

No. 13-__

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**

PETITION FOR A WRIT OF CERTIORARI

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January 15, 2014

QUESTIONS PRESENTED

Whether the Federal Arbitration Act preempts a California rule that would condition enforcement of arbitration agreements upon a pre-arbitration, judicial determination that the arbitration agreement, as applied, provides for judicially-imposed standards for accessibility, informality, and affordability unique to certain statutory claims notwithstanding the U.S. Supreme Court's recent prior decisions in *AT&T Mobility LLC v. Concepcion*, No. 09-893, 563 U.S. ___, 131 S.Ct. 1740 (April 27, 2011) (precluding states from requiring arbitration procedures inconsistent with the FAA, even if based on public policy considerations) and *American Express Co. v. Italian Colors Restaurant*, No. 12-133, ___ U.S. ___, 133 S.Ct. 2304 (June 20, 2013) (“the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims”).

Whether the Federal Arbitration Act preempts California efforts to invent and apply a new unconscionability test (“unreasonably one-sided”), in lieu of the unconscionability test generally applicable in California (“shocks the conscience”), notwithstanding the plain language of Section 2 of the FAA that limits defenses to arbitration agreement enforcement to “such grounds as exist at law or in equity for the revocation of any contract” and precludes defenses to arbitration enforcement that apply uniquely to arbitration agreements.

**PARTIES TO THE PROCEEDING
CORPORATE DISCLOSURE STATEMENT**

Petitioner is Sonic-Calabasas A, Inc., *dba* Acura 101 West. Petitioner is wholly owned by Sonic Automotive, Inc., a publicly held company. Sonic Automotive, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent is Frank Moreno, an individual.

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PRAYER

Petitioner Sonic-Calabasas A, Inc., *dba* Acura 101 West, respectfully petitions that a writ of certiorari be issued to review the judgment and opinion of the California Supreme Court, issued October 17, 2013.

OPINIONS BELOW

The October 17, 2013, opinion of the California Supreme Court following remand from this Court (App., *infra*, at pp. 1a, *et seq.*) (“*Sonic II*”) is reported at 57 Cal.4th 1109, 163 Cal.Rptr.3d 269, and 311 P.3d 184.

This opinion followed a decision from this Court to Grant Review, Vacate the initial decision of the California Supreme Court in this action, and Remand for further consideration. This Court's Order (App., *infra*, at p. 123a) was reported at 132 S.Ct. 496 (Oct. 31, 2011).

The initial, vacated decision of the California Supreme Court (App., *infra*, at pp. 124a, *et seq.*) ("*Sonic I*") is reported at 51 Cal. 4th 659, 181 Cal. Rptr. 3d 58, and 247 P.3d 130.

The superseded decision of the California Court of Appeal, Second District, Division 4 (App., *infra*, at pp. 205a, *et seq.*) was reported at 174 Cal. App. 4th 546, and 94 Cal. Rptr. 3d 544.

The order of the California Superior Court, County of Los Angeles, denying Petitioner's petition to compel arbitration (App., *infra*, at pp. 232a, *et seq.*) was not reported.

JURISDICTION

The opinion of the California Supreme Court was filed on October 17, 2013.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), which provides for review by this Court of final judgments or decrees rendered by the highest court of a State in which a decision could be had. *See Southland Corp. v. Keating*, 465 U.S. 1, 6–8 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Some seven years after Petitioner first filed its Petition to Compel Arbitration pursuant to the Federal Arbitration Act, Petitioner Sonic still seeks its “day in arbitration” but instead finds itself being sent back to the trial court to start the entire process over.

Petitioner is an automobile dealership located in California. In connection with his employment with Petitioner, Respondent Frank Moreno entered into a written agreement to submit all disputes between Respondent and Petitioner to binding arbitration under the Federal Arbitration Act (“FAA”). Subject to exceptions not relevant here, the terms of the written agreement expressly precluded Respondent from “resort to any court or other governmental dispute

resolution forum. . . .” (See Arbitration Agreement, at App., *infra.*, pp. 237a–238a.)

Notwithstanding the written arbitration agreement, Respondent filed a claim through the California Labor Commissioner, seeking unpaid vacation wages. Petitioner responded by filing a Petition to Compel Arbitration in California Superior Court in February 2007, seeking to compel Respondent to proceed in binding arbitration pursuant to his pre-dispute arbitration agreement. From its initial briefing, Petitioner raised the issue of the FAA and its preemptive power over state requirements hostile to arbitration. (See, *e.g.*, Petitioner’s Points and Authorities to the trial court, Part II, App., at pp. 253a–258a.)

The trial court denied the Petition to Compel Arbitration as premature, holding that the employee must be permitted to proceed first to the Labor Commissioner for nonbinding adjudication of his claim using the so-called “Berman” process (named after its chief legislative sponsor). before the matter could proceed to arbitration. The trial court did not rule expressly on the question of federal preemption, but it did hold that the arbitration agreement would be enforceable after the non-binding administrative adjudication. This was an implicit recognition of the preemptive effect of the FAA over Labor Code section 229, which would otherwise have permitted the employee to proceed in court notwithstanding the arbitration agreement. See Cal. Labor Code § 229 (App., at pp. 273a____; see also *Perry v. Thomas*, 482 U.S. 483 (1987) (holding Section 229 preempted where FAA applies).

Petitioner appealed, and the Court of Appeal reversed holding that the arbitration agreement

waived Respondent's right to proceed before the Labor Commissioner. In its decision, the Court of Appeal discussed at length the issue of federal preemption by the FAA (*see* Court of Appeal Decision, at Part III, App., at pp. 213a–219a), but ultimately reversed without finding federal preemption, finding that requiring the matter to proceed to binding arbitration in the first instance (a *de facto* elimination of the Berman procedures) did not violate state public policy and hence the arbitration agreement was not against public policy and was enforceable. Thus, the arbitration agreement in this case was not unconscionable as the lack of the Berman process was the only basis for not enforcing arbitration in the first instance.

Respondent was granted review of the Court of Appeal decision by the California Supreme Court, which reversed and reinstated the order of the Superior Court. In doing so, the California Supreme Court concluded that California's public policy favoring informal adjudication of wage claims through the Labor Commissioner's administrative hearing process was violated by an agreement that required employees to forego that forum for another, such as arbitration, even when governed by the Federal Arbitration Act. The California Supreme Court referred to binding arbitration under the FAA as a "Berman Waiver". Distinguishing this Court's decisions on federal preemption of state rules restricting arbitration, the Court concluded that the FAA did not preempt its holding because the minor delaying from requiring the Berman prerequisites was not enough to trigger preemption. (*See* California Supreme Court Decision, *Sonic I*, at Part II.D, App. at pp. 155a–169a.)

A petition for writ of certiorari to this Court followed (see *Sonic-Calbasas A, Inc. v. Moreno*, Docket No. 10-1450), and this Court issued a GVR order on October 31, 2011, specifically instructing the California tribunal to offer “further consideration in light of *AT&T Mobility LLC v. Concepcion*.” *Sonic-Calbasas A, Inc. v. Moreno*, 132 S.Ct. 496 (Oct. 31, 2011) (*citation omitted*). (See App. at p. 123a).

The California Supreme Court’s decision on remand was filed on October 17, 2013. (App., at pp. 1a, *et seq.*) The California Supreme Court properly recognized that because the FAA does not permit states to displace or delay arbitration by granting exclusive jurisdiction to a governmental forum, its previous rule conditioning enforcement of the arbitration agreement on pre-arbitration access to the California Berman process for non-binding adjudication of wage claims was preempted by the FAA. However, the court opened the door for a case-by-case, pre-arbitration judicial unconscionability determination, premised on the theory that elimination of the statutory procedures and protections from the Berman process might make enforcement of the arbitration agreement unfair to employees and hence unenforceable. Petitioner’s contention is that, in so doing, the state court articulated a new standard for unconscionability that is preempted by the FAA.

First, this new standard of unconscionability is an express attempt by the California Supreme Court to effect on a case-by-case basis what the FAA expressly prohibits: consideration of state public policy considerations of accessibility, informality, and affordability that conflict with the paramount purpose of the FAA, which is the enforcement of arbitration agreements according to the terms thereof. This is a 180-

degree reversal of the California Supreme Court's previous position from *Sonic I*, where the court expressly rejected a case-by-case evaluation of "whether and to what extent a particularly wage claimant will benefit from the Berman hearing process," agreeing with the lower court that the trial court at that stage is in no position to determine such matters. *Sonic I, supra*, 51 Cal.4th at 683. Indeed, in its new standard, the court went so far as to explicitly hold that the fact that an arbitration agreement does not permit an employee to pursue wage claims through the non-binding administrative Berman process may be considered as a factor in determining that the arbitration agreement is unconscionably unenforceable. *See Sonic II, supra*, 57 Cal.4th at 1152 (App., at p. 52a.) As such this new California standard is contrary to and preempted by the FAA under the Supremacy Clause of the U.S. Constitution.

Second, the new standard of unconscionability is not a generally applicable rule that exists "at law or in equity for the revocation of *any* contract." *See* 9 U.S.C. § 2 (*emphasis added*.) The court below abandoned the long-accepted "shocks the conscience" standard for substantive unconscionability, announcing a new, less rigid, "unreasonably one-sided" standard that cannot fall within the Savings Clause language of Section 2 of the FAA, which permits only the application of contract principles that apply generally to all contracts.

Accordingly, Petitioner respectfully requests that this Court grant the requested writ of certiorari to the Supreme Court of California and issue a decision reinforcing the strong federal policy under the FAA requiring enforcement of arbitration agreements according to their terms. It has been seven years since Petitioner first sought to compel Respondent to honor

his arbitration agreement and it high time that he be ordered to do so.

REASONS FOR GRANTING THE PETITION

At its essence, the California Supreme Court held on remand that while the FAA prohibits California from *delaying* arbitration by requiring a prior, non-binding administrative adjudication of wage claims before the California Labor Commissioner, California courts can consider the arbitration agreement's lack of access to that process and the procedural advantages that may become available to claimants as a basis for finding the arbitration agreement unconscionable and *unenforceable* altogether. Translation: We can't delay arbitration of wage claims, so we will just stop arbitration altogether! This cannot possibly be consistent with the FAA and this Court's consistent jurisprudence favoring enforcement of arbitration agreements pursuant to their terms. Accordingly, Petitioner urges this Court to issue a writ of certiorari reversing this decision of the California Supreme Court.

I. California's New Standard For Unconscionability Is Preempted By The FAA As A Forbidden Public Policy Limitation Masquerading As Unconscionability Analysis.

A. California Jurisprudence Continues to Demonstrate A Consistent Refusal To Follow The FAA Mandate Of Enforcement Of Arbitration Agreements By Their Terms.

After this Court ordered the California Supreme Court to revisit its earlier decision in this case in light

of the intervening opinion in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), an optimistic observer might have expected California to accept the clear message from this Court that the FAA requires states to enforce arbitration agreements as written, without conditioning enforcement based on state public policy considerations. But anyone familiar with the history of California's application of the FAA would not have been surprised when the California Supreme Court issued its decision on remand giving lip service to this Court's admonitions but continuing to press its contrary agenda, albeit under a different label.

After all, the *AT&T Mobility* decision itself arose out of California's application of its *Discover Bank* rule, which until rejected by this Court conditioned enforcement of arbitration agreements on the availability of class treatment in arbitration. See *Discover Bank v. Superior Court (Boehr)*, 36 Cal.4th 148, 113 P.3d 1100 (2005). Many other decisions of this Court have arisen from California misapplication of the FAA. See, e.g., *Southland v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Preston v. Ferrer*, 552 U.S. 346 (2008); *AT&T Mobility, supra*, 131 S.Ct. 1740; *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (remand in this case); see also Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (2006). These cases reflect a sustained effort by the California judiciary to uphold both statutory and judicial exceptions to the prime directive of the FAA: the enforcement of arbitration agreements by the terms thereof.

This consistent reluctance to enforce arbitration agreements is not coincidental but rooted in a public

policy distrustful of arbitration that has been applied to several broad classes of claims. Whether they be statutory claims under the Franchise Investment Law (see *Southland, supra*, 465 U.S. 1), statutory wage claims (see *Perry, supra*, 482 U.S. 483), civil rights claims (see *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000)), claims under the Talent Agencies Act (see *Preston, supra*, 552 U.S. 346), or claims for which class treatment is perceived as more efficient (see *Discover Bank, supra*, 36 Cal.4th 148; see also *Gentry v. Superior Court (Circuit City Stores)*, 42 Cal.4th 443 (2007)), California has regularly singled out specific classes of claims for special handling in arbitration, or, even outright exemption from arbitration. See, e.g., *Perry, supra*, 482 U.S. at 484; *Broughton v. Cigna Health Plans of California*, 21 Cal.4th 1066, 988 P.2d 67 (1999) (claims for public injunctive relief under Consumers Legal Remedy Act; *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal.4th 303, 66 P.3d 1157 (2003) (injunctive relief claims under unfair competition statute. Indeed, the California Supreme Court's first decision below created just such an exception, holding that the arbitration agreement could not be enforced until after a "preliminary non-binding hearing and decision by the Labor Commissioner," effectively establishing exclusive initial jurisdiction in a state administrative body notwithstanding the mandate of the FAA. See *Sonic I*, 51 Cal.4th at 695.

But such exclusions from arbitration are patently incompatible with the FAA, as this Court has been prompted to reassert increasingly in recent years. *Preston, supra*, 552 U.S. at 349–350 ("state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA"); *AT&T Mobility, supra*, 131 S.Ct. at 1747

("[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA"). This was the basis for this Court vacating the California Supreme Court decision below and remanding for further consideration. 132 S.Ct. 496.

To its credit, the California Supreme Court recognized unanimously that its categorical rule authorizing Labor Commissioner adjudication notwithstanding an arbitration agreement covered by the FAA could not survive the preemption analysis set forth in this Court's *AT&T Mobility* decision. (*Sonic II, supra*, 57 Cal.4th at 1139 (majority opinion), 1172 (CORRIGAN, J., concurring), and 1173 (CHIN, J., concurring and dissenting)). Had that been the end of the analysis, further examination of the matter would be unneeded. But the California Supreme Court did not leave it there. Shorn of its public policy rationale for interfering with the enforcement of the arbitration agreement, the state court proceeded to manufacture a question that was not litigated before the lower courts below: Could an arbitration agreement that does not permit pre-arbitration resort to the California Labor Commissioner for initial determination be substantively unconscionable on that basis?

Recognizing that a categorical response to that inquiry would suffer the same preemption fate as its rules in *Discover Bank* and *Sonic I*, the court's answer was . . . it depends. With that holding, particularly as amplified by a significant watering-down of existing general principles of substantive unconscionability, the California Supreme Court repackaged the rejected "public policy exception," labeled it an unconscionability analysis (despite recognizing that public policy and unconscionability are inextricably intertwined),

and remanded the matter for an opportunity for Respondent to avoid enforcement of the arbitration agreement as “unreasonably one-sided” if the arbitration procedures should fail to meet unspecified standards of informality, efficiency, and affordability for not providing the Berman rights as part of the arbitration process. This new standard of substantive unconscionability is little more than California again attempting to apply public policy disfavoring the arbitration of specific classes of claims.

In fact, arbitration in California would soon become extinct if this rule were allowed to stand. The FAA would become a virtual nullity. California could simply put into place an administrative process for each type of claim it wished to exempt from arbitration (*e.g.*, discrimination claims, harassment claims, defamation claims, etc.), then conclude that these administrative procedures imbued claimants with additional rights and remedies. Without access to such rights and remedies in arbitration, the dispute resolution agreement would become “unreasonably one-sided” and unenforceable under the new, watered-down standard. This cannot be consistent with this Court’s consistent pronouncements of the preemptive power of the FAA.

B. The Decision Below Ignores This Court’s Unequivocal Rejection Of The So-Called “Effective Vindication” Exception To Enforceability Under The FAA.

California has confirmed for decades that the general standard for unconscionability is both objective and significant. *Herbert v. Lankershim*, 9 Cal.2d 409, 476 (1937) (substantively unconscionability found only where the one-sided provisions are

“. . . so gross as to *shock the conscience* and common sense of all men.”); *see also Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal.4th 223, 246 (2012) (“A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to shock the conscience”).

Respondent did not argue below that the arbitration agreement was so one-sided as to “shock the conscience.” The California Supreme Court emphasized this in its initial decision in this case:

We note that the Labor Commissioner, who intervened in this case at the trial court level, did not contend that arbitration and Berman hearings are incompatible, or that the present arbitration agreement could not be enforced, but only that “the arbitration agreement should be construed as providing that respondent is entitled to initially pursue his remedy before the Commissioner and is only required to proceed to arbitration if and when a *de novo* appeal is filed.” The trial court's order did not irrevocably deny the petition to compel arbitration but merely ruled that it could not be granted until a Berman hearing had taken place. This is also Moreno's position before us. *Sonic I, supra*, 51 Cal.4th at 674–75. (App. at p. 134a).

Accordingly, the only fairness issues arguably before the Court are those relating directly to the arbitration agreement and its interaction with the Berman procedures. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (rejecting state policies that go only to the fairness of the arbitration clause).

