27-28; *Mitsubishi Motors Corp.*, 473 U.S. at 616, 637, this Court has never actually *applied* it to invalidate an arbitration agreement, *Italian Colors Rest.*, 133 S. Ct. at 2310.[2]

[2] The judge-made vindication exception should be contrasted with the statutory saving clause contained within the FAA itself, which permits agreements to arbitrate to be invalidated

(Continued on following page)

Moreover, in those sporadic instances where the Court discussed that exception to the FAA, it never suggested courts could invalidate agreements to arbitrate statutory claims based on whether a plaintiff had a chance to vindicate a *procedure* that would have been available absent the arbitration agreement. To the contrary, this Court held that "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232. Thus, this Court recognized that a plaintiff's "challenges to the adequacy of arbitration procedures" were "insufficient to preclude arbitration of statutory claims." *Gilmer*, 500 U.S. at 30.

***The unchecked growth of the vindication principle in California Supreme Court cases*:**

1. ***Broughton.*** In a 1999 opinion, the California Supreme Court recognized that this Court's decisions had previously discussed the vindication of *federal* statutory rights "in the context of an inquiry into whether *Congress* had intended federal statutory claims to be exempt from arbitration." *Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 1082-83, 988 P.2d 67, 78 (1999). *Broughton,* however, construed

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"upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). The saving clause has been used by courts to invalidate an agreement on state-law grounds where, for example, the contract lacks mutual consideration. *See Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 605-14 (4th Cir. 2013).

this vindication doctrine as applying to claims asserting *state* statutory rights under California's Consumers Legal Remedies Act, to avoid a perceived potential for "the vitiation through arbitration of the substantive rights afforded by" state statutes. *Id.* at 1083, 988 P.2d at 79.

The California Supreme Court failed to appreciate the special interplay between the FAA and subsequent *Congressional* mandates – Congress is free to enact federal laws that overrule or limit earlier federal laws, including the FAA. The federal rights vindication exception posited by this Court is not founded on any exception to preemption contained in the language of the FAA itself. *Italian Colors Rest.*, 133 S. Ct. at 2310 (explaining that the "vindication" principle is a "judge-made exception to the FAA"). Instead, it derives from "the congressional intention expressed in some other [federal] statute" in which "Congress itself has evinced an intention" to exempt federal statutory rights from arbitration. *Mitsubishi Motors Corp.*, 473 U.S. at 627-28. In that narrow context, this Court has suggested that, where a party cannot effectively vindicate a federal statutory claim in the arbitral forum, an inherent conflict may exist between arbitration and the underlying purpose of a *federal* statute sufficient to override the FAA's mandate. *See Gilmer*, 500 U.S. at 27-28; *McMahon*, 482 U.S. at 226-27, 242.

But, according to *Broughton*, application of a vindication defense outside the context of competing Congressional enactments survives FAA preemption

because the California Supreme Court believed that arbitration is inappropriate where the arbitral forum "cannot necessarily afford" all the procedural "advantages" available in court, regardless whether the rights and remedies being adjudicated are of state or federal derivation. 21 Cal. 4th at 1083, 988 P.2d at 78-79.

2. *Armendariz.* One year after it decided *Broughton,* the California Supreme Court held, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 90-91, 99-103, 6 P.3d 669, 677, 679-82 (2000), that courts can, as a matter of state public policy, refuse to enforce as written mandatory employment agreements to arbitrate unwaivable state statutory claims for employment discrimination – unless the parties' agreed-upon arbitration procedure approximates court procedures that the California Supreme Court believed essential to vindicate state statutory rights.