Indeed, Respondent's sole theory from the outset of the case was that California public policy considerations, would not permit parties to circumvent the Berman Process through arbitration, because of California's strong public policy favoring the prompt adjudication of claims for unpaid wages. It was not until weeks before the California Supreme Court initially held oral argument that the court requested briefing on the question of unconscionability. Accordingly, under established law, Respondent's failure to pursue unconscionability at the lower court should have foreclosed his reliance on such a theory on appellate review. *See Pearson Dental Supplies, Inc. v. Superior Court (Turcois)*, 48 Cal.4th 665, 681 (2010) (failure to raise specific theory of unconscionability at trial court forfeits issue for appellate review); *Koehl v. Verio, Inc.*, 142 Cal.App.4th 1313, 1338–39 (2006) (“A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court but manifestly unjust to the opposing litigant”), *quoting Ernst v. Searle*, 218 Cal. 233, 240–41 (1933).

Despite this well-settled rule, and despite its own recognition that the Respondent had made a choice to focus on other arguments at the court below (*see Sonic II, supra*, 57 Cal.4th at 1158), the California Supreme Court went ahead with its unconscionability analysis. The foundation for this argument, was an affirmative defense included by Respondent in his opposition to the Petition to Compel Arbitration, arguing that an arbitration agreement that barred Respondent from exercising his statutory right to invoke the non-binding administrative remedy afforded by the Labor Commissioner, would fail “to provide an arbitral forum in which employees can fully and effectively vindicate their statutory rights to recover unpaid wages” and

thus be “contrary to public policy, unconscionable, and unenforceable.” *Sonic II, supra*, 57 Cal.4th at 1142.

The significance of the court’s reliance on the argument that Respondent would be prevented from “fully and effectively vindicat[ing]” his statutory rights in arbitration cannot be ignored. After all, it was this same “vindication of statutory rights” theory that was rejected just last term by this Court in *American Express Co. v. Italian Colors Restaurant*, No. 12-133, ___ U.S. ___, 133 S.Ct. 2304 (June 20, 2013) (“*Italian Colors*”). In that decision, this Court held that as long as claimants retained the right to pursue claims, the “effective vindication” doctrine could not be used to avoid enforcement of the agreement by its terms as required by the FAA. *Italian Colors, supra*, 133 S.Ct. at 2311–12.

In other words, the very argument relied upon by the California Supreme Court—that Respondent had raised the “effective vindication” doctrine as a defense before the trial court—is the same argument rejected by this Court as inapplicable to overcome the preemptive effect of the FAA.

While the California court attempts to escape the inevitable application of the *Italian Colors* by arguing that *Italian Colors* did not involve application of the preemptive power of the FAA in a conflict between federal and state authorities, the plain language of *Italian Colors*, as well as other subsequent cases to have addressed the issue, show that this is a distinction without a difference. In *Italian Colors*, for example, this Court drew heavily from its previous decision in *AT&T Mobility*, which was most emphatically a federal/state preemption case. *Italian Colors, supra*, 133 S.Ct. at 2312 (“Truth to tell, our decision in *AT&T Mobility* all but resolves this case”).

By relying on this preemption precedent and its rejection of the argument that some small-dollar claims might go unaddressed, it is plain that the FAA does not permit state rules that interfere with arbitration as agreed by the parties to avoid preemption because of concerns that certain claims “might otherwise slip through the legal system” and not be effectively vindicated. *Italian Colors*, *supra*, 133 S.Ct. at 2312, *quoting AT&T Mobility*, *supra*, 131 S.Ct. at 1753.

Other courts to have addressed the issue since *Italian Colors* have consistently held that the *Italian Colors* standard applies in the context of federal preemption of inconsistent state laws. *Ferguson v. Corinthian Colleges, Inc.*, 733 F3d 928, 936 (9th Cir., Oct. 28, 2013) (recognizing, as even the dissent in *Italian Colors* did, that the “effective vindication” argument does not apply to conflicts between state and federal laws; state laws must bow to the FAA); *Feeney v. Dell, Inc.*, 466 Mass. 1001, 993 N.E.2d 329 (Mass. Aug 1, 2013) (concluding that *AT&T Mobility* and *Italian Colors* mandate FAA preemption of state rules despite significant “effective vindication” concerns, whether under federal or state law); *Lewis v. Advance America, Cash Advance Centers of Illinois, Inc.*, No. 13–CV–942–JPG–SCW, 2014 WL 47125 (S.D. Ill., Jan. 6, 2014) (while Illinois law might find the absence of procedures to facilitate pursuit of small-damages claims unconscionable, the *Italian Colors* case permits “no exception to the FAA’s enforcement of agreements to arbitrate” and “*AT&T Mobility* means that the Illinois [] rule is preempted by the FAA”); *McCardle v. AT&T Mobility LLC*, No. C 09–1117 CW, 2013 WL 5372338 (N.D. Cal., Sep. 25, 2013) (recognizing that both majority and dissenting justices in *Italian Colors* confirm that “effective vindication” rule has no

application to conflicts between FAA and state laws); *Bates v. Laminack*, __ F.Supp.2d __, 2013 WL 4735402 (S.D. Tex., Sep. 3, 2013) (applying *Italian Colors* to state-law rule that might otherwise bar enforcement absent FAA preemption); *Andrade v. P.F. Chang's China Bistro, Inc.*, No. 12CV2724 JLS JMA, 2013 WL 5472589 (S.D. Cal., Aug. 9, 2013) (recognizing that state-law policy considerations regarding “effective vindication” must bow to preemptive power of FAA under *Italian Colors*); *Laster v. T-Mobile USA, Inc.*, No. 05CV1167 DMS (WVG), 2013 WL 4082682 (S.D. Cal., Jul. 19, 2013) (noting that even if the “effective vindication” doctrine had previously applied to state laws, it would be subject to the significant limitations imposed by the *Italian Colors* decision).

As this Court held in *Italian Colors*, the only remaining vitality of the “effective vindication” principle is where the arbitration agreement interferes with the *right to pursue* available statutory remedies; “the fact that it is not worth the expenses involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.” 133 S.Ct. at 2310–11. Because there is no question that the arbitration agreement in this case assures Respondent of the right to pursue his statutory claims this “effective vindication” rule would have no application to the present case even if it were to be applicable to state-law claims, which is by no means a certainty.¹

¹ A growing chorus of judicial opinions hold that the “effective vindication” rule has no applicability in the preemption analysis. California’s *Gentry* rule applied the “effective vindication” principle to afford parties seeking to avoid arbitration as agreed an opportunity to show not that their right to pursue claims was impaired, but that there might be, in specific cases, a more

C. If *AT&T Mobility* Stops California From Delaying Arbitration To Allow the Berman Hearing to Proceed, It Certainly Stops California From Using the Berman Process to Deny Arbitration Altogether.

As noted, the California Supreme Court found a narrow foundation for its unconscionability argument in Respondent’s “effective vindication” defense. (*Sonic II, supra*, 57 Cal.4th at 1142.) Elsewhere, the majority noted that Respondent made a choice “to focus in the trial court on his argument that waiver of a Berman hearing was per se unconscionable and contrary to public policy.” (*Id.*, 57 Cal.4th at 1158.) By so characterizing Respondent’s strategy choice, the California Supreme Court properly recognized that the “per se unconscionable” argument and the “contrary to public policy” argument are essentially the same theory. It said as much in its first opinion. *Sonic I, supra*, 51 Cal.4th at 686–87 (one-sidedness of arbitration agreement tied specifically to the surrender of Berman process that was established to further a “public policy goal of ensuring prompt

efficient manner in which claims could be pursued. *Gentry v. Superior Court (Circuit City Stores)*, 42 Cal.4th 443. This rule is coming under increasing attack in light of *AT&T Mobility* and *Italian Colors*. See, e.g., *Cunningham v. Leslie’s Poolmart, Inc.*, No. CV 13–2122 CAS (CWx), 2013 WL 3233211 (C.D.Cal. Jun. 25, 2013) (rejecting *Gentry* as preempted by FAA as improper imposition of specific limitations on arbitration procedures). The issue of whether *Gentry* retains any vitality in light of recent decisions of this Court is presently before this Court in the petition for writ of certiorari filed in *CarMax Auto Superstores California, LLC v. Fowler*, Docket No. 13–439 (writ filed October 8, 2013).

payment of wages by according employees special advantages in their effort to obtain such payment”).

But this public policy basis was rejected by this Court as preempted generally by the FAA in *AT&T Mobility*, as preempted in this specific case in its vacation of the *Sonic I* decision, and as emphatically re-rejected in last term’s *Italian Colors* decision. Accordingly, the analysis should have ended there, particularly as the acknowledged overlap between the public policy and unconscionability defenses to contract enforcement (*see Sonic I, supra*, 51 Cal.4th at 687 (“there is sometimes an overlap between these two defenses to contract enforcement. [¶] Such is the case here”) confirms that the only element that might make the arbitration agreement in this case unfair is the perception that the agreement may not do all that the state policy would wish to protect wage claimants. This is not permissible basis for finding of unconscionability. *See Allied-Bruce Terminix, supra*, 513 U.S. at 281.

The California majority cunningly realized that to survive preemption, it would have to manufacture a distinction between the rejected “per se unconscionable” (or public policy) rule and the case-by-case unconscionability rule it adopted. Moreover, any distinctions must be such that they do not adversely impact the essential functions of arbitration. However, despite the attempt to remodel the “public policy” and “effective vindication” rules previously rejected, a keen observer can quickly discover that there are no such fundamental distinctions between the rejected theories and the new theory. The FAA preempts *Sonic II* just as it did *Sonic I*.

The California Supreme Court found that the California Labor Code provisions establishing the

Berman Process reflect a specific statutory entitlement to a “speedy, informal, and affordable method of resolving wage claims.” *Sonic II, infra*, 57 Cal.4th at 1155, quoting *Cuadra v. Millan*, 17 Cal.4th 855 (1998). It held that the Berman Process includes “certain advantages, chiefly designed to reduce the costs and risks of pursuing a wage claim, recognizing that such costs and risks could prevent a theoretical right from becoming a reality.” *Sonic II, infra*, 57 Cal.4th at 1155.

But while scrupulously avoiding language that could be interpreted to establish a *per se* unconscionability rule, the California Supreme Court concluded that to the extent that these protections do not interfere with the fundamental attributes of arbitration, an arbitration agreement that requires claimants to forego these protections would necessarily compel the loss of these statutory benefits. *Sonic II, supra*, 57 Cal.4th at 1152. While the court noted that the loss of such benefits would not be dispositive, it may be directly considered as a factor in the case-by-case analysis of whether any given agreement was substantively unconscionable. *Id.* This case-by-case analysis would have to be performed by the judiciary, because unconscionability goes to the formation of a contract; a substantively unconscionable agreement is void *ab initio*.

In other words, the court below held that while an arbitration agreement that did not include the specific advantages designed by the legislature to reduce the risks and costs of bringing wage claims might not be inherently unfair in every case, claimants seeking to avoid arbitration should have the right to a preliminary, pre-arbitration judicial evaluation of the specifics of their arbitration agreement and how it

would apply to the specific claim(s) to ensure that the absence of the specified advantages would not make the process to enforce that claim unfairly difficult.

If this analysis sounds familiar, it should: it mimics the issues before this Court in *Italian Colors*, although on a much more theoretical level. In *Italian Colors*, this Court was not faced with an arbitration agreement that *might*, as a practical matter, prevent claimants from an “affordable method of resolving wage claims.” Based on the evidence recognized by the Court, it was *a certainty* that no litigant could possibly come out ahead by following the dispute resolution procedure between the parties. *Italian Colors, supra*, 133 S.Ct. at 2308 (cost of prevailing estimated at “at least several hundred thousand dollars” while maximum recovery, even trebled, was less than \$40,000). Yet this Court properly recognized that because there was no impediment to the right to bring the claim in arbitration, the fact that the claim could not be brought efficiently was not enough to dislodge the language of the parties’ arbitration agreement. *Id.*, 133 S.Ct. at 2311.

Here, the unconscionability analysis envisioned by the court below does not go to whether the employees in question are denied the right to proceed with their wage claim in arbitration. That has never been argued at any level throughout this litigation. Rather, the new analysis goes only to whether the process would be “speedy, informal and affordable” enough (as opposed to the speedy, informal and affordable nature of arbitration in the first place), and whether the process would give the same “advantages” of reduced costs and risks to the claimants that they *might* otherwise have in the absence of arbitration.

This rule is made worse because even the Berman Procedures do not expressly *entitle* claimants to any of the so-called benefits. The Labor Code expressly makes pursuit of claims through the Berman Procedure optional; any employee who elected to forego the Berman Procedure from the outset would never receive any of these contingent benefits. In addition, because the Labor Commissioner itself has discretion whether to proceed through even the first stage of the Berman Process let alone through other decision points through the whole process; no claimant can ever claim entitlement to any of these benefits, even if he or she chose to file with the Labor Commissioner. Even initially were the Labor Commissioner to proceed through the Berman Procedures, there is no guarantee that the claimant would necessarily enjoy the increased efficiency and reduced costs and risks envisioned by the Berman drafters. For example, the statutory provisions relating to representation by the Labor Commissioner are expressly conditioned on the claimant meeting unstated financial ability requirements and on complete agreement with each administrative finding. But, perhaps most importantly, in every case either party may call for an appeal, which would require both parties to again put forth their claims and defenses for a de novo review, rendering the time and resources previously spent almost entirely superfluous and dramatically delaying the arbitration process. *See Preston, supra*, 552 U.S. at 357-58 (state-imposed delay of arbitration preempted by FAA).

This Court has concluded that only an agreement that provides an absolute bar to the right to pursue claims (or, perhaps, imposes prohibitive forum costs) can avoid the strong mandate of the FAA that arbitration agreements be enforced as written.

Against this backdrop, the California court's suggestion that the absence of a statutory set of *potential* benefits that go not to the right to pursue claims—but only to the speed, cost, and potential risks in pursuing the claim—risks could make an arbitration agreement unenforceably unconscionable is clearly inconsistent with this Court's stated interpretation of the FAA.

A critical flaw which the California Supreme Court fails to recognize is its presumption that the so-called statutory benefits of the Berman Procedure do not interfere with the fundamental attributes of arbitration, as pronounced by this Court. According to an ongoing chorus of U.S. Supreme Court decisions, the most fundamental principle of arbitration is the need to enforce the arbitration agreement according to the terms included by the parties. “The overarching purpose of the FAA, evident in the text of §§ 2, 3 and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *AT&T Mobility, supra*, 131 S.Ct. at 1748. This has long been the case. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989) (citing enforcement of private arbitration agreements according to their terms as the “principal purpose” of the FAA); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (courts must “rigorously enforce” arbitration agreements according to their terms).

In its attempt to reconcile its desired result with the FAA, the California Supreme Court refuses to recognize this standard, watering it down by elevating considerations of costs, efficiency and speed to “fundamental” status despite clear guidance to the

contrary from this Court. For example, the court below selectively quotes from *AT&T Mobility* to describe the “fundamental attributes of arbitration” and “especially its ‘lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.’” *Sonic II, supra*, 57 Cal.4th at 1143, quoting *AT&T Mobility, supra*, 131 S.Ct. at 1748,1751. But while these additional qualities of higher efficiency (including speed and costs) and qualified decision-makers might be side benefits of arbitration (see *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758, 1775 (2010)), they do not replace the primary reason behind the enactment of the FAA: the enforcement of private arbitration agreements pursuant to the terms thereof. As this Court recognized in *Dean Witter Reynolds*, while the FAA was enacted against a backdrop of “agitation against the costliness and delays of litigation” which can be mitigated by arbitration, “passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.” *Dean Witter Reynolds, supra*, 470 U.S. 213, 219–20 (citations omitted).

Indeed, the details of the *Dean Witter Reynolds* decision underscores this conclusion. In that case, this Court ordered an arbitration agreement enforced according to its terms, even though the result meant the “inefficient maintenance of separate proceedings in different forums.” 470 U.S. at 217. Similarly, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, this Court confirmed that the FAA sometimes “requires piecemeal litigation when

necessary to give effect to an arbitration agreement.” 460 U.S. 1, 19–20 (1983) (*emphasis in original*).

And just as efficiency as an attribute of arbitration must take a back seat to enforcement of the agreement as drafted, so, too, must informality give way to enforcement pursuant to the terms of the agreement. Even the California Supreme Court has recognized that incorporation of “legal formalities” of rules of pleading, rules of evidence, and motion practice do not render an arbitration agreement substantively unconscionable, as they can benefit both sides in the arbitration. *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1069–70, 1075 (2003).

That California may have a strong preference for “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes” through an administrative adjudicatory forum is not the question on which the preemption argument turns. That would amount to a conclusion that if California could arguably make an administrative adjudication process faster and easier for claimants than arbitration, it could avoid preemption under the FAA. This Court has made it increasingly clear in recent years that such state public policies cannot prevail against the FAA and its preemptive effect. *AT&T Mobility, supra*, 131 S.Ct. at 1753 (protection of small-dollar claims that might otherwise slip through the system may be desirable, but states cannot require procedures inconsistent with the FAA to implement such a policy).

In fact, the California Supreme Court expressly tries to distinguish this case from *Italian Colors* by arguing that the California legislature had specifically enacted an “entitlement”—the Berman Procedure and its tools for a “speedy, informal, and affordable”

dispute resolution mechanism—while the federal antitrust rules in *Italian Colors* offered no such congressionally sanctioned entitlement. *Sonic II*, *supra*, 57 Cal.4th at 1154-55, *citing Cuadra, supra*, 17 Cal.4th at 858. But if states were free under the FAA to impose their own public policy choices in the form of “entitlements” of additional dispute resolution advantages, then such exceptions would soon swallow the rule. The FAA requires that parties, not state public policies, draft arbitration procedures.

D. Requiring A Pre-Arbitration Judicial Evaluation Of The Relative Efficiency Of Arbitration As Compared To Initial Pursuit Of Claims Through The Berman Process Is Directly Contrary To This Court’s Mandate From *Italian Colors*.

Not only would the process of evaluating whether the arbitration proceedings could match the speed, risk mitigation, and affordability that the Berman Process might offer to wage claimants be inconsistent with enforcement of the arbitration agreement as drafted, but it would be flatly contrary to the mandate from this Court in *Italian Colors* on the same issue. As this Court recognized in that decision,

The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly

destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure. 133 S.Ct. at 2312; *see also Preston, supra*, 552 U.S. 357–58 (state-created delays to enforcement are unacceptable impediment to arbitration).

As Justice Chin explained in his dissent to the decision below (*see Sonic II, supra*, 57 Cal.4th at 1188 (CHIN, J., concurring and dissenting)), the pre-arbitration, case-by-case unconscionability analysis would impose a significant preliminary hurdle, with parties submitting evidence on myriad issues including, but not necessarily limited to:

- What arbitration procedures can the employee afford now? When the agreement was formed?
- What are the specific rules and procedures the arbitration will follow, including any unspecified arbitration procedures?
- Would Berman procedures be available to this claimant?
- How long will the Berman Process take, including any *de novo* judicial review? How long will the arbitration take?
- How much will the Berman Process cost, including any *de novo* judicial review? How much will the arbitration cost?
- What is the likelihood of either party requesting *de novo* review?

This is precisely the kind of “judicially created superstructure” that this Court explicitly rejected in *Italian Colors*.

What makes such an evaluation even more impossible is that it will be impossible to answer each of these questions at the pre-arbitration, gateway stage at which the court would have to make a decision on unconscionability. As the court below recognized, “the agreement on its face does not necessarily reveal many of the particulars of the arbitration process that Sonic has adopted.” *Sonic II, supra*, 57 Cal.4th at 1147. But while the California Supreme Court sees nothing wrong with delaying arbitration to have a mini-trial on the myriad issues that would have to be addressed, in practice, it will be impossible to make any findings definitive. This, because the specific handling of the arbitration procedures is left to the eventual arbitrator, who is never identified at the time the agreement is formed or even at the time a dispute initially arises. “The particulars of an arbitration process that are not specified in the arbitration agreement or the applicable arbitration rules are *for the arbitrator*, not the court, to decide.” *Sonic II, supra*, 57 Cal.4th at 1180 (CHIN, J., Dissenting) (*emphasis in original*); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (procedural questions for the arbitrator). Thus, until the parties identify and appoint an arbitrator, and until that arbitrator determines which arbitration procedures he or she will apply to their specific case, it is impossible for anyone to know enough of the particulars of the arbitration process to be able to conclude from the outset whether the arbitration procedures will afford the claimant sufficient benefits as to meet even the subjective standard proffered by the California Supreme Court.

Significantly, the concerns that the *Sonic II* decision might spawn a raft of unworkable and inefficient mini-trials regarding the potential arbitral procedures is far

more than merely theoretical. In the few weeks immediately following the decision of the California Supreme Court in *Sonic II*, the California Labor Commissioner has sprung into action, intervening on behalf of the employee in cases where an employer attempts to enforce an arbitration agreement that does not, by its terms, permit resort to the Berman Process. This has resulted in the very harm this Court sought to avoid in *Italian Colors*: a fact-specific judicial inquiry into the effect of the arbitration agreement in “depriving” the employee of the potential benefits of the Berman Process. Attached as Appendix L hereto is an example of the Labor Commissioner’s efforts to interfere with the enforcement of an arbitration agreement following the pattern laid out by the California Supreme Court in the *Sonic II* decision that is the subject of this petition for writ of certiorari.

II. The Lower Standard For Substantive Unconscionability Adopted By The California Supreme Court In The Case Below Deviates From The Long-Standing Standard Under California Law And, As Such, Does Not Fall Within The Narrow Scope Of The Savings Clause Under Section 2 Of The FAA.

To avoid FAA preemption, a state may only apply “grounds that exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. This Court has held that such grounds include “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *AT&T Mobility, supra*, 131 S.Ct. at 1146, *quoting Doctor’s Associates, Inc. v. Cassarotto*, 517 U.S. 681, 687 (1996). Key here is that the unfairness cannot be limited to policy considerations

unique to arbitration. As this Court stated succinctly in *Allied-Bruce Terminix*

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act's language and Congress' intent. 513 U.S. at 281, quoting Volt Information Sciences, Inc., supra, 489 U.S. at 474 (emphasis added).

As noted above, California law has long regarded unconscionability—as reinforced recently in a 2012 decision from the California Supreme Court—as a strict, objective standard, only affecting contractual terms so egregiously one-sided as to “shock the conscience.” *Pinnacle Museum Tower Assn., supra*, 55 Cal.4th at 246 (“A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to shock the conscience”).

But rather than apply this objective standard to the arbitration dispute before it, the *Sonic II* court declared that “adhesive arbitration agreements” may be examined for unconscionability merely by determining “whether they are unreasonably one-sided.” *Sonic II, supra*, 57 Cal.4th at 1145 (emphasis added). Even though “evidence relevant to the unconscionability claim was not developed below,” California’s high court reiterated its newfound “unreasonably one-sided” standard throughout the opinion and rejected the dissent’s argument that its change to the rules of unconscionability was “*dicta* and an advisory opinion.” *Id.*, 57 Cal.4th at 1158.

In attempting to insulate its holding itself from the dissent's argument that it had "improperly relaxed the unconscionability standard by using the phrase 'unreasonably one-sided' instead of 'so one-sided as to shock the conscience,'" the majority opinion below mustered only one California Court of Appeal case for support. *Sonic II*, *supra*, 57 Cal.4th at 1159, citing *A & M Produce Co. v. FMC Corp.* 135 Cal.App.3d 473 (1982). In *A & M Produce*, the Court of Appeal was faced with unconscionability arguments related to a commercial contract based largely on UCC provisions not directly adopted by California. The court found that this analysis was "only partially illuminated by California precedent." *Id.*, 135 Cal.App.3d at 478. The court then reviewed case law and numerous legal treatises related to the UCC and the unconscionability doctrine from jurisdictions outside California. *Id.*, 135 Cal.App.3d at 486. And while the *A & M Produce* court summarized its review of extra-jurisdictional authority by noting that "unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party," this was not taken from then-existing California law. Rather the appellate panel drew from a string of federal district cases that, ultimately, had relied on Pennsylvania law. *Id.*, 135 Cal.App.3d at 485–86, citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (whether contracts could be found unconscionable was "actually one of first impression") and *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 81 (3d Cir. 1948). This standard could hardly be further from that of general California contract law.

The subjective *A & M Produce* standard has been repeatedly analyzed—and rejected—by California

courts because it deviates from the longstanding “shock the conscience” standard:

Substantive unconscionability is indicated by contract terms so one-sided as to “*shock the conscience*.” [Citation] A less stringent standard of “reasonableness” was applied in *A & M Produce*. This standard was expressly rejected by Division Two of this court . . . as being inherently subjective. [Citation] We agree. With a concept as nebulous as “unconscionability” it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience. *American Software, Inc. v. Ali*, 46 Cal.App.4th 1386, 1391 (1996) (*emphasis in original*), *citing California Grocers Assn. v. Bank of America*, 22 Cal.App.4th 205, 214 (1994) (“We also decline to follow *A & M Produce* to the extent it may be construed as making ‘reasonableness’ the standard of unconscionability. Such an amorphous standard is far too subjective to provide adequate guidance”).

The length to which the court below has gone to justify its softer “unreasonably favorable” standard to find unconscionability in adhesive arbitration agreements—and its willingness to ignore even its own recent authority to the contrary—is further evidence that California courts simply refuse to adhere to standards for “enforceability of contracts generally” when the matter involves arbitration. *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

Even the concurring opinion below recognized the danger in the majority’s non-standard formulation of the standard, expressly disagreeing with the majority’s

“failure to articulate a clear standard for assessing the unconscionability of arbitration terms in employment agreements” and reiterating that “the proper test for determining unconscionability here is whether the terms are so one-sided as to ‘shock the conscience.’” *Sonic II*, *supra*, 57 Cal.4th at 1172 (CORRIGAN, J., concurring), *quoting Pinnacle*, *supra*, 55 Cal.4th at 246.

As this Court recently reiterated, “[i]t is this Court’s responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.” *Nitro-Lift Technologies, L.L.C. v. Howard*, ___U.S.___, 133 S.Ct. 500, 503 (2012), *quoting Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994). But California courts, rather than respecting this Court’s guidance, continue to attempt to create “a great variety of devices and formulas” to disfavor and discourage arbitration in accordance with the terms of parties’ agreements. *AT&T Mobility*, *supra*, 131 S.Ct. at 1747 (*internal citation omitted*). Because the lowered standard of unconscionability in *Sonic II*—which deviates from California law applicable to contracts in general—is just such a device and formula, it is preempted by the FAA.

CONCLUSION

California courts do little to disguise their distrust of arbitration as a valid dispute resolution alternative. And few observers would have been surprised when the majority opinion below worked hard to resuscitate its blanket public policy rule from *Sonic I* and establish a case-by-case analysis that would apply a softened standard for unconscionability that does not comply with Section 2 of the FAA. As their colleague noted bluntly in dissent, “[t]he majority’s superficial and unpersuasive attempt to distance itself from *Sonic I*’s unqualified statement, and its embrace of the case-by-case approach it previously rejected in this very case, suggest that the majority, having been rebuffed by the high court in its first attack on this predispute arbitration agreement, is now simply searching for a new plan of attack.” *Sonic II, supra*, 57 Cal. 4th at 1184 (CHIN, J., dissenting).

This Court is—again—in a position to send a clear message to California and other states that the FAA requires the enforcement of arbitration agreements according to their terms, and state public policy considerations founded in a distrust of arbitration cannot be used to delay or derail the enforcement of arbitration agreements as drafted. The Massachusetts Supreme Court received and understood this message, even if it did not entirely agree with it. *Feeney, supra*, 466 Mass. at 1003 (regarding the rule in *Italian Colors* that the FAA command to enforce arbitration trumps any interest in ensuring the prosecution of low-value claims as “untenable,” but recognizing the obligation to follow it as a controlling statement of federal law). But California, as evidenced by this *Sonic II* decision, needs another reminder, which this Court is in a position to do by granting Petitioner’s petition for

writ of certiorari to and reiterating again that the FAA requires enforcement of arbitration agreements pursuant to their terms and preempts state efforts to impede such enforcement, regardless of how well-meaning their conflicting public policy considerations may be.

Respectfully submitted,

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January 15, 2014

APPENDIX

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APPENDIX A

SUPREME COURT OF CALIFORNIA

No. S174475

Oct. 17, 2013

SONIC-CALABASAS A, INC.,

Plaintiff and Appellant,

v.

FRANK MORENO,

Defendant and Respondent.

Synopsis

Background: Employer petitioned to compel arbitration of former employee's administrative wage claim filed with the Labor Commissioner for unpaid vacation pay. Labor Commissioner intervened on behalf of employee. The Superior Court, Los Angeles County, No. BS107161, Aurelio Munoz, J., denied motion. Employer appealed, and the Court of Appeal reversed with directions. Employee petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal, and the Supreme Court, 51 Cal.4th 659, 121 Cal.Rptr.3d 58, 247 P.3d 130, reversed and remanded. Employer petitioned for writ of certiorari. The United States Supreme Court granted the petition, ___ U.S. ___, 132 S.Ct. 496, 181 L.Ed.2d 343, and vacated and remanded for reconsideration.

Holdings: On remand for reconsideration, the Supreme Court, Liu, J., held that:

FAA preempts state-law rule requiring a Berman hearing prior to arbitration, and court could consider waiver of Berman protections when considering whether arbitration provision was unconscionable due to waiver of affordable and accessible dispute resolution forum.

Reversed and remanded with directions.

Corrigan, J., concurred with opinion.

Chin, J., concurred in part and dissented in part with opinion in which Baxter, J., concurred.

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Opinion

LIU, J.

In *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 121 Cal.Rptr.3d 58, 247 P.3d 130 (Sonic I), we held as a categorical rule that it is contrary to public policy and unconscionable for an employer to require an employee, as a condition of employment, to waive the right to a Berman hearing, a dispute resolution forum established by the Legislature to assist employees in recovering wages owed. We further held that our rule prohibiting waiver of a Berman hearing does not discriminate against arbitration agreements and is therefore not preempted by the Federal Arbitration Act (FAA). We did not invalidate the arbitration agreement at issue. Instead, we held that if one of the parties is dissatisfied with the result of the Berman hearing, it can move to arbitrate the wage dispute consistent with the arbitration agreement, just as a dissatisfied party can obtain a trial in court without such an agreement.

The United States Supreme Court granted certiorari in this case, vacated the judgment, and remanded the case to this court for consideration in light of *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. ____, 131 S.Ct. 1740, 179 L.Ed.2d 742 (*Concepcion*). In *Concepcion*, the high court clarified the limitations that the FAA imposes on a state's capacity to enforce its rules of unconscionability on parties to arbitration agreements. In light of *Concepcion*, we conclude that because compelling the parties to undergo a Berman hearing would impose significant delays in the commencement of arbitration, the approach we took in *Sonic I* is inconsistent with the FAA. Accordingly, we now hold, contrary to *Sonic I*, that the FAA preempts our state-law rule

categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment.

At the same time, we conclude that state courts may continue to enforce unconscionability rules that do not “interfere[]with fundamental attributes of arbitration.” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1748.) Although a court may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a Berman hearing, such an agreement may be unconscionable if it is otherwise unreasonably one-sided in favor of the employer. As we explained in *Sonic I* and reiterate below, the Berman statutes confer important benefits on wage claimants by lowering the costs of pursuing their claims and by ensuring that they are able to enforce judgments in their favor. There is no reason why an arbitral forum cannot provide these benefits, and an employee’s surrender of such benefits does not necessarily make the agreement unconscionable. The fundamental fairness of the bargain, as with all contracts, will depend on what benefits the employee received under the agreement’s substantive terms and the totality of circumstances surrounding the formation of the agreement.

The employee in this case contends that the particular arbitration scheme at issue is unconscionable, while the employer contends that its arbitration agreement offers adequate protections and advantages to facilitate the employee’s claim and is not unreasonably one-sided. Because evidence relevant to the unconscionability claim was not developed below, we remand to the trial court to determine whether the present arbitration agreement

is unconscionable under the principles set forth in this opinion.

I.

Frank Moreno is a former employee of Sonic-Calabasas A, Inc. (Sonic), which owns and operates an automobile dealership. As a condition of his employment with Sonic, Moreno signed a document entitled “Applicant’s Statement & Agreement.” The agreement set forth a number of conditions of employment, including consent to drug testing and permission to contact former employers, as well as a provision making the employment at will. The agreement also contained a paragraph governing dispute resolution, which required both parties to submit employment disputes to “binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal.Code Civ. Proc. sec. 1280 et seq. . . .)” The arbitration provision applied to “all disputes that may arise out of the employment context . . . that either [party] may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum[,] . . . whether based on tort, contract, statutory, or equitable law, or otherwise.” The provision specified that it did not apply to claims brought under the National Labor Relations Act or the California Workers’ Compensation Act, or to claims before the Employment Development Department. The provision further stated that the employee was not prevented from “filing and pursuing administrative proceedings only before the California Department of Fair Employment and Housing or the U.S. Equal Opportunity Commission.”

In addition, the agreement provided that arbitration is to be conducted by a “retired California Superior Court Judge” and that “to the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8.” At the request of either party, an arbitration award may be reviewed by a second arbitrator who will, “ as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial.”

In December 2006, after leaving his position with Sonic, Moreno filed an administrative wage claim with the Labor Commissioner for unpaid vacation pay pursuant to Labor Code section 98 et seq. (All statutory references are to the Labor Code unless otherwise indicated.) Moreno alleged he was entitled to unpaid “[v]acation wages for 63 days earned 7/15/02 to 7/15/06 at the rate of \$441.29 per day.” The filing of such a claim is the first step toward obtaining a Berman hearing.