Armendariz held that, as a result of California public policy, arbitration agreements become an unenforceable vehicle for the waiver of unwaivable state statutory rights if a court believes the procedures that the parties adopted in their contract threaten the ability of a party to fully and effectively vindicate a statutory claim in the arbitral forum. *Id*. at 99-103, 6 P.3d at 680-82 (citing *Broughton*, 21 Cal. 4th at 1087, 988 P.2d at 81-82, and *Gilmer*, 500 U.S. at 27-28). In short, "*Armendariz* makes clear that for public policy reasons [California courts] will not enforce provisions contained within arbitration

agreements that pose significant obstacles to the vindication of employees' [state] statutory rights." *Gentry v. Superior Court*, 42 Cal. 4th 443, 463 n.7, 165 P.3d 556, 568 n.7 (2007). *Armendariz* reasoned that this defense was not preempted by the FAA because, in the California Supreme Court's view, federal cases permitted courts not to enforce arbitration agreements where the "arbitral forum" would not be "adequate" to vindicate certain statutory rights. *See Armendariz*, 24 Cal. 4th at 98-99, 6 P.3d at 679-80. For that proposition, *Armendariz* cited: (1) this Court's decisions in *Mitsubishi Motors Corp.* and *Gilmer*, which discussed only vindication of *Congressionally* conferred statutory rights; and (2) *Broughton*, in which the California Supreme Court extended this Court's prior dicta about the vindication exception to state statutory rights. *See id.*, 6 P.3d at 679-80.

3. ***Little.*** Next, in *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1076-81, 63 P.3d 979, 987-90 (2003), the California Supreme Court confirmed that *Armendariz*'s procedural requirements imposed a state public policy limitation on the enforceability of arbitration agreements governed by the FAA. *Little* emphasized that *Armendariz*'s requirements were founded on the premise that California's public policy against exculpatory contracts renders certain state-law claims unwaivable, and on the further premise that this policy would be violated unless the parties' agreed-upon arbitration procedures matched up with the list of procedures that *Armendariz* said were "necessary to enable an employee to vindicate these

unwaivable rights in an arbitration forum." *Id.* at 1076-77, 63 P.3d at 987.

Little acknowledged that *Armendariz*'s public policy defense "specifically concern[ed] arbitration agreements" and was "unique" to the "context of arbitration." *Id.* at 1079, 63 P.3d at 989. *Little* nonetheless maintained that this defense was not preempted by the FAA. *Id*., 63 P.3d at 988-89. *Little* relied on the FAA saving clause permitting courts not to "enforce an arbitration agreement based on 'generally applicable contract defenses.'" *Id.*, 63 P.3d at 989. According to *Little*, one such defense is California's public policy against exculpatory contracts that "force a party to forgo unwaivable public rights." *Id.* at 1079-80, 63 P.3d at 989.

4. *Discover Bank*. Just two years later, in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160-73, 113 P.3d 1100, 1108-17 (2005), the California Supreme Court invoked the same policy concern for the vindication of state law that it had previously applied in *Armendariz* and *Little,* but did so in the form of an unconscionability defense.

Discover Bank addressed whether courts may invalidate class arbitration waivers pursuant to an unconscionability defense. *Id*. at 152-53, 160-63, 113 P.3d at 1103, 1108-10. *Discover Bank* held that, since class actions and arbitrations are "often inextricably linked to the vindication" of substantive state rights, such waivers are contrary to California's public policy

against exculpatory contracts – and therefore unconscionable – when they are the only effective way to halt and redress wrongful conduct. *Id.* at 160-63, 113 P.3d at 1108-10. As with the public policy defense against arbitration adopted in *Armendariz* and *Little*, *Discover Bank* held that the FAA did not preempt its unconscionability defense because, while it was tailored to arbitration agreements, the defense could be traced to a general policy against exculpatory contracts. *See id.* at 163-67, 113 P.3d at 1110-13.[3]

5. *Gentry*. In its 2007 decision in *Gentry v. Superior Court*, the California Supreme Court built on the vindication rationale from *Armendariz*, *Little*, and *Discover Bank* to invalidate pursuant to a public policy defense the same arbitration procedure – a class arbitration waiver – that had been the subject of an unconscionability defense in *Discover Bank*. *Gentry* held that, where employees assert unwaivable state statutory wage claims subject to an arbitration agreement that precludes any attempt to pursue those claims on a classwide basis, this waiver *of a class procedure* is unenforceable as a matter of California public policy if the dispute resolution method specified in the employment contract – i.e., individual arbitration – could not as effectively vindicate the employee's substantive rights under the state's Labor Code. 42 Cal. 4th at 456-63, 165 P.3d at 563-68.