In February 2007, Sonic petitioned the superior court to compel arbitration of the wage claim and to dismiss the pending administrative action, arguing that Moreno waived his right to a Berman hearing in the arbitration agreement. The Labor Commissioner intervened on Moreno’s behalf (§ 98.5), and Moreno adopted the Labor Commissioner’s arguments. The Labor Commissioner argued that the arbitration agreement, properly construed, did not preclude Moreno from filing an administrative wage claim

under section 98 et seq. According to the Labor Commissioner, resort to a Berman hearing was compatible with the arbitration agreement because the hearing could be followed by arbitration in lieu of a de novo appeal in the superior court under section 98.2, subdivision (a). The Labor Commissioner further argued that interpreting the arbitration agreement to waive a Berman hearing would violate public policy, relying on *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*).

The superior court denied the petition to compel arbitration as premature. Citing *Armendariz*, the court said that as a matter of “basic public policy ... until there has been the preliminary non-binding hearing and decision by the Labor Commissioner, the arbitration provisions of the employment contract are unenforceable, and any petition to compel arbitration is premature and must be denied.”

Sonic appealed. The Labor Commissioner did not participate in the appeal. During the briefing period in the Court of Appeal, the United States Supreme Court decided *Preston v. Ferrer* (2008) 552 U.S. 346, 128 S.Ct. 978, 169 L.Ed.2d 917 (*Preston*), which held that the Labor Commissioner’s original and exclusive jurisdiction under the Talent Agencies Act (§ 1700 et seq.) was preempted when the parties entered into an arbitration agreement governed by the FAA. The Court of Appeal concluded that *Preston* was not dispositive of Sonic’s appeal. According to the court, *Preston* applies when a party challenges the validity of a contract as a whole and seeks to have that challenge adjudicated by an administrative agency; it does not apply when a party challenges the arbitration clause itself as unconscionable. The Court of Appeal further

concluded that the arbitration agreement, correctly interpreted, constituted a waiver of a Berman hearing. By its terms, the agreement precluded Moreno from pursuing any judicial “or other government dispute resolution forum,” subject to certain enumerated exceptions. The court stated: “Given that neither the Division of Labor Standards Enforcement nor the Labor Commissioner was listed among the stated exceptions, we conclude, as a matter of law, that Moreno was barred from pursuing an administrative wage claim under section 98 et seq.” The Court of Appeal then held that a Berman waiver is enforceable and not contrary to public policy.

We granted Moreno’s petition for review. As discussed below, we held in *Sonic I* that although Moreno could be compelled to arbitrate, he could not be required to waive his right to a Berman hearing before arbitration. Accordingly, we reversed the Court of Appeal and ordered reinstatement of the trial court’s denial of Sonic’s petition to compel arbitration. Sonic then petitioned the United States Supreme Court for a writ of certiorari. The high court granted the petition, vacated our judgment, and remanded the case to this court “for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. ____ [131 S.Ct. 1740, 179 L.Ed.2d 742] (2011).” (*Sonic-Calabasas A, Inc. v. Moreno* (2011) 565 U.S. ____, 132 S.Ct. 496, 181 L.Ed.2d 343.) We requested supplemental briefing from the parties on how *Concepcion* affects our decision in *Sonic I*.

II.

We begin by reviewing the Berman statutes and our opinion in *Sonic I*.

A.

In *Sonic I, supra*, 51 Cal.4th 659, 121 Cal.Rptr.3d 58, 247 P.3d 130, we explained how Berman hearings and related statutory protections benefit employees with wage claims against their employers: “If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options. The employee may seek judicial relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. (§§ 218, 1194.) Or the employee may seek administrative relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8. The latter option was added by legislation enacted in 1976 (Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371) and is commonly known as the “Berman” hearing procedure after the name of its sponsor.’ [Citation.]

“Once an employee files a complaint with the Labor Commissioner for nonpayment of wages, section 98, subdivision (a) ‘ provides for three alternatives: the commissioner may either accept the matter and conduct an administrative hearing [citation], prosecute a civil action for the collection of wages and other money payable to employees arising out of an employment relationship [citation], or take no further action on the complaint. [Citation.]” ’ (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115, 56 Cal.Rptr.3d 880, 155 P.3d 284.) ‘If the commissioner decides to accept the matter and conduct an administrative hearing, he or she must hold the hearing within 90 days.’ (*Ibid.*) Moreover, prior to holding a Berman hearing or pursuing a civil action, the Labor Commissioner’s staff may attempt to settle

claims either informally or through a conference between the parties. (Dept. of Industrial Relations, Div. of Labor Stds. Enforcement (DLSE), Policies and Procedures for Wage Claim Processing (2001 rev.) pp. 2-3.)

“A Berman hearing is conducted by a deputy [labor] commissioner, who has the authority to issue subpoenas. (Cal.Code Regs., tit. 8, §§ 13502, 13506.) “The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims. In brief, in a Berman proceeding the commissioner may hold a hearing on the wage claim; the pleadings are limited to a complaint and an answer; the answer may set forth the evidence that the defendant intends to rely on . . .; if the defendant fails to appear or answer no default is taken and the commissioner proceeds to decide the claim, but may grant a new hearing on request. (§ 98.) The commissioner must decide the claim within 15 days after the hearing. (§ 98.1.)’ [Citation.] The hearings are not governed by the technical rules of evidence, and any relevant evidence is admitted ‘if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.’ (Cal.Code Regs., tit. 8, § 13502.) The hearing officer is authorized to assist the parties in cross-examining witnesses and to explain issues and terms not understood by the parties. (DLSE, Policies and Procedures for Wage Claim Processing, *supra*, at p. 4.) The parties have a right to have a translator present. (*Ibid.*; see § 105 . . .)

“Once judgment is entered in the Berman hearing, enforcement of the judgment is to be a court priority. (§ 98.2, subd. (e).) The Labor Commissioner is charged with the responsibility of enforcing the judgment and

‘shall *1129 make every reasonable effort to ensure that judgments are satisfied, including taking all appropriate legal action and requiring the employer to deposit a bond as provided in Section 240.’ (*Id.*, subd. (i))

“Within 10 days after notice of the decision any party may appeal to the appropriate court, where the claim will be heard de novo; if no appeal is taken, the commissioner’s decision will be deemed a judgment, final immediately, and enforceable as a judgment in a civil action. (§ 98.2.) If an employer appeals the Labor Commissioner’s award, ‘[a]s a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award.’ (§ 98.2, subd. (b).) The purpose of this requirement is to discourage employers from filing frivolous appeals and from hiding assets in order to avoid enforcement of the judgment. (Sen. Com. on Labor and Industrial Relations, Analysis of Assem. Bill No. 2772 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, p. 4.)

“Under section 98.2, subdivision (c), ‘If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney’s fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.’ This provision thereby establishes a one-way fee-shifting scheme, whereby unsuccessful appellants pay attorney fees while successful appellants may not obtain such fees.

[Citation.] This is in contrast to section 218.5, which provides that in civil actions for nonpayment of wages initiated in the superior court, the ‘prevailing party’ may obtain attorney fees.

“Furthermore, the Labor Commissioner ‘may’ upon request represent a claimant ‘financially unable to afford counsel’ in the de novo proceeding and ‘shall’ represent the claimant if he or she is attempting to uphold the Labor Commissioner’s award and is not objecting to the Commissioner’s final order. (§ 98.4.) Such claimants represented by the Labor Commissioner may still collect attorney fees pursuant to section 98.2, although such claimants have not, strictly speaking, incurred attorneys fees, because construction of the statute in this manner is consistent with the statute’s goals of discouraging unmeritorious appeals of wage claims. [Citation.]” (*Sonic I, supra*, 51 Cal.4th at pp. 672-674, 121 Cal.Rptr.3d 58, 247 P.3d 130, fn. omitted.)

In sum, the Berman statutes provide important benefits to employees by reducing the costs and risks of pursuing a wage claim in several ways. First, the Berman hearing itself provides an accessible, informal, and affordable mechanism for lay persons to seek resolution of such claims. (*See Cuadra v. Millan* (1998) 17 Cal.4th 855, 858, 72 Cal.Rptr.2d 687, 952 P.2d 704 (*Cuadra*)) Second, section 98.2, subdivision (c) discourages unmeritorious appeals of Berman hearing awards by providing that a party who unsuccessfully appeals an award must pay the other party’s costs and attorney fees. (*See Lolley v. Campbell* (2002) 28 Cal.4th 367, 376, 121 Cal.Rptr.2d 571, 48 P.3d 1128 (*Lolley*)) Third, section 98.2, subdivision (c) provides that an employee will not be saddled with the employer’s attorney fees and costs unless the employee

appeals from a Berman hearing award and receives a judgment of zero on appeal. This rule differs from section 218.5, which provides for attorney fees for the “prevailing party” in wage actions initiated in the superior court. Fourth, section 98.4 provides that a wage claimant who is “financially unable to afford counsel” may be represented by the commissioner in the event the employer appeals and “shall” be represented by the commissioner if the employee seeks to uphold a Berman hearing award. Fifth, the Berman statutes ensure that an employee will actually collect a judgment or award by mandating that the Labor Commissioner use her best efforts to collect a Berman hearing award and by requiring the employer to post an undertaking for the amount of the award if it takes an appeal. (*See Sonic I, supra*, 51 Cal.4th at p. 674, 121 Cal.Rptr.3d 58, 247 P.3d 130; § 98.2, subs. (b), (e), (i).) Finally, the Berman process ensures that employees have assistance in resolving their claims, including the use of a translator if needed. (§ 105.).

B.

In considering whether a Berman waiver violates public policy, *Sonic I* first reviewed the law governing mandatory employment arbitration agreements, i.e., arbitration agreements that are conditions of new or continuing employment. As we explained, “[i]n *Armendariz, supra*, 24 Cal.4th 83 [99 Cal.Rptr.2d 745, 6 P.3d 669], we concluded that such agreements were enforceable, provided they did not contain features that were contrary to public policy or unconscionable. (*Id.* at p. 99 [99 Cal.Rptr.2d 745, 6 P.3d 669].) We concluded that ‘arbitration agreements cannot be made to serve as a vehicle for the waiver of [unwaivable] statutory rights,’ such as rights under the Fair Employment and Housing Act (FEHA . . .).

To ensure that such waiver did not occur, we held that arbitrations addressing such statutory rights would be subject to certain minimal requirements. As we later summarized these: “(1) the arbitration agreement may not limit the damages normally available under the statute (*Armendariz, supra*, 24 Cal.4th at p. 103 [99 Cal.Rptr.2d 745, 6 P.3d 669]); (2) there must be discovery “sufficient to adequately arbitrate their statutory claim” (*id.* at p. 106 [99 Cal.Rptr.2d 745, 6 P.3d 669]); (3) there must be a written arbitration decision and judicial review “sufficient to ensure the arbitrators comply with the requirements of the statute” (*ibid.*); and (4) the employer must “pay all types of costs that are unique to arbitration” (*id.* at p. 113 [99 Cal.Rptr.2d 745, 6 P.3d 669]).” (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076 [130 Cal.Rptr.2d 892, 63 P.3d 979] *1131 (Little).) We did not hold that the above requirements were the only conditions that public policy could place on arbitration agreements, and have since recognized other limitations. (See *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 463 [64 Cal.Rptr.3d 773, 165 P.3d 556] (*Gentry*) [prohibition of class arbitration contrary to public policy in some cases].)” (*Sonic I, supra*, 51 Cal.4th at p. 677, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

We then concluded that the protections afforded by a Berman hearing may not be waived as a condition of employment: “There is no question that the lawful payment of wages owed is not merely an individual right but an important public policy goal . . . ‘Civil Code section 3513 provides, in pertinent part, that: “[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.” [¶] The determination of whether a particular statute is for public or private benefit is for

the court in each case (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 645, p. 586). The provisions of the Labor Code, particularly those directed toward the payment of wages to employees entitled to be paid, were established to protect the workers and hence have a public purpose. As was pointed out in *In re Trombley* (1948) 31 Cal.2d 801, 809, 193 P.2d 734: “[i]t has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due.” [Citation.]’ [Citation.]” (*Sonic I, supra*, 51 Cal.4th at p. 679, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

We went on to explain: “Although the statutory protections that the Berman hearing and the post-hearing procedures afford employees were added piecemeal over a number of years, their common purpose is evident: Given the dependence of the average worker on prompt payment of wages, the Legislature has devised the Berman hearing and post-hearing process as a means of affording an employee with a meritorious wage claim certain advantages, chiefly designed to reduce the costs and risks of pursuing a wage claim, recognizing that such costs and risks could prevent a theoretical right from becoming a reality. These procedures, including the employer undertaking and the one-way fee provision, also deter employers from unjustifiably prolonging a wage dispute by filing an unmeritorious appeal. This statutory regime therefore furthers the important and long-recognized public purpose of ensuring that workers are paid wages owed. The public benefit of the Berman procedures, therefore, is not merely incidental

to the legislation's primary purpose but in fact central to that purpose. Nor can there be any doubt that permitting employers to require employees, as a condition of employment, to waive their right to a Berman hearing would seriously undermine the efficacy of the Berman hearing statutes and hence thwart the public purpose behind the statutes." (*Sonic I, supra*, 51 Cal.4th at p. 679, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

We rejected Sonic's argument that "even if a nonarbitration clause that required a Berman hearing waiver is contrary to public policy, an arbitration clause containing the same waiver would not be, because arbitration offers the same or similar advantages as does the Berman hearing process." (*Sonic I, supra*, 51 Cal.4th at p. 680, 121 Cal.Rptr.3d 58, 247 P.3d 130.) We explained that "the choice is not between a Berman hearing and arbitration, because a person subject to binding arbitration and eligible for a Berman hearing will still be subject to binding arbitration if the employer appeals the Berman hearing award. The choice is rather between arbitration that is or is not preceded by a Berman hearing. As discussed above, there are considerable advantages for employees to undergo the Berman hearing process before arbitration." (*Ibid.*) "In contrast, arbitration, notwithstanding its advantages as a reasonably expeditious means of resolving disputes, still generally bears the hallmark of a formal legal proceeding in which representation by counsel is necessary or at least highly advantageous. The arbitration in question here, for example, is to be conducted by a 'retired California Superior Court Judge' and 'to the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of

demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8.’ The arbitrator’s award at either party’s request will be reviewed by a second arbitrator who will ‘as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial.’ A wage claimant undergoing arbitration will need the same kind of legal representation as if he or she were going to superior court.” (*Sonic I, supra*, 51 Cal.4th at pp. 680-681, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

We therefore concluded that “an employee going directly to arbitration will lose a number of benefits and advantages. He or she will not benefit from the Labor Commissioner’s settlement efforts and expertise. He or she must pay for his or her own attorney whether or not he or she is able to afford it—an attorney who may not have the expertise of the Labor Commissioner. Moreover, what matters to the employee is not a favorable arbitration award per se but the enforcement of that award, and an employee going directly to arbitration will have no special advantage obtaining such enforcement. Nor is there any guaranty that the employee will not be responsible for any successful employer’s attorney fees, for under section 218.5, an employee who proceeds directly against an employer with a wage claim not preceded by a Berman hearing will be liable for such fees if the employer prevails on appeal. In short, the Berman hearing process, even when followed by binding arbitration, provides on the whole substantially lower costs and risks to the employee, greater deterrence of frivolous employer claims, and greater assurance that

awards will be collected, than does the binding arbitration process alone.” (*Sonic I, supra*, at p. 681, 121 Cal.Rptr.3d 58, 247 P.3d 130, fns. omitted.)

We also rejected Sonic’s argument that because employees have the option of pursuing a Berman hearing or going directly to court (§ 218), Berman hearings must be waivable in a predispute agreement. “The purpose of the Berman hearing statutes is to empower wage claimants by giving them access to a Berman hearing with all of its advantages. Allowing an employee the freedom to choose whether to resort to a Berman hearing when a wage claim arises, after evaluating in light of the particular circumstances whether such a hearing is advantageous, is wholly consistent with the public policy behind the Berman hearing statutes. A requirement that the employee surrender the option of a Berman hearing as a condition of employment is not. As we recognized in *Armendariz*, our concern is with the impermissible waiver of certain rights and protections as a condition of employment before a dispute has arisen. (*See Armendariz, supra*, 24 Cal.4th at p. 103, fn. 8 [99 Cal.Rptr.2d 745, 6 P.3d 669].) We therefore find the argument that, because the Legislature intended an employee to have the option of a Berman hearing when a wage claim arises, the Legislature also must have intended to permit employers to require employees to waive that option as a condition of employment, to be unpersuasive.” (*Sonic I, supra*, 51 Cal.4th at pp. 682-683, 121 Cal.Rptr.3d 58, 247 P.3d 130, fn. omitted.) For the reasons above, we held that a Berman waiver in the context of a predispute arbitration agreement violates public policy. (*Id.* at p. 684, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

Sonic I further held that a Berman waiver is unconscionable. As we explained: “One common formulation of unconscionability is that it refers to ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’” [Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. “The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, “which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” (*Little, supra*, 29 Cal.4th at p. 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979.)

“Substantively unconscionable terms can take various forms, but may generally be described as unfairly one-sided. One such form, as in *Armendariz*, is the arbitration agreement’s lack of a “modicum of bilaterality,” wherein the employee’s claims against the employer, but not the employer’s claims against the employee, are subject to arbitration. (*Armendariz, supra*, 24 Cal.4th at p. 119 [99 Cal.Rptr.2d 745, 6 P.3d 669].) Another kind of substantively unconscionable provision occurs when the party imposing arbitration mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed.’ (*Little, supra*, 29 Cal.4th at pp. 1071-1072 [130 Cal.Rptr.2d 892, 63 P.3d 979].) In determining unconscionability, our inquiry is into whether a

contract provision was ‘unconscionable at the time it was made.’ (Civ.Code, § 1670.5, subd. (a).)” (*Sonic I, supra*, 51 Cal.4th at pp. 684-685, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

Applying these principles, we first observed that “the arbitration agreement was a contract of adhesion indisputably imposed as a condition of employment” and that “contract terms imposed as a condition of employment are particularly prone to procedural unconscionability.” (*Sonic I, supra*, 51 Cal.4th at pp. 685-686, 121 Cal.Rptr.3d 58, 247 P.3d 130.) “[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.” (*Armendariz, supra*, 24 Cal.4th at p. 115 [99 Cal.Rptr.2d 745, 6 P.3d 669].) Moreover, many employees may not give careful scrutiny to routine personnel documents that employers ask them to sign. (*See Gentry, supra*, 42 Cal.4th at p. 471 [64 Cal.Rptr.3d 773, 165 P.3d 556].)

“Furthermore, for reasons suggested above, significant substantive unconscionability is also present. As explained, Berman hearing and post-hearing procedures were designed to provide wage claimants with meritorious claims unique protections that lower the costs and risks of pursuing such claims, leveling a playing field that generally favors employers with greater resources and bargaining power. Requiring employees to forgo these protections as a condition of employment can only benefit the employer at the expense of the employee. Nor can we say, as also explained, that the benefits the employee gains from

arbitration compensates for what he or she loses by forgoing the option of a Berman hearing.

“In sum, rather than being justified by ‘legitimate commercial needs’ (see *Armendariz, supra*, 24 Cal.4th at p. 117 [99 Cal.Rptr.2d 745, 6 P.3d 669]), the main purpose of the Berman waiver appears to be for employers to gain an advantage in the dispute resolution process by eliminating the statutory advantages accorded to employees designed to make that process fairer and more efficient. We conclude the waiver is markedly one-sided and therefore substantively unconscionable. This substantive unconscionability, together with the significant element of procedural unconscionability, leads to the conclusion that the Berman waiver in the arbitration agreement at issue here is unconscionable.” (*Sonic I, supra*, 51 Cal.4th at p. 686, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

Although we found the Berman waiver unconscionable and contrary to public policy, we did not invalidate the arbitration agreement. Instead, we held that an arbitration agreement may be enforced so long as arbitration is preceded by the option of a Berman hearing at the employee’s request. If the employee chooses to have a Berman hearing, then the post-Berman hearing protections for employees would apply in arbitration: “A party to a Berman hearing seeking a de novo appeal via arbitration pursuant to a prior agreement rather than through a judicial proceeding would initially file an appeal in superior court pursuant to section 98.2, subdivision (a), together with a petition to compel arbitration. The superior court would determine whether the appeal is timely and whether it comports with all the statutory requirements, such as the undertaking requirement in

subdivision (b). If so, and if the petition to compel arbitration is unopposed, or found to be meritorious, the trial court will grant the petition. The Labor Commissioner, pursuant to section 98.4, may then represent an eligible wage claimant in the arbitration proceeding. The one-way fee-shifting provisions of section 98.2, subdivision (c) will be enforced initially by the arbitrator, with such judicial review as may be appropriate.” (*Sonic I, supra*, 51 Cal.4th at p. 676, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

Finally, we held that the FAA does not preempt this approach because “our conclusion that Berman waivers are contrary to public policy and unconscionable does not discriminate against arbitration agreements.” (*Sonic I, supra*, 51 Cal.4th at p. 689, 121 Cal.Rptr.3d 58, 247 P.3d 130.) “Rather, our conclusion that a Berman waiver is contrary to public policy and unconscionable is equally applicable whether the waiver appears within an arbitration agreement or independent of arbitration.” (*Ibid.*) Below we discuss in greater detail *Sonic I*’s analysis of the preemption issue after first examining the high court’s decision in *Concepcion*.

III.

Two months after *Sonic I* was filed, the United States Supreme Court issued its decision in *Concepcion, supra*, 563 U.S. ____, 131 S.Ct. 1740. We now analyze the effect of that decision on *Sonic I*, beginning with a review of the state-law rule at issue in *Concepcion*.

A.

In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (*Discover Bank*), this court confronted the question of

whether provisions in arbitration agreements waiving class actions are unconscionable. We had previously approved of class arbitration as a means of “provid[ing] small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.’ [Citation.] Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to ‘retain[] the benefits of its wrongful conduct.’ [Citation.]” (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 609, 183 Cal.Rptr. 360, 645 P.2d 1192 (*Keating*), overruled on other grounds in *Southland Corp. v. Keating* (1984) 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1.) We held in *Discover Bank* that when a class arbitration waiver “is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” (*Discover Bank*, at pp. 162-163, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)

We further held that the FAA does not preempt this unconscionability rule. Reciting the applicable law, we said that “the text of § 2 [of the FAA] provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, as a

matter of federal law [citation], “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 . . . Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. [Citations.] A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law. Nor may a court 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.” (Discover Bank, *supra*, 36 Cal.4th at pp. 164-165, 30 Cal.Rptr.3d 76, 113 P.3d 1100, quoting *Perry v. Thomas* (1987) 482 U.S. 483, 492-493, fn. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426, italics added by *Discover Bank*.)

We reasoned that our unconscionability rule prohibiting class waivers is not preempted because it applies equally to arbitration and nonarbitration agreements: “[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements. (See *America Online [Inc. v. Superior Court* (2001)] 90 Cal.App.4th [1], 17-18 [108 Cal.Rptr.2d 699].)” (*Discover Bank, supra*, 36 Cal.4th

at pp. 165-166, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) In addition, we observed that in the years since *Keating* was decided, class arbitration had proven to be a viable alternative to class litigation or bilateral arbitration. (*Discover Bank*, at p. 172, 30 Cal.Rptr.3d 76, 113 P.3d 1100 and cases cited therein.)

B.

The high court in *Concepcion* held that the FAA preempts the unconscionability of class arbitration waivers in consumer contracts, thereby abrogating *Discover Bank*. *Concepcion* involved a class action filed in federal court alleging that AT & T engaged in fraud and false advertising by charging sales tax for phones it advertised as free. The value of the claim of the class representatives, Vincent and Liza Concepcion, was \$30.22. AT & T moved to compel arbitration. The arbitration agreement provided that if an arbitration award was greater than AT & T's last written settlement offer, AT & T would pay at minimum \$7,500 plus twice plaintiff's attorney fees. The district court denied the motion to compel, holding that the class waiver made the arbitration agreement unconscionable under *Discover Bank* and that the \$7,500 penalty did not cure the unconscionability because AT&T could always avoid the penalty by paying the face value of the claim. As the Ninth Circuit said in affirming the district court, "the maximum gain to a customer for the hassle of arbitrating a \$30.22 dispute is still just \$30.22." (*Laster v. AT & T Mobility LLC* (2009) 584 F.3d 849, 856.)

The Supreme Court reversed. While acknowledging that *Discover Bank*'s unconscionability rule applies equally to arbitration and non-arbitration contracts, the high court concluded that more is required to avoid FAA preemption: "the inquiry becomes more complex

when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration . . . [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 . . .’ [Citation.]” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1747.)

“An obvious illustration of this point,” *Concepcion* said, “would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. *See Discover Bank, supra*, at 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (arguing that class waivers are similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to ‘any’ contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1747.) The high court added that “[t]he same argument might apply to a rule classifying as unconscionable

arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed ‘a panel of twelve lay arbitrators’ . . .).” (*Ibid.*)

Such unconscionability rules, “‘aimed at destroying arbitration’ or ‘demanding procedures incompatible with arbitration,’” would contravene the FAA’s “overarching purpose” of “ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1748.) Similarly, the high court reasoned, “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” (*Ibid.*) According to *Concepcion*, classwide arbitration interferes with fundamental attributes of arbitration in several ways.

First, classwide arbitration “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1751.) “In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.’ [Citation.]” (*Ibid.*) Classwide arbitration, by contrast, is a slower process because “before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted.” (*Ibid.*)

Second, “class arbitration *requires* procedural formality” because of due process concerns. (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1751; *see ibid.* [“The [American Arbitration Association’s] rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation.”].) “If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class [¶] We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator.” (*Id.* at pp. ____ – ____, 131 S.Ct. at pp. 1751-1752.)

“Third, class arbitration greatly increases risks to defendants” and “is poorly suited to the higher stakes of class litigation” because of the lack of judicial review. (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1752.) “[I]n class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a class-wide basis will have a substantial deterrent effect on incentives to arbitrate.” (*Id.* at p. ____, fn. 8, 131 S.Ct. at p. 1752, fn. 8.)

The high court concluded: “Because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ [citation], California’s *Discover Bank* rule is preempted by the FAA.” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1753.)

Sonic contends that the FAA as construed by *Concepcion* preempts our holding in *Sonic I* that a waiver of Berman procedures in an arbitration agreement is, in and of itself, unconscionable and contrary to public policy. Sonic points to our acknowledgment that the usual time between the filing of a complaint with the Labor Commissioner and the conclusion of a Berman hearing is four to six months. (*Sonic I, supra*, 51 Cal.4th at p. 681, fn. 5, 121 Cal.Rptr.3d 58, 247 P.3d 130.) Sonic then underscores *Concepcion*'s observation that "in *Preston v. Ferrer*, holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: 'A prime objective of an agreement to arbitrate is to achieve "streamlined proceedings and expeditious results," which objective would be 'frustrated' by requiring a dispute to be heard by an agency first. 552 U.S., at 357-358, 128 S.Ct. 978. That rule, we said, would 'at the least, hinder speedy resolution of the controversy.' *Id.*, at 358, 128 S.Ct. 978." (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1749, fn. omitted.) We agree with *Sonic* that the FAA as construed by *Concepcion* preempts *Sonic I*'s rule categorically prohibiting waiver of a Berman hearing in arbitration agreements. Accordingly, we overrule the contrary holding in *Sonic-Calabasas A, Inc. v. Moreno, supra*, 51 Cal.4th 659, 121 Cal.Rptr.3d 58, 247 P.3d 130.

In *Sonic I*, we distinguished *Preston* on grounds that, after *Concepcion*, are no longer dispositive of the preemption issue before us. *Preston* involved a dispute between Ferrer, a television personality, and Preston, an attorney, over fees that Ferrer allegedly owed Preston. Ferrer claimed that the contract between him

and Preston was invalid because Preston had acted as a personal manager without a license. In addition, Ferrer argued that despite an arbitration agreement in the contract, California's Talent Agency Act (TAA) gave the Labor Commissioner primary jurisdiction to resolve such disputes, with a trial de novo available if either party appeals. (§ 1744, subd. (a).) *Sonic I* observed that *Preston* followed a line of cases establishing that when a party subject to an arbitration agreement challenges the contract as a whole and not merely the arbitration clause, it is the arbitrator who decides the validity of the contract. (*Sonic I*, *supra*, 51 Cal.4th at pp. 689-690, 121 Cal.Rptr.3d 58, 247 P.3d 130; accord, *Preston*, *supra*, 552 U.S. at p. 353, 128 S.Ct. 978; see also *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 446, 126 S.Ct. 1204, 163 L.Ed.2d 1038; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 403-404, 87 S.Ct. 1801, 18 L.Ed.2d 1270.)

Sonic I explained that the present case was distinguishable from *Preston* because “the challenge is to a portion of the arbitration agreement—the Berman waiver—as contrary to public policy and unconscionable, rather than to the contract as a whole . . . These cases are distinguished not merely because of the nature of the litigants’ challenges, but also because of the fundamental differences between the two statutory regimes at issue. The statute in *Preston*, the TAA, merely lodges primary jurisdiction in the Labor Commissioner, and does not come with the same type of statutory protections as are found in the Berman hearing and posthearing procedures discussed above. In fact, notwithstanding Ferrer’s argument that those in his position would be deprived of the Labor Commissioner’s expertise (*Preston*, *supra*, 552 U.S. at p. 358 [128 S.Ct. 978]), the *Preston* court

recognized that section 1700.45 explicitly authorizes predispute agreements that allow parties to bypass the Labor Commissioner to resolve TAA issues through arbitration, albeit with certain conditions that could not lawfully be applied in that case (*Preston*, at p. 356 [128 S.Ct. 978]). A predispute agreement that provides for such arbitration of TAA disputes, therefore, cannot be unconscionable or contrary to public policy. This is in marked contrast to the Berman hearing statutes, which have no comparable provision authorizing arbitration agreements that bypass the Labor Commissioner, and which we have construed as not permitting such agreements as a condition of employment.” (*Sonic I*, *supra*, 51 Cal.4th at p. 692, 121 Cal.Rptr.3d 58, 247 P.3d 130, fn. omitted.)

We now re-examine *Sonic I*'s conclusion in light of *Concepcion*'s precept that “efficient, streamlined procedures” is a fundamental attribute of arbitration with which state law may not interfere. (*Concepcion*, *supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1749.) As noted, *Sonic I* distinguished *Preston* on the ground that predispute waiver of the administrative procedure at issue in *Preston* was expressly authorized by the TAA and thus “cannot be unconscionable or contrary to public policy.” (*Sonic I*, *supra*, 51 Cal.4th at p. 692, 121 Cal.Rptr.3d 58, 247 P.3d 130.) *Concepcion*, unlike *Preston*, did address unconscionability, and the high court made clear that courts cannot impose unconscionability rules that interfere with arbitral efficiency, including rules forbidding waiver of administrative procedures that delay arbitration. (*Concepcion*, *supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1749.) The high court responded to the argument that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system” by asserting that

“States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” (*Id.* at p. ____, 131 S.Ct. at p. 1753.) The same logic applies to *Sonic I*’s rule categorically prohibiting waiver of a Berman hearing. Because a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with a fundamental attribute of arbitration—namely, its objective “to achieve ‘streamlined proceedings and expeditious results.’” (“*Concepcion*, at p. ____, 131 S.Ct. at p. 1749, quoting *Preston*, *supra*, 552 U.S. at p. 357, 128 S.Ct. 978.) *Sonic I*’s rule is thus preempted by the FAA.

Moreno and the Labor Commissioner as amicus curiae contend that the delay contemplated here presents no obstacle to accomplishing the objectives of the FAA. In his briefing, Moreno says: “While the facilitation of streamlined proceedings is an important purpose of the FAA, it is unequivocally clear that requiring arbitration proceedings to go forward at once, without any postponement or delay, regardless of the existence of generally applicable state contract law grounds supporting a discrete challenge to the enforceability of an arbitration agreement, is not a ‘fundamental attribute’ of arbitration. Thus, a defense of fraud, duress or unconscionability as to some specific provision of the arbitration agreement will require the postponement of arbitration while the validity of the defense is adjudicated. ‘If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.’ (*Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, ____ [130 S.Ct. 2772, 2778, 177 L.Ed.2d 403] (2010).) Thus, the policy of

promoting streamlined arbitration proceedings must yield to the assertion of a ground for revocation of a contract under the § 2 savings clause. This is necessary because the § 2 savings clause recognizes that implementation of a state policy aimed at preventing the unfairness of enforcing an arbitration agreement procured by fraud or duress, or a provision within the agreement that is unconscionable or that violates public policy, trumps the purpose of facilitating streamlined arbitration proceedings.”

It is one thing to acknowledge that the arbitration process must permit time to adjudicate state-law defenses under the FAA’s savings clause. But that is different from asserting that the FAA therefore permits state law to categorically forbid waiver of administrative procedures that significantly delay the commencement of arbitration. To be sure, the parties to a contract must have an opportunity to determine whether the arbitration agreement should be enforced; the FAA does not require arbitration when there are valid contract defenses to the enforcement of the arbitration agreement. But it does not follow that the FAA, as interpreted by *Concepcion*, permits additional delay that results not from adjudicating whether there is an enforceable arbitration agreement, but from an administrative scheme to effectuate state policies unrelated to the agreement’s enforceability. Moreno’s argument that the former implies the latter is unpersuasive.

In sum, we hold that *Sonic I*’s rule prohibiting waiver of a Berman hearing is preempted by the FAA.

IV.