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[3] Since *Concepcion* addressed the FAA's impact on *Discover Bank* at length, we discuss *Discover Bank* in further detail when we later describe *Concepcion*'s analysis. *Infra*, pp. 16-17.

Under *Gentry*, where "class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration," courts must, as a matter of California public policy, "invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.'" *Id*. at 463, 165 P.3d at 568. Like *Little*, *Gentry* held that *Armendariz*'s public policy defense – including its application to class arbitration waivers – was not preempted by the FAA because, in the California Supreme Court's view, the FAA permitted courts to limit the enforcement of arbitration procedures based on state public policy where those procedures "significantly undermine the ability of employees to vindicate" their state statutory rights. *Id.* at 465 & n.8, 165 P.3d at 569 & n.8.

6. The California Supreme Court's first decision in this case (*Sonic I*). In its initial decision in the case here, the California Supreme Court concluded that an agreement to resolve disputes through arbitration impermissibly waived "advantages" consisting of certain "procedures" that California laws made available to employees who pursue wage claims before the Labor Commissioner's office through a so-called "Berman" process. *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659, 668-69, 679, 681 n.4, 247 P.3d 130, 133-34, 140-41, 142 n.4 (2011). The Berman process allows an employee to file a state statutory wage claim in an administrative

proceeding before the Labor Commissioner. *Id.* at 671-72, 247 P.3d at 135.

Applying the public policy defense (predicated on a vindication rationale) that it had first adopted in *Armendariz* and *Little* and subsequently applied in *Gentry*, the California Supreme Court concluded that substituting arbitration as an alternative to "Berman" procedures violated California public policy. *See id.* at 678-84, 247 P.3d at 140-44. It also concluded that this rendered the agreement unconscionable as written because this policy defense and California's unconscionability rules "overlap[ped]." *Id.* at 686-87, 247 P.3d at 145-46.

At the time of this decision, the California Supreme Court did not have the benefit of this Court's 2011 decision in *Concepcion,* which overruled *Discover Bank* just two months after *Sonic I* was decided.

B. *Concepcion* and its progeny hold that the FAA preempts state-law defenses to arbitration predicated on concerns for the vindication of state statutory rights.

Concepcion explained that, under the FAA, parties may agree "to arbitrate *according to specific rules*" and courts must "enforce [those agreements] *according to their terms*." *Concepcion*, 131 S. Ct. at 1745, 1748-49 (emphases added). Congress was careful to temper the FAA's mandate to respect parties' freedom of contract by including in the FAA a

saving clause that preserves generally applicable contract defenses from preemption. *Id*. at 1748.

But even a defense that a state court characterizes as generally applicable to all contracts is preempted by the FAA if the defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id*. at 1747-48. When, as a practical matter, a nominally arbitration-neutral contract defense disproportionately invalidates arbitration agreements, the defense erects a barrier to the FAA's objective of allowing parties the freedom to structure contractual terms for dispute resolution – or not to contract at all if those terms are unacceptable. *See id.* (generally applicable state contract defenses are preempted by the FAA where they "disfavor[ ] arbitration" by having a "disproportionate impact" on arbitration agreements and frustrating the FAA's "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms").

Concepcion applied these principles to hold that the FAA preempted the unconscionability standard adopted by the California Supreme Court in *Discover Bank*. *Id.* at 1746-53.

In *Discover Bank*, after a plaintiff filed a California class action alleging breach of contract and violations of the Delaware Consumer Fraud Act, the defendant sought to compel arbitration on an individual basis pursuant to an arbitration agreement that included a class arbitration waiver. 36 Cal. 4th at 153-54, 113 P.3d at 1103-04. The California Court

of Appeal directed the trial court to compel arbitration, but the California Supreme Court reversed, concluding that class actions and arbitrations are "often inextricably linked to the vindication" of state rights. *Id.* at 155, 160-61, 174, 113 P.3d at 1104-05, 1108-09, 1118. *Discover Bank* therefore determined that where the parties' agreed-upon arbitration rules waive a class proceeding, such waivers "may operate effectively as exculpatory contract clauses" in violation of California public policy. *Id.* at 160-63, 113 P.3d at 1108-10. *Discover Bank* decided that this standard was not preempted by the FAA because it was, at least nominally, based on a generally applicable California policy against exculpatory contracts. *Id.* at 165-66, 113 P.3d at 1111-12.