Although we conclude that the FAA preempts a state-law rule categorically requiring arbitration to be

preceded by a Berman hearing, our holding does not fully resolve the unconscionability claim in this case. In his opposition to the petition to compel arbitration, Moreno stated as an affirmative defense that “[i]f the arbitration agreement between the parties is construed as absolutely prohibiting Respondent from exercising [his] statutory right to initially invoke the non-binding or administrative remedy afforded by the Labor Commissioner, then the arbitral scheme crafted by Petitioner fails to provide an arbitral forum in which employees can fully and effectively vindicate their statutory rights to recover unpaid wages, and is thus contrary to public policy, unconscionable and unenforceable.” Because *Sonic I* concluded categorically that arbitration must be preceded by a Berman hearing and that the petition to compel arbitration was premature, we had no occasion to address whether, without a Berman hearing, Moreno can vindicate his right to recover unpaid wages under this particular arbitral scheme. Moreover, we did not address whether any barrier to vindicating such rights would make the arbitration agreement unconscionable or otherwise unenforceable under California law and, if so, whether such a rule would be preempted by the FAA. We turn now to these questions.

A.

We begin by noting that after *Concepcion*, unconscionability remains a valid defense to a petition to compel arbitration. Quoting the FAA’s saving clause, *Concepcion* reaffirmed that the FAA “permits arbitration agreements to be declared unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract’” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1746, quoting 9 U.S.C. § 2), including “generally applicable contract defenses,

such as fraud, duress, or unconscionability' [citation]" (*Concepcion*, at p. ____, 131 S.Ct. at p. 1746). Although courts may not rewrite agreements and impose terms to which neither party has agreed, it has long been the proper role of courts enforcing the common law to ensure that the terms of a bargain are not unreasonably harsh, oppressive, or one-sided. (See *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 485-493, 186 Cal.Rptr. 114 (A & M Produce); *Williams v. Walker-Thomas Furniture Co.* (D.C. Cir.1965) 350 F.2d 445 (*Walker-Thomas Furniture*); *Henningsen v. Bloomfield Motors, Inc.* (1960) 32 N.J. 358, 161 A.2d 69.) After *Concepcion*, the exercise of that judicial function as applied to arbitration agreements remains intact, as the FAA expressly provides.

What is new is that *Concepcion* clarifies the limits the FAA places on state unconscionability rules as they pertain to arbitration agreements. It is well-established that such rules must not facially discriminate against arbitration and must be enforced evenhandedly. *Concepcion* goes further to make clear that such rules, even when facially nondiscriminatory, must not disfavor arbitration as *applied* by imposing procedural requirements that "interfere[]with fundamental attributes of arbitration," especially its "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.' [Citation.]" (*Concepcion, supra*, 563 U.S. at pp. ____, ____, 131 S.Ct.at pp. 1748, 1751.) As the high court explained, if facial neutrality or evenhanded enforcement were the only principles limiting the scope of permissible state law defenses to arbitration, then a state court could—on grounds of unconscionability or public policy—compel the adoption of an arbitration procedure that would be

arbitration in name only. It could impose judicially monitored discovery, evidentiary rules, jury trials, or other procedures that mimic court proceedings, and thereby undermine the FAA's purpose of encouraging arbitration as an efficient alternative to litigation. (*Id.* at p. ____, 131 S.Ct. at p. 1747.)

Importantly, state-law rules that do not “interfere[] with fundamental attributes of arbitration” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1748) do not implicate *Concepcion*'s limits on state unconscionability rules. As our cases have held, such rules may address issues that arise uniquely in the context of arbitration. In *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 826-827, 171 Cal.Rptr. 604, 623 P.2d 165 (*Scissor-Tail*), for example, we held unconscionable a provision in an arbitration agreement that effectively gave the party imposing an adhesive contract the right to choose a biased arbitrator. In addition, we held in *Armendariz* that because arbitrators, unlike judges, are paid by the parties, an equal division of costs between employer and employee has the potential in practice of being unreasonably one-sided or burdening an employee's exercise of statutory rights. (*Armendariz, supra*, 24 Cal.4th at pp. 107-113, 99 Cal.Rptr.2d 745, 6 P.3d 669.) As these examples suggest, a facially neutral state-law rule is not preempted simply because its evenhanded application “would have a disproportionate impact on arbitration agreements.” (*Concepcion*, at p. ____, 131 S.Ct. at p. 1747.) Under *Concepcion*, a state-law rule is preempted when its impact is such that it interferes with fundamental attributes of arbitration. (*Id.* at p. ____, 131 S.Ct. at p. 1748.)

Moreover, there are other ways an arbitration agreement may be unconscionable that have nothing to do with fundamental attributes of arbitration. In *Little*, for example, we found unconscionable a \$50,000 threshold for an arbitration appeal that decidedly favored defendants in employment contract disputes. (*Little, supra*, 29 Cal.4th at pp. 1071-1074, 130 Cal.Rptr.2d 892, 63 P.3d 979.) In *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407, 7 Cal.Rptr.3d 418, the court found unconscionable an arbitration agreement with a damages limitation clause under which “the customer does not even have the theoretical possibility he or she can be made whole.” And in *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 799-800, 137 Cal.Rptr.3d 773 (*Ajamian*), the court found unconscionable an arbitration agreement that, among other things, “impos[ed] upon [the employee] the obligation to pay [the employer’s] attorney fees if [the employer] prevails in the proceeding, without granting her the right to recoup her own attorney fees if she prevails.”

Consider also the form of unconscionability identified in *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 7 Cal.Rptr.3d 267 (*Gutierrez*). There, the plaintiff entered into an automobile lease agreement with defendant automobile dealer. He subsequently sued the dealer over alleged fraud in the transaction. The adhesive agreement contained an inconspicuous arbitration clause. (*Id.* at pp. 83-84, 7 Cal.Rptr.3d 267.) The Court of Appeal found that, based on the American Arbitration Association rules in effect at the time the defendant moved to compel arbitration, the plaintiff would have had to pay \$8,000 in administrative fees to initiate the arbitration. (*Id.* at pp. 90-91, 7 Cal.Rptr.3d 267.) It was undisputed that such fees exceeded the plaintiff’s ability to pay.

(*Id.* at p. 91, 7 Cal.Rptr.3d 267.) In holding this aspect of the arbitration agreement unconscionable, *Gutierrez* said: “We conclude that where a consumer enters into an adhesive contract that mandates arbitration, it is unconscionable to condition that process on the consumer posting fees he or she cannot pay. It is self-evident that such a provision is unduly harsh and one-sided, defeats the expectations of the non-drafting party, and shocks the conscience. While arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not. (*See Patterson v. ITT Consumer Financial Corp.* [(1993) 14 Cal.App.4th 1659, 1665, 18 Cal.Rptr.2d 563].) To state it simply: it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high. Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself.” (*Id.* at pp. 89-90, 7 Cal.Rptr.3d 267, fns. omitted.)

As the cases above illustrate, the core concern of unconscionability doctrine is the ““absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”” (*Sonic I, supra*, 51 Cal.4th at pp. 684-685, 121 Cal.Rptr.3d 58, 247 P.3d 130; *Walker-Thomas Furniture, supra*, 350 F.2d at p. 449.) Unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as ““overly harsh”” (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1532, 60 Cal.Rptr.2d 138 (*Stirlen*)), “unduly oppressive” (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925, 216 Cal.Rptr. 345, 702

P.2d 503 (*Perdue*)), “so one-sided as to “shock the conscience”” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (2012) 55 Cal.4th 223, 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (*Pinnacle*)), or “unfairly one-sided” (*Little, supra*, 29 Cal.4th at p. 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979). All of these formulations point to the central idea that unconscionability doctrine is concerned not with “a simple old-fashioned bad bargain” (*Schnuerle v. Insight Communications Co.* (Ky.2012) 376 S.W.3d 561, 575 (*Schnuerle*)), but with terms that are “unreasonably favorable to the more powerful party” (8 Williston on Contracts (4th ed. 2010) § 18.10, p. 91). These include “terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.” (*Ibid.*)

After *Concepcion*, courts may continue to apply unconscionability doctrine to arbitration agreements. (See *Schnuerle, supra*, 376 S.W.3d at pp. 579-580 [*Concepcion* does not preempt holding that confidentiality provision of arbitration agreement is unconscionable]; *In re Checking Account Overdraft Litigation* (11th Cir.2012) 685 F.3d 1269, 1280-1283 [*Concepcion* does not preempt holding under South Carolina law that fee-shifting provision in arbitration agreement is unconscionable].) As the FAA contemplates in its savings clause (9 U.S.C. § 2), courts may examine the terms of adhesive arbitration agreements to determine whether they are unreason-

ably one-sided. What courts may not do, in applying unconscionability doctrine, is to mandate procedural rules that are inconsistent with fundamental attributes of arbitration, even if such rules are “desirable for unrelated reasons.” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1753.)

B.

Under *Concepcion*, the FAA preempts *Sonic I*’s rule that waiver of a Berman hearing necessarily renders an adhesive arbitration agreement unconscionable regardless of what the terms of the agreement provide or how the agreement was formed. State law may not categorically require arbitration to be preceded by an administrative hearing because the hearing interferes with arbitral efficiency by substantially delaying arbitration. Thus, the fact that arbitration supplants an administrative hearing cannot be a basis for finding an arbitration agreement unconscionable.

But the waivability of a Berman hearing in favor of arbitration does not end the unconscionability inquiry. The Berman statutes include various features designed to lower the costs and risks for employees in pursuing wage claims, including 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. Waiver of these protections does not necessarily render an arbitration agreement unenforceable, nor does it render an arbitration agreement unconscionable per se. But waiver of these protections in the context of an agreement that does not provide an employee with

an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability. As with any contract, the unconscionability inquiry requires a court to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided. In the present case, we remand to the trial court to conduct this fact-specific inquiry.

In evaluating the substantive terms of an arbitration agreement, a court applying unconscionability doctrine must consider not only what features of dispute resolution the agreement eliminates but also what features it contemplates. Here, the agreement between Sonic and Moreno says that arbitration shall be conducted by a "retired California Superior Court Judge." The agreement further provides for a right to conduct discovery and take depositions, and it makes applicable, "to the extent applicable in civil actions in California courts[,] . . . all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8." At either party's request, an arbitration award may be reviewed by a second arbitrator who will, "as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial." Moreno contends that these terms of arbitration, which impose many of the formalities of litigation, do not offer a "speedy, informal, and affordable method of resolving wage claims" (*Cuadra, supra*, 17 Cal.4th at p. 858, 72 Cal.Rptr.2d 687, 952 P.2d 704) and unconscionably prevent him from pursuing his claim.

On the other hand, the agreement on its face does not necessarily reveal many of the particulars of the arbitration process that Sonic has adopted. (*See, e.g., Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 494-495, 145 Cal.Rptr.3d 432 [examining American Arbitration Association rules to determine the nature of the arbitration agreement].) It may be, for example, that the actual arbitration process Sonic uses has rules that enable an employee to obtain prompt, affordable, and enforceable resolution of a wage claim. Indeed, we recognized in *Sonic I* that “[i]t may be possible for an arbitration system to be designed so that it provides an employee all the advantages of the Berman hearing and posthearing protections.” (*Sonic I, supra*, 51 Cal.4th at p. 681, fn. 4, 121 Cal.Rptr.3d 58, 247 P.3d 130.) At oral argument here and in *Sonic I*, counsel for Sonic said that the present agreement is so designed. According to counsel, the agreement authorizes or mandates cost savings comparable to what an employee would realize through the Berman process, it requires Sonic to post an undertaking to ensure that an employee can collect an arbitral award, and it provides for a translator if needed. (*See also ibid.* [“At oral argument, Sonic’s counsel argued that its arbitration in fact resembled a Berman hearing in its informality, and the arbitrator would or might incorporate Berman-like protections such as one-way fee shifting.”].) These facts about the arbitration process are not in the record before us, but they may be introduced by Sonic and considered by the trial court on remand. Civil Code section 1670.5, subdivision (b) provides that “[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid

the court in making the determination,” and we have said, in construing this statute, that “a claim of unconscionability often cannot be determined merely by examining the face of the contract.” (*Perdue, supra*, 38 Cal.3d at p. 926, 216 Cal.Rptr. 345, 702 P.2d 503.)

We emphasize that there is no single formula for designing an arbitration process that provides an effective and low-cost approach to resolving wage disputes. There are potentially many ways to structure arbitration, without replicating the Berman protections, so that it facilitates accessible, affordable resolution of wage disputes. We see no reason to believe that the specific elements of the Berman statutes are the only way to achieve this goal or that employees will be unable to pursue their claims effectively without initial resort to an administrative hearing as opposed to an adequate arbitral forum. Waiver of the Berman protections will not, by itself, support a finding of unconscionability where the arbitral scheme at issue provides employees with an accessible and affordable process for resolving wage disputes. The unconscionability inquiry is not a license for courts to impose their renditions of an ideal arbitral scheme. Rather, in the context of a standard contract of adhesion setting forth conditions of employment, the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable, and thereby “effectively blocks every forum for the redress of disputes, including arbitration itself.” (*Gutierrez, supra*, 114 Cal.App.4th at p. 90, 7 Cal.Rptr.3d 267.)

In *Sonic I*, we acknowledged that outside the context of an adhesive form contract, other considerations may inform the unconscionability inquiry. Evidence that a

Berman waiver is part of a nonstandard contract freely negotiated by parties of comparable bargaining power, “such as may exist between an employer and a highly compensated executive employee,” weighs against a finding of unconscionability. (*Sonic I, supra*, 51 Cal.4th at p. 682, fn. 7, 121 Cal.Rptr.3d 58, 247 P.3d 130.) Whether Moreno, who was not a low-wage worker at Sonic and whose wage claim alleges “[v]acation wages for 63 days . . . at the rate of \$441.29 per day” (*id.* at p. 670, 121 Cal.Rptr.3d 58, 247 P.3d 130), had comparable bargaining power or freely negotiated his contract are matters for the trial court to determine on remand. Further, when a negotiated or nonstandard contract is at issue, terms of employment unrelated to arbitration may confer substantial benefits that inform the fairness of requiring the employee to surrender statutory protections in favor of arbitration. In addition, Civil Code section 1670.5, subdivision (b) indicates that any evidence concerning the “commercial setting, purpose, and effect” of the agreement is pertinent to the inquiry.

In sum, unconscionability doctrine does not mandate the adoption of any particular form of dispute resolution mechanism, and courts may not decline to enforce an arbitration agreement simply on the ground that it appears to be a bad bargain or that one party could have done better. Unconscionability doctrine is instead concerned with whether the agreement is unreasonably favorable to one party, considering in context “its commercial setting, purpose, and effect.” (Civ.Code, § 1670.5, subd. (b).) In applying the doctrine to the arbitration agreement here, the trial court may consider as one factor Moreno’s surrender of the Berman protections in their entirety, although that factor alone does not

necessarily render the agreement unconscionable. Because it may not have been clear before our decision today that evidence concerning the specific arbitral scheme at issue in this case is pertinent to the unconscionability inquiry, the parties will have the opportunity to present such evidence in order to inform the trial court's unconscionability determination. "Since unconscionability is a contract defense," it will be Moreno's burden on remand to prove "that an arbitration provision is unenforceable on that ground." (*Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 708, 123 Cal.Rptr.3d 547.) Further, the Labor Commissioner may intervene in any proceedings when it appears that his or her jurisdiction is being usurped by an unenforceable arbitration agreement. (*See City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 412, 100 Cal.Rptr.3d 396.)

C.

The unconscionability doctrine we have stated above is not preempted by the FAA. In holding that an employee's surrender of Berman protections in their totality may be considered as a factor in determining whether an arbitration agreement is unconscionable, our doctrine does not facially discriminate against arbitration. It applies equally to arbitration and nonarbitration agreements that require employees to forgo the Berman protections in resolving wage claims. In addition, our unconscionability doctrine as applied does not pose an obstacle to the achievement of the FAA's objectives as construed in *Concepcion*. Because the Berman statutes promote the very objectives of "informality," "lower costs," "greater efficiency and speed," and use of "expert adjudicators" that the high court has deemed "fundamental

attributes of arbitration” (*Concepcion, supra*, 563 U.S. at pp. ____, ____, 131 S.Ct. at pp. 1748, 1751; see *Cuadra, supra*, 17 Cal.4th at p. 858, 72 Cal.Rptr.2d 687, 952 P.2d 704), the case-by-case application of unconscionability doctrine to agreements that require employees to *forgo* such benefits will, if anything, tend to promote the FAA’s objectives rather than lead to any increase in cost, procedural rigor, complexity, or formality. As noted, there are potentially many ways to design arbitration, consistent with its fundamental attributes, so that it is affordable and accessible for wage claimants. Sonic argues that the arbitration process at issue here fits this description, and Sonic will have the opportunity on remand to provide evidence in support of its contention.

The fact that the FAA preempts *Sonic I’s* rule requiring arbitration of wage disputes to be preceded by a Berman hearing does not mean that a court applying unconscionability analysis may not consider the value of benefits provided by the Berman statutes, which go well beyond the hearing itself. The FAA preempts *Sonic I’s* rule because it categorically favors a particular form of dispute resolution—the Berman hearing—over arbitration and creates an immovable obstacle to a streamlined arbitral process. By contrast, the unconscionability analysis we describe today is not premised on the superiority of the Berman hearing as a dispute resolution forum. Our rule contemplates that arbitration, no less than an administrative hearing, can be designed to achieve speedy, informal, and affordable resolution of wage claims and that the features of arbitration set forth in an agreement properly inform the unconscionability inquiry. *Sonic I’s* rule runs afoul of *Concepcion* because it interposes the Berman hearing as an unwaivable prerequisite to arbitration and thereby significantly delays the start

of arbitration. The rule we adopt today, which makes clear that the Berman hearing is waivable, does not delay arbitration or otherwise interfere with fundamental attributes of arbitration. It simply requires an adhesive arbitration agreement that compels the surrender of Berman protections as a condition of employment to provide for accessible, affordable resolution of wage disputes.

The distinction between state-law rules that undermine fundamental attributes of arbitration and state-law rules that do not may be further elucidated by considering an example drawn from the facts of *Concepcion*. As noted, *Concepcion* held that because class proceedings undermine arbitration's fundamental attributes of informality and efficiency, the FAA preempts a state unconscionability rule forbidding waiver of class proceedings. But *Concepcion* did not rule out other ways to enable consumers "to prosecute small-dollar claims that might otherwise slip through the legal system." (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1753.) The high court noted that the arbitration agreement at issue there "provides that AT & T will pay claimants a minimum of \$7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT & T's last settlement offer" and then observed that "[t]he District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole, [citation]." (*Ibid.*)

Suppose that, in light of *Concepcion*, a state legislature seeking to protect small-dollar claimants were to enact a generally applicable, unwaivable

statute similar to the provision just described, requiring a defendant to pay a penalty plus attorney fees if a plaintiff with a low-value claim obtains an award through litigation or arbitration greater than the defendant's last settlement offer. Nothing in *Concepcion* suggests that such a statute—which is designed to achieve the same objective as a rule forbidding class waivers but does not interfere with fundamental attributes of arbitration—would be preempted by the FAA. Moreover, the fact that the statute would render invalid an arbitration (or nonarbitration) agreement at odds with the penalty scheme—and thus leave the parties to their usual rights and remedies under state law, including class proceedings—does not mean that the statute has somehow circumvented the FAA's preemption of state-law rules forbidding class waivers.

The unconscionability rule we set forth today stands on exactly the same legal footing. Many of the Berman protections are situated no differently than state laws concerning attorney fee-shifting, assistance of counsel, or other rights designed to benefit one or both parties in civil litigation. The FAA's preemption of any state-law rule categorically forbidding waiver of formal discovery, jury factfinding, class procedures, or civil litigation generally (*see Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1747) does not mean that a party's surrender of specific statutory benefits that would otherwise apply to certain kinds of claims becomes a prohibited consideration in deciding whether an arbitration agreement is unconscionable. Although the mere substitution of arbitration for litigation does not itself entail the loss of a benefit (*see Armendariz, supra*, 24 Cal.4th at pp. 98-99, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614,

626-628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (*Mitsubishi Motors*)), an assessment of what a party has lost through an arbitration agreement often involves consideration of what specific rights, protections, or benefits would otherwise apply. (See, e.g., *Armendariz*, at pp. 110-111, 99 Cal.Rptr.2d 745, 6 P.3d 669 [“[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.”]; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 709-710, 155 Cal.Rptr.3d 506 (*Serpa*) [finding arbitration agreement unconscionable because it deprived employee of a favorable fee-shifting rule under the Fair Employment and Housing Act (FEHA)]; *Ajamian, supra*, 203 Cal.App.4th at p. 800, 137 Cal.Rptr.3d 773 [finding arbitration agreement unconscionable because it “arguably strips [the employee] of her right to recover attorney fees under her California statutory claims” and “imposes on her the obligation to pay [the employer’s] attorney fees where she would have no such obligation under at least one of her California statutory claims”].)

In this case, the types of benefits that would otherwise apply are ones designed to promote, not undermine, the speed, economy, informality, and efficiency of dispute resolution. Our unconscionability analysis does not pose an obstacle to the FAA’s objectives any more than if the Legislature were to enact a statute requiring any dispute resolution mechanism, including arbitration, used in lieu of the Berman procedures to have features that mitigate risks and costs for wage claimants, so long as those features do not interfere with fundamental attributes

of arbitration. Although *Concepcion* says state law cannot require a procedure that undermines fundamental attributes of arbitration “even if it is desirable for unrelated reasons” (*Concepcion*, at p. _____, 131 S.Ct. at p. 1753), this does not mean that the FAA preempts generally applicable state laws that do not undermine fundamental attributes of arbitration.

To be sure, when a court invalidates an arbitration agreement on unconscionability grounds, it may be said that unconscionability doctrine results in a refusal to enforce arbitration agreements “according to their terms.” (*Concepcion, supra*, at p. _____, 131 S.Ct. at p. 1748.) It also may be said that unconscionability doctrine results in arbitration rules that “increase[] risks to defendants” or lessen a defendant’s incentives to arbitrate. (*Id.* at p. _____ & fn. 8, 131 S.Ct. at p. 1752 & fn. 8.) But that is true of any generally applicable principle of unconscionability as applied to an adhesive arbitration agreement. For example, an adhesive agreement that gives the employer the right to choose a biased arbitrator is unconscionable (*see Scissor-Tail, supra*, 28 Cal.3d at pp. 826–827, 171 Cal.Rptr. 604, 623 P.2d 165), even though such a rule does not enforce the agreement according to its terms and increases risk to the employer, who would prefer to pick the arbitrator. The FAA plainly does not preempt such a state-law rule. The directive to enforce arbitration “in accordance with the terms of the agreement,” which appears in section 4 of the FAA (9 U.S.C. § 4), logically applies *after* a court has determined that there is an “enforceable” agreement under section 2 of the FAA (9 U.S.C. § 2). Were it otherwise, we would attribute to Congress an irrational intent to negate, through section 4, the savings clause it wrote into section 2. Neither a mere

refusal to enforce an arbitration agreement according to its terms nor increased risk to a defendant can, by itself, serve as a principle that distinguishes between an unconscionability rule that is preempted and one that is not.

In sum, we do not hold that any time arbitration is substituted for a judicial or administrative forum, there is a loss of benefits. Nor do we hold that the proponent of arbitration will invariably have to justify the agreement through provision of benefits comparable to those otherwise afforded by statute. Both California and federal law treat the substitution of arbitration for litigation as the mere replacement of one dispute resolution forum for another, resulting in no inherent disadvantage. (*See Armendariz, supra*, 24 Cal.4th at pp. 98-99, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Mitsubishi Motors, supra*, 473 U.S. at pp. 626-628, 105 S.Ct. 3346.) But where, as here, a particular class has been legislatively afforded specific protections in order to mitigate the risks and costs of pursuing certain types of claims, and to the extent those protections do not interfere with fundamental attributes of arbitration, an arbitration agreement requiring a party to forgo those protections may properly be understood not only to substitute one dispute resolution forum for another, but also to compel the loss of a benefit. The benefit lost is not dispositive but may be one factor in an unconscionability analysis.

V.

While this case was pending before our court, the United States Supreme Court decided another arbitration case, *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. ____, 133 S.Ct. 2304, 186 L.Ed.2d 417 (*Italian Colors*). We requested supplemental briefing from the parties on the

significance of *Italian Colors* to the present dispute. Having reviewed the high court's opinion and the parties' submissions, we do not believe *Italian Colors* alters our conclusions above.

In *Italian Colors*, the owner of a small restaurant sought to bring a class action suit alleging that American Express had violated the Sherman Act by "us[ing] its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards." (*Italian Colors, supra*, 570 U.S. at p. _____, 133 S.Ct. at p. 2308.) American Express moved to compel individual, bilateral arbitration pursuant to a standardized agreement with an express class action waiver. In response, the plaintiff merchants submitted a declaration from an economist showing that the cost of an expert analysis necessary to prove the antitrust claims would far exceed the maximum recovery for any individual plaintiff. On that basis, the plaintiffs argued that individual arbitration would be prohibitively costly and that enforcing the class action waiver would prevent them from effectively vindicating their rights under the Sherman Act. The high court rejected the plaintiffs' argument and upheld the arbitration agreement. (*Id.* at p. _____, 133 S.Ct. at p. 2312.)

The high court explained that the principle that the FAA requires courts to enforce arbitration agreements according to their terms "holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been ' "overridden by a contrary congressional command."'" (*Italian Colors, supra*, 570 U.S. at p. _____, 133 S.Ct. at p. 2309, citations omitted.) The high court found no contrary congressional command evident in the Sherman Act, observing that

“the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.” (*Id.* at p. _____, 133 S.Ct. at p. 2309; *see id.* at p. _____, 133 S.Ct. at p. 2309 [“The antitrust laws do not ‘evin[c]e an intention to preclude a waiver’ of class-action procedure. [Citation.]”]) Further, the high court said: “Nor does congressional approval of [Federal Rule of Civil Procedure] 23 establish an entitlement to class proceedings for the vindication of statutory rights.” (*Id.* at p. _____, 133 S.Ct. at p. 2309.)

The high court then addressed the plaintiffs’ contention that “a judge-made exception to the FAA . . . serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the ‘effective vindication’ of a federal statutory right. Enforcing the waiver of class arbitration bars effective vindication, [the plaintiffs] contend, because they have no economic incentive to pursue their antitrust claims individually in arbitration.” (*Italian Colors, supra*, 570 U.S. at p. _____, 133 S.Ct. at p. 2310.) According to the high court, the “effective vindication” exception “finds its origin in the desire to prevent ‘prospective waiver of a party’s right to pursue statutory remedies,’ [(*Mitsubishi Motors, supra*, 473 U.S. at p. 637, fn. 19, 105 S.Ct. 3346)] (emphasis *1154 added). That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. [Citation.] But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy. [Citation.] The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their

statutory remedy than did federal law before its adoption of the class action for legal relief in 1938, [citations]. Or, to put it differently, the individual suit that was considered adequate to assure ‘effective vindication’ of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption.” (*Italian Colors*, at p. _____, 133 S.Ct. at pp. 2310-2311, fns. omitted.)

We believe the reasoning of *Italian Colors* does not alter the unconscionability analysis applicable to the present case. As an initial matter, *Italian Colors* involved the harmonization of the FAA with other federal law; it was not a preemption case. The high court thus had no occasion to consider the well-established principle that “courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’” (*Arizona v. United States* (2012) 567 U.S. _____, _____, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351; see *Chamber of Commerce v. Whiting* (2011) 563 U.S. _____, _____, 131 S.Ct. 1968, 1985, 179 L.Ed.2d 1031 [“Our precedents ‘establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.’ [Citation.]”]) Laws ensuring the prompt and full payment of wages unquestionably fall within the historic police powers of the state (see *Kerr’s Catering Service v. Dept. of Industrial Relations* (1962) 57 Cal.2d 319, 326-327, 19 Cal.Rptr. 492, 369 P.2d 20, and cases cited therein), as does the power to police unfairly one-sided contracts of adhesion (see *Steven v. Fidelity & Casualty Co.* (1962) 58 Cal.2d 862, 879-882, 27 Cal.Rptr. 172, 377 P.2d 284 (Steven), and cases cited therein). *Italian Colors* did not construe the FAA in light of basic principles of federalism.

In any event, neither the federal antitrust laws nor Federal Rule of Procedure 23 “establish[ed] an entitlement to class proceedings for the vindication of [the] statutory rights” at issue in *Italian Colors*. (*Italian Colors*, *supra*, 570 U.S. at p. _____, 133 S.Ct. at p. 2309.) According to the high court, the class waiver in *Italian Colors* could not have conflicted with other federal policy because “[n]o contrary congressional command requires us to reject the waiver of class arbitration here.” (*Id.* at p. _____, 133 S.Ct. at p. 2309.) Here, by contrast, the Legislature has “establish[ed] an entitlement” (*id.* at p. _____, 133 S.Ct. at p. 2309) to a specific set of protections in order to provide lay persons with an accessible, informal, and affordable mechanism for resolving wage claims. Whereas the class waiver in *Italian Colors* eliminated no statutory entitlement specifically designed to help vindicate the rights at issue there, the same is not true of the waiver of statutorily provided Berman protections in this case.

Similarly, the high court’s discussion of the “effective vindication” exception in *Italian Colors*—a doctrine that guides the harmonization of federal statutes—does not affect our analysis in the present case. In stating that “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy” (*Italian Colors*, *supra*, 570 U.S. at p. _____, 133 S.Ct. at p. 2311), the high court was proceeding on the premise, established earlier in its opinion, that the “right to pursue” the antitrust remedy in that case encompassed no specific entitlement under the antitrust laws or Federal Rule of Civil Procedure 23 to a class proceeding or to “an affordable procedural path to the vindication of every claim” (*id.* at p. _____, 133 S.Ct. at p. 2309). Here, by

contrast, the Legislature adopted the Berman protections specifically to provide a “speedy, informal, and affordable method of resolving wage claims.” (*Cuadra, supra*, 17 Cal.4th at p. 858, 72 Cal.Rptr.2d 687, 952 P.2d 704.) Whereas in *Italian Colors* “the individual suit that was considered adequate to assure ‘effective vindication’ of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption” (*Italian Colors*, at p. ____, 133 S.Ct. at p. 2311), here the Legislature enacted the Berman protections “as a means of affording an employee with a meritorious wage claim certain advantages, chiefly designed to reduce the costs and risks of pursuing a wage claim, recognizing that such costs and risks could prevent a theoretical right from becoming a reality.” (*Sonic I, supra*, 51 Cal.4th at p. 679, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

Toward the end of its opinion in *Italian Colors*, the high court added this paragraph concerning *Concepcion*: “Truth to tell, our decision in [*Concepcion*] all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law ‘interfere[d] with fundamental attributes of arbitration.’ 563 U.S., at ____, 131 S.Ct., at 1748. ‘[T]he switch from bilateral to class arbitration,’ we said, ‘sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.’ *Id.*, at ____, 131 S.Ct., at 1751. We specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’ *Id.*, at ____, 131 S.Ct., at 1753.” (*Italian Colors, supra*, 570 U.S. at p. ____, 133 S.Ct. at

p. 2312.) The high court ended this paragraph with a footnote responding to the dissent: “In dismissing [*Concepcion*] as a case involving pre-emption and not the effective-vindication exception, the dissent ignores what that case established—that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. The latter interest, we said, is ‘unrelated’ to the FAA. 563 U.S., at ____, 131 S.Ct., at 1752-1753. Accordingly, the FAA does, contrary to the dissent’s assertion [citation], favor the absence of litigation when that is the consequence of a class-action waiver, since its ‘principal purpose’ is the enforcement of arbitration agreements according to their terms.” (*Id.* at p. ____, fn.5, 133 S.Ct. at p. 2312, fn. 5.)

As indicated, the high court understood the result in *Italian Colors* to be entailed by *Concepcion*, and one can see why. *Concepcion* upheld a class arbitration waiver in the face of a contrary unconscionability rule because the rule interfered with fundamental attributes of arbitration. In light of *Concepcion*’s holding that class procedures interfere with fundamental attributes of arbitration, it is unsurprising that the high court in *Italian Colors* upheld a class waiver in the face of no contrary legislative command. But the logic that unites *Italian Colors* and *Concepcion* does not speak to whether the FAA preempts state-law protections for wage claimants that, unlike class procedures, do not interfere with fundamental attributes of arbitration. The high court’s assertion in footnote 5 of *Italian Colors* that *Concepcion* “established . . . that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims” (*Italian Colors*, *supra*, 570 U.S. at p. ____, 133 S.Ct. at p. 2312, fn. 5) must be read in the context of the paragraph that

precedes it. *Concepcion* held that the FAA preempts a state-law rule that interferes with fundamental attributes of arbitration “even if [the rule] is desirable for unrelated reasons,” such as facilitating the prosecution of “small-dollar claims that might otherwise slip through the legal system.” (*Concepcion*, *supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1753.) *Concepcion* did not hold that the FAA preempts state-law rules designed to facilitate prosecution of small-dollar claims even when the rules do not interfere with fundamental attributes of arbitration, and we decline to infer such a broad expansion of *Concepcion*’s holding from a footnote in *Italian Colors*.

Finally, the high court in *Italian Colors* ended its opinion by decrying prearbitration litigation over the expected costs of pursuing a particular legal claim or theory: “Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.” (*Italian Colors*, *supra*, 570 U.S. at p. ____, 133 S.Ct. at p. 2312.) Again, the high court disapproved of “[s]uch a preliminary litigating hurdle” (*ibid.*) in a statutory context where no specific legislative mandate sought to ensure the affordability of pursuing the antitrust claim at issue there. The high court had no occasion to consider a statutory context in which specific legislation does seek to ensure the affordability of pursuing a particular kind of claim. Nor did the high court in *Italian Colors* consider the savings clause in section 2 of the FAA (9 U.S.C. § 2), which plainly contemplates litigation and judicial determination of “generally applicable contract defenses, such as fraud, duress, or unconscionability’ [citation]” (*Concepcion*, 563 U.S. at p. ____, 131 S.Ct.

at p. 1746) as a prelude to enforcement of an arbitration agreement. (See *Rent-A-Center West, Inc. v. Jackson* (2010) 561 U.S. 63, ____, 130 S.Ct. 2772, 2778, 177 L.Ed.2d 403.)