Like the plaintiff in *Discover Bank*, the plaintiffs in *Concepcion* brought a class action alleging violations of state statutes. *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *1 (S.D. Cal. Aug. 11, 2008).[4] They seized on the vindication rationale underlying *Discover Bank*'s unconscionability standard to evade FAA preemption, arguing that the FAA did not preempt *Discover Bank* because it was based on California's generally applicable "policy against exculpation." *Concepcion*, 131 S. Ct. at 1746-48; *accord* Brief for Respondents at 19-20, 51-52, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 4411292

[4] Before reaching this Court, the *Concepcion* case was known as the *Laster* case. *See Concepcion*, 131 S. Ct. at 1745.

(*Concepcion* plaintiffs' merits brief arguing that *Discover Bank* survives FAA preemption since class actions and arbitrations are inextricably intertwined with the vindication of substantive rights and a waiver of class procedures may therefore violate California's prohibition against exculpatory contracts); Transcript of Oral Argument at 43:7-44:2, 47:10-17, 50:3-7, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), *available at* http://goo.gl/NO20QO (last visited Feb. 12, 2014) (plaintiffs' counsel asserting at oral argument in *Concepcion* that FAA does not bar state courts from invalidating or refusing to enforce arbitration procedure that would prevent parties from vindicating their rights and would thereby be exculpatory).

Concepcion, however, rejected the assertion that this California policy could override the FAA's principal objective of enforcing arbitration agreements according to their terms. *Concepcion* acknowledged that the FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'" 131 S. Ct. at 1746. But *Concepcion* determined that where courts hold arbitration procedures to be "unconscionable or unenforceable as against public policy" *based on their "general principle of unconscionability or public-policy disapproval of exculpatory agreements,"* such state defenses "[i]n practice . . . have a disproportionate impact on arbitration agreements" even though they "presumably apply" to all contracts. *Id.* at 1747 (emphasis added). *Concepcion* therefore held that such state

unconscionability or public policy standards are preempted by the FAA. *Id.* at 1747-48. In short, *Concepcion* held *Discover Bank* to be preempted because *Discover Bank*'s unconscionability standard "allowed courts to ignore and refuse to enforce the clear terms of the parties' agreement, and instead employ a judicial policy judgment" that a procedure to which the parties did not contractually agree "would better promote the vindication of the parties' rights in certain cases." *Truly Nolen of Am. v. Superior Court*, 208 Cal. App. 4th 487, 506, 145 Cal. Rptr. 3d 432, 445 (2012).

After *Concepcion*, some courts nonetheless suggested that *Concepcion* did not address whether the FAA prevents courts from refusing to enforce agreements to arbitrate statutory claims where the plaintiff could establish the agreed-upon arbitration procedures were insufficient to vindicate statutory rights. *See, e.g.*, *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 535-36 (S.D.N.Y. 2012), *rev'd*, 726 F.3d 290 (2d Cir. 2013). But this Court's intervening decision in *Italian Colors Restaurant* confirmed that *Concepcion*'s preemption analysis addressed that very vindication rationale.

In *Italian Colors Restaurant*, the defendants sought to compel arbitration of the plaintiffs' federal antitrust claims on an individual basis pursuant to the arbitration agreement's class arbitration waiver. 133 S. Ct. at 2307-08. The Second Circuit held that this waiver was unenforceable under the vindication exception because evidence "establishe[d], as a matter

of law, that the cost of plaintiffs' individually arbitrating" their federal antitrust claims "would be prohibitive." *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 217-19 (2d Cir. 2012). The Second Circuit distinguished *Concepcion* on the ground that it dealt with the FAA's preemption of state-law defenses to arbitration rather than with a vindication analysis. *Id.* at 212-13.

This Court reversed. *Italian Colors Rest.*, 133 S. Ct. at 2310-12. In rejecting the plaintiffs' arguments under the vindication exception, this Court held that *Concepcion* "all but resolves this case" and expressly rejected the dissenting opinion's view that *Concepcion* did not involve the vindication rationale. *Id.* at 2312 & n.5. Moreover, while Justice Kagan's dissenting opinion disagreed with the majority's view that *Concepcion* dealt with a vindication analysis, even the dissent acknowledged that states could not circumvent the FAA's mandate based on a concern for the vindication of state law, explaining that the FAA has "no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law." *Id.* at 2320 (Kagan, J., dissenting).

Lower appellate courts have likewise recognized that courts cannot refuse to enforce agreements to arbitrate state statutory claims out of a concern for whether the agreed-upon arbitration procedures sufficiently help the plaintiff vindicate state statutory rights, even where this concern is characterized (as it

was here) as an unconscionability analysis. *See, e.g.*, *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 935-36 (9th Cir. 2013) (holding the *Broughton* case – from which the California Supreme Court's vindication rationale originated in 1999 – to be preempted by the FAA because the vindication exception "does not extend to state statutes"); *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1186-88 (Fla. 2013) (rejecting contention that "the vindication-of-statutory-rights analysis applies in the state statutory context"; creating exception to FAA's mandate based on concern for vindication of state statutes would be "contrary to the rationale of *Concepcion*"); *Coneff v. AT & T Corp.*, 673 F.3d 1155, 1158-59 & n.2 (9th Cir. 2012) (rejecting assertion that *Concepcion* permits state unconscionability law "to invalidate class-action waivers when such waivers preclude effective vindication" of statutory rights and explaining that vindication exception does not extend to state law).

C. The California Supreme Court's decision here (*Sonic II*) conflicts with *Concepcion* and its progeny.

In response to an earlier petition for a writ of certiorari in the present case, this Court vacated and remanded for reconsideration in light of *Concepcion*. *Sonic-Calabasas A, Inc. v. Moreno*, 565 U.S. ___, 132 S. Ct. 496 (2011). Consequently, in *Sonic II*, the California Supreme Court was presented with its first

opportunity to assess the impact of *Concepcion* and *Italian Colors Restaurant* on California law.

In *Sonic II*, the California Supreme Court explained that it was addressing whether respondent Moreno "can vindicate his right to recover unpaid wages" under California law and, in particular, "whether any barrier to vindicating such rights would make the arbitration agreement unconscionable or otherwise unenforceable . . . and, if so, whether such a rule would be preempted by the FAA." Pet. App. 35a.

The California Supreme Court pointed out that, when an employee like Moreno elects to pursue his state statutory right to recover unpaid wages before the Labor Commissioner through the administrative "Berman" process rather than in court, state law affords the employee certain "Berman hearing and posthearing procedures" that are designed to "'reduc[e] the costs and risks of pursuing a wage claim in several ways.'"[5] Pet. App. 13a, 31a. A majority of the court concluded that courts may consider whether the parties' agreed-upon arbitration procedures fail to include the Berman procedures available

[5] These procedures include "procedural informality, assistance of a translator, use of an expert adjudicator who is authorized to help the parties by questioning witnesses and explaining issues and terms, and provisions on fee shifting, mandatory undertaking, and assistance of the Labor Commissioner as counsel to help employees defend and enforce any award on appeal." Pet. App. 41a.

outside of arbitration, and whether the absence of these procedures therefore fails to "provide an employee with an accessible and affordable arbitrable forum for resolving wage disputes." Pet. App. 41a-42a.

The *Sonic II* court did not suggest that the arbitration agreement actually waived the employee's right to pursue unpaid wages. Instead, the court emphasized that the unconscionability inquiry focuses on whether the arbitral scheme, in failing to provide Berman procedures, "imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable" by creating "practical impediments to the use of arbitration to resolve wage disputes." Pet. App. 44a, 80a.

The majority opinion insisted that this unconscionability standard survived FAA preemption even after *Concepcion* and *Italian Colors Restaurant*. Citing *Armendariz*'s and *Mitsubishi Motors Corp.*'s discussion of the vindication of statutory rights, the majority maintained that the FAA allows state courts to refuse to enforce agreements to arbitrate state statutory claims where arbitration would not afford procedural benefits that plaintiffs would have received outside arbitration. Pet. App. 49a-50a, 52a (citing *Armendariz*, 24 Cal. 4th at 98-99, 6 P.3d at 679-80, and *Mitsubishi Motors Corp.*, 473 U.S. at 626-28). The majority reasoned that those procedures would help "vindicate" a statutory right. Pet. App. 56a-57a.

This standard conflicts with this Court's precedent. As Justice Chin's dissenting opinion here emphasized, *see* Pet. App. 109a-122a, and as we explained above, *supra*, pp. 15-21, under *Concepcion* and its progeny the FAA precludes state courts from refusing to enforce arbitration agreements based on a concern for whether the arbitration procedures supposedly fail to assist a plaintiff with vindicating a state statutory right.

Additionally, as Justice Chin's dissenting opinion explained, the majority's decision contravenes *Concepcion* by impermissibly applying a state-law contract defense to an arbitration agreement based on the uniqueness of that agreement. Pet. App. 119a-120a. The *Sonic II* majority opinion insisted that the FAA authorizes the vindication rationale applied in this case because courts supposedly have the power to create state law rules "uniquely in the context of arbitration." Pet. App. 37a. But, contrary to this view, *Concepcion* emphasized that "a court 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*, 131 S. Ct. at 1747. Such an arbitration-specific rule is preempted by the FAA because it has "a disproportionate impact on arbitration agreements." *Id.* Thus, in sharp contrast to the approach adopted by the majority opinion here, with its unique and disproportionate focus on arbitration agreements, other appellate courts faithfully applying *Concepcion*'s

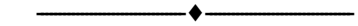
mandate have recognized that "[a]ny general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013).

In fact, the majority opinion cloaks its vindication rationale in the arbitration-specific unconscionability standard the California Supreme Court developed in *Armendariz*. *See* Pet. App. 37a. *Armendariz* indicated a provision in an employment arbitration agreement is substantively unconscionable if the agreement is one-sided in that it establishes arbitration procedures that benefit the employer without mutually benefiting the employee. *Armendariz*, 24 Cal. 4th at 113-17, 6 P.3d at 689-92. But *Armendariz* openly acknowledged that its "one-sided" unconscionability standard was "peculiar to the arbitration context" because it turned on an examination of whether the employer had "impose[d] a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense." *Id*. at 118-20, 6 P.3d at 692-94. It is this standard's peculiar focus on the uniqueness of an arbitration agreement that led the Alabama Supreme Court to refuse to adopt such a standard on the ground it was barred by the FAA. *See Ex Parte McNaughton*, 728 So. 2d 592, 598-99 (Ala. 1998). As the Alabama Supreme Court explained, the standard "directly depends on arbitration for its application"

and therefore impermissibly "assigns a suspect status to arbitration agreements." *Id.* at 598.

By improperly applying a vindication rationale with a unique and disproportionate focus on arbitration, and grounding it on an unconscionability standard that is peculiar to arbitration, the California Supreme Court's opinion here not only deepens an existing split with other lower appellate courts over FAA preemption, *compare Armendariz*, 24 Cal. 4th at 118-20, 6 P.3d at 692-94, *with McNaughton*, 728 So. 2d at 598-99, its development of a "unique rule" for arbitration agreements is also critically at odds with *Concepcion* and the lower court decisions that properly adhere to *Concepcion*'s directives, Pet. App. 119a-120a.

This Court should grant certiorari to resolve the conflict in the law created by the California Supreme Court's decision in *Sonic II*.



CONCLUSION

For the foregoing reasons and for the reasons stated in the petition for certiorari, the petition should be granted. Furthermore, the California Supreme Court's decision is so clearly erroneous

under *Concepcion* and *Italian Colors Restaurant* that this Court should summarily reverse it.

Respectfully submitted,

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