In any event, we do not anticipate that our unconscionability inquiry will create “a preliminary litigating hurdle” that would delay arbitration under a valid agreement. The wage claim here is simpler than the antitrust claim at issue in *Italian Colors*, and courts here and elsewhere have routinely decided whether arbitration is affordable in a given case. (See post, 163 Cal.Rptr.3d at p. 306, 311 P.3d at p. 215.) Moreover, Code of Civil Procedure section 1290.2, which governs petitions to compel arbitration brought in California courts, provides that such petitions “shall be heard in a summary way in the manner and upon the notice provided by law for the making and hearing of motions” As we explained in *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 58 Cal.Rptr.2d 875, 926 P.2d 1061, hearing and determination “‘in the manner . . . provided by law for the . . . hearing of motions’ (§ 1290.2)” generally means that “the facts are to be proven by affidavit or declaration and documentary evidence with oral testimony taken only in the court’s discretion.” (*Id.* at pp. 413-414, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) With respect to claims of fraud, where factual differences may be difficult to resolve without making credibility determinations, oral testimony is generally appropriate. (*Id.* at p. 414, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) In cases such as this one, however, there is no reason to suppose that the trial court cannot resolve the claim of unconscionability in a summary fashion based on declarations or other documentary evidence submitted in connection with a motion to

compel arbitration. (See, e.g., *Gutierrez, supra*, 114 Cal.App.4th at pp. 90-91, 7 Cal.Rptr.3d 267.)

In sum, *Italian Colors* does not alter the unconscionability analysis we set forth above. Where a state-law rule interferes with fundamental attributes of arbitration, the FAA preempts the state-law rule even if the rule is designed to facilitate prosecution of certain kinds of claims. *Concepcion* established this principle, *Italian Colors* reaffirmed it, and we apply it today to invalidate the categorical rule on waiving a Berman hearing that we adopted in *Sonic I*. Yet a court, when faced with an unconscionability claim arising from an adhesive employment contract requiring waiver of the Berman protections in their entirety, must still determine whether the overall bargain was unreasonably one-sided. This unconscionability inquiry does not, in purpose or effect, express a preference for nonarbitral as opposed to arbitral forums. To the contrary, it promotes and encourages the use of conventional bilateral arbitration as a means of low-cost, efficient dispute resolution. Our unconscionability doctrine poses no obstacle to enforcement of arbitration agreements so long as the arbitral scheme, however designed, provides employees with an accessible, affordable process for resolving wage disputes that does not “effectively block [] every forum for the redress of [wage] disputes, including arbitration itself.” (*Gutierrez, supra*, 114 Cal.App.4th at p. 90, 7 Cal.Rptr.3d 267.)

VI.

Justice Chin dissents from our treatment of Moreno’s unconscionability claim on several grounds. To a significant extent, his dissent relitigates issues that this court has already decided to the contrary.

And his only new argument—that the FAA preempts the unconscionability rule we set forth today—is unpersuasive for reasons we have discussed above and further elucidate below.

A.

As an initial matter, Justice Chin says Moreno forfeited his right to litigate the unconscionability issue. The dissent acknowledges that Moreno asserted in the trial court, as a defense to enforcement of the arbitration agreement, that the agreement was unconscionable because it “fails to provide an arbitral forum in which employees can fully and effectively vindicate their statutory rights to recover unpaid wages.” (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 317, 311 P.3d at p. 224.) The dissent insists, nevertheless, that Moreno’s unconscionability claim should be deemed forfeited because “he did nothing further in the trial court to pursue either this or any other unconscionability defense.” (*Ibid.*) But a similar argument failed to persuade the court in *Sonic I*. (See *Sonic I*, *supra*, 51 Cal.4th at p. 685, fn. 10, 121 Cal.Rptr.3d 58, 247 P.3d 130; *id.* at p. 713, 121 Cal.Rptr.3d 58, 247 P.3d 130 (conc. & dis. opn. of Chin, J.)) Moreno raised the unconscionability defense and then chose, given the state of the law at the time, to focus in the trial court on his argument that waiver of a Berman hearing was *per se* unconscionable and contrary to public policy. Moreno will now have the opportunity to develop his unconscionability defense in light of the principles we articulate today.

Justice Chin also characterizes our discussion of unconscionability as “dicta” and an “advisory opinion.” (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at pp. 315, 318, 311 P.3d at pp. 222, 225.) But this is incorrect. “Dicta consists of observations and statements

unnecessary to the appellate court’s resolution of the case.” (*Garfield Medical Center v. Belshé* (1998) 68 Cal.App.4th 798, 806, 80 Cal.Rptr.2d 527.) Statements by appellate courts “responsive to the issues raised on appeal and . . . intended to guide the parties and the trial court in resolving the matter following . . . remand” are not dicta. (*Ibid.*; see *United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 834-835, 209 Cal.Rptr. 16.) Our discussion of unconscionability is responsive to whether Moreno has a viable unconscionability defense after *Concepcion*, and it is intended to guide the parties and the trial court on remand. The discussion is neither dicta nor an advisory opinion.

B.

The core of Justice Chin’s dissent is his contention that the arbitration agreement at issue here is not unconscionable. He advances several arguments in support of this claim.

1.

Justice Chin says we have improperly relaxed the unconscionability standard by using the phrase “unreasonably one-sided” instead of “so one-sided as to shock the conscience.” (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 319, 311 P.3d at pp. 225-226.) Justice Corrigan also favors the term “shock the conscience.” (Conc. opn., *post*, at pp. 314-315, 311 P.3d at pp. 221-222.) But an examination of the case law does not indicate that “shock the conscience” is a different standard in practice than other formulations or that it is the one true, authoritative standard for substantive unconscionability, exclusive of all others.

In *Armendariz*, the seminal California case to examine unconscionability in the context of adhesive

arbitration agreements, we relied in part on *A & M Produce, supra*, 135 Cal.App.3d 473, 186 Cal.Rptr. 114, to elucidate general principles of unconscionability. (See *Armendariz, supra*, 24 Cal.4th at pp. 113-114, 99 Cal.Rptr.2d 745, 6 P.3d 669.) *A & M Produce*, which predates our arbitration cases, did not involve arbitration and made no reference to the “shock the conscience” standard. Upon reviewing case law from a variety of jurisdictions, *A & M Produce* stated that “[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” (*A & M Produce*, at p. 486, 186 Cal.Rptr. 114, quoting *Walker-Thomas Furniture, supra*, 350 F.2d at p. 449.)

Some Courts of Appeal, starting with *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 214-215, 27 Cal.Rptr.2d 396, have criticized the term “unreasonable” as overly subjective and have instead used the “shock the conscience” standard. But no uniformity has emerged in our lower courts. Some Courts of Appeal have used the “shock the conscience” standard in arbitration cases (*see, e.g., Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 736, 153 Cal.Rptr.3d 78; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1158-1159, 128 Cal.Rptr.3d 330; *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1419, 114 Cal.Rptr.3d 781), while others have not (*see, e.g., Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 484, 127 Cal.Rptr.3d 461; *Olvera v. El Pollo Loco, Inc.* (2009) 173 Cal.App.4th 447, 456, 93 Cal.Rptr.3d 65; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 113, 12 Cal.Rptr.3d 663). And still others have regarded the term “shock the conscience” as

interchangeable with various other formulations. (See, e.g., *Serpa, supra*, 215 Cal.App.4th at p. 703, 155 Cal.Rptr.3d 506.)

As Justice Chin notes, we recently said in *Pinnacle*, an arbitration case, that “[a] contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be ‘so one-sided as to “shock the conscience.”’” (*Pinnacle, supra*, 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217.) But whether “shock the conscience” has a different meaning than “unreasonably one-sided” or should be the exclusive formulation of substantive unconscionability was not remotely at issue in *Pinnacle*, and “it is axiomatic that cases are not authority for propositions not considered.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176, 119 Cal.Rptr.2d 903, 46 P.3d 372.) Likewise here, whether these different formulations actually constitute different standards in practice and whether one is more objective than the other are issues that have not been briefed and are not before us. It is enough to observe that courts, including ours, have used various nonexclusive formulations to capture the notion that unconscionability requires a substantial degree of unfairness beyond “a simple old-fashioned bad bargain.” (*Schnuerle, supra*, 376 S.W.3d at p. 575; see *ante*, 163 Cal.Rptr.3d at pp. 291, 293-294, 311 P.3d at pp. 202, 204-205.)

2.

Next, Justice Chin argues what neither Sonic nor its amici curiae contend: that the Berman procedures do not actually benefit employees. He claims that because the Labor Commissioner may exercise her discretion in deciding whether to conduct Berman hearings, any value of the Berman procedure to Moreno is “entirely

speculative.” (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at pp. 321, 322, 311 P.3d at pp. 228, 229.) Of course, no one can foresee with total certainty whether a particular employee’s application for a Berman hearing will be granted, but that hardly means the Berman procedures have merely speculative value *ex ante*. If the Berman procedures were, in practice, rarely used and generally unavailable to the employee, the significance of waiving such procedures would be diminished. But the parties have not suggested, nor does the record before us indicate, that such is the case.

To the extent Justice Chin suggests that the Berman process is not well designed to facilitate prompt and enforceable resolution of wage claims, we have repeatedly concluded otherwise. In *Cuadra*, the court unanimously said: “The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims.” (*Cuadra, supra*, 17 Cal.4th at p. 858, 72 Cal.Rptr.2d 687, 952 P.2d 704.) In *Lolley*, the court unanimously said the fee-shifting provision in the Berman statutes “serves the legislative purpose of discouraging unmeritorious appeals of wage claims, thereby reducing the costs and delays of prolonged disputes.” (*Lolley, supra*, 28 Cal.4th at p. 376, 121 Cal.Rptr.2d 571, 48 P.3d 1128.) And in *Sonic I*, the court said the benefits afforded to employees by the Berman statutes are “chiefly designed to reduce the costs and risks of pursuing a wage claim.” (*Sonic I, supra*, 51 Cal.4th at p. 679, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

To the extent Justice Chin suggests that the Berman protections, despite their design, do not actually achieve their intended purpose, his contention is unsupported by the record before us.

Although it may take several months or even a year to resolve a wage claim through the Berman process, the record contains no evidence, and the dissent cites none, that enables us to compare this timeframe with the time required to resolve a similar claim through arbitration of the sort contemplated in the agreement here. Such evidence, if any, may be considered on remand. In addition, Justice Chin notes our statement in *Gentry* that “Berman hearings may result in no cost savings to the employee” because of the possibility that “a losing employer has a right to a trial de novo in superior court.” (*Gentry, supra*, 42 Cal.4th at p. 464, 64 Cal.Rptr.3d 773, 165 P.3d 556.) But the court made that statement in the context of concluding that “Berman hearings are neither effective nor practical substitutes for class action or arbitration.” (*Id.* at p. 465, 64 Cal.Rptr.3d 773, 165 P.3d 556.) The fact that thousands of individual Berman hearings would not result in cost savings as compared to a single class proceeding (*id.* at p. 464, 64 Cal.Rptr.3d 773, 165 P.3d 556) sheds no light on whether Berman hearings would result in cost savings as compared to individual arbitrations of the same wage claims under the litigation-like rules set forth in the agreement in this case.

The rest of Justice Chin’s dissent provides similarly scant support for its disparagement of the “asserted benefits of the Berman procedure” as “speculative.” (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 322, 311 P.3d at p. 229.) Although the mandatory assessment of costs and attorney fees against the unsuccessful party in an appeal applies to the employee as well as the employer, the statute’s asymmetric definition of success plainly works in the employee’s favor. (§ 98.2, subd. (c) [“An employee is successful if the court awards an amount greater than zero.”]) And even if

the benefit of this provision was not available when Moreno signed his agreement in July 2002—a fact relevant to the unconscionability analysis on remand—there is no question that the benefit has been available since July 2003 (Stats. 2003, ch. 93, § 2, p. 790) and helps to “reduc[e] the costs and delays of prolonged disputes” by deterring meritless appeals (*Lolley, supra*, 28 Cal.4th at p. 376, 121 Cal.Rptr.2d 571, 48 P.3d 1128). Further, although the Labor Commissioner has discretion to stay an award for good cause, it is unclear how this detracts from the Labor Commissioner’s statutory duty to “make every reasonable effort to ensure that judgments are satisfied.” (§ 98.2, subd. (i).) For an employee seeking to collect a judgment, it surely helps to have the Labor Commissioner on your side. Finally, with regard to the undertaking that an employer must post before taking an appeal (*id.*, subd. (b)), the dissent notes that an employee who arbitrates a wage claim may obtain a provisional remedy requiring payment of wages during arbitration. (Conc. & dis. opn., post, at pp. 321-322, 311 P.3d at p. 228.) But such a remedy is available only upon a showing that “the award to which the applicant may be entitled may be rendered ineffectual without provisional relief.” (Code Civ. Proc., § 1281.8, subd. (b).)

In sum, the Berman procedures taken together are the Legislature’s solution to the real-world problems employees face in recovering wages owed. The Legislature has structured a set of informal procedures and incentives that make it more likely employees will be able to recover wages without incurring substantial attorney fees or the risk of liability for an employer’s attorney fees. The Legislature has also enacted provisions to deter meritless appeals of wage claims through a trial de

novo in superior court and to ensure that employees will be able to actually collect a favorable judgment. The dissent does not persuade us to second-guess the efficacy of this legislative solution or to depart from this court's consistent understanding of the Berman statutes' benefits. Because we see no basis to conclude that the benefits of the Berman procedures are "entirely speculative" (conc. & dis. opn., *post*, 163 Cal.Rptr.3d at pp. 321, 322, 311 P.3d at pp. 228, 229) or that "arbitration is more streamlined than the Berman process" in this and every case (*id.* at p. 327, 311 P.3d at p. 232), we decline to reject Moreno's claim of unconscionability on such grounds and instead direct the trial court on remand to consider Moreno's claim in light of any relevant evidence that the parties may submit.

3.

Justice Chin's other reasons for challenging our unconscionability analysis are likewise unpersuasive. He contends that our unconscionability rule is "hopelessly vague, uncertain, and subjective" because we do not define the terms "accessible," "affordable," "low-cost," "speedy," or "effective." (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 320, 311 P.3d at pp. 226-227.) But the principles we set forth today are hardly anomalous insofar as they are not bright-line formulations. As this court long ago stated in determining "reasonable water use" in a water rights case: "There would seem to be no more difficulty in ascertaining what is a reasonable use of water than there is in determining probable cause, reasonable doubt, reasonable diligence, preponderance of evidence, a rate that is just and reasonable, public convenience and necessity, and numerous other problems which in their nature are not subject to

precise definition but which tribunals exercising judicial functions must determine.” (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706, 22 P.2d 5.) Many other examples abound. This court in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone* (1999) 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d 527, in an opinion by Justice Chin, defined “unfair competition” for purposes of the Unfair Competition Law (Bus. & Prof.Code, § 17200 et seq.) as conduct that “threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws . . . , or otherwise significantly threatens or harms competition,” while providing no definition or elaboration of the terms “threatens,” “ incipient,” “policy,” “spirit,” or “significantly threatens or harms competition.”

It has long been recognized that substantive unconscionability is not susceptible to “precise definition” (*A & M Produce, supra*, 135 Cal.App.3d at p. 487, 186 Cal.Rptr. 114), and neither Civil Code section 1670.5 nor Uniform Commercial Code article 2-302 suggests otherwise. The fact that “affordable,” “accessible,” “effective,” and similar terms are not subject to precise definition has not prevented common-law courts from applying these terms one case at a time to enforce the basic principle that the nondrafting party to an adhesive contract may not be subject to unconscionably one-sided terms. Indeed, the extant case law belies Justice Chin’s concern that courts are simply unable to make reasonable determinations about whether an arbitration process is affordable. (See, e.g., *Gutierrez, supra*, 114 Cal.App.4th at pp. 90-91, 7 Cal.Rptr.3d 267; *Patterson v. ITT Consumer Financial Corporation* (1993) 14 Cal.App.4th 1659, 1665-1666, 18 Cal.Rptr.2d 563; *Alexander v. Anthony Intern., L.P.* (3d Cir.2003) 341

F.3d 256, 269-270; *Brady v. Williams Capital Group, L.P.* (2009) 64 A.D.3d 127, 135-136, 878 N.Y.S.2d 693; *Murphy v. Mid-West Nat. Life Ins. Co. of Tennessee* (2003) 139 Idaho 330, 78 P.3d 766, 768.) Despite the dire assertion that our approach to unconscionability is “hopelessly vague and unworkable” (conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 324, 311 P.3d at p. 230), we doubt the standards in our opinion today will cause judges throughout the state to simply throw up their hands in despair.

Nor is our approach inconsistent with *Little*, in which we said that, “[w]ithout more,” arbitration conducted with many of the formalities of litigation is not unconscionably one-sided. (*Little, supra*, 29 Cal.4th at p. 1075, fn. 1, 130 Cal.Rptr.2d 892, 63 P.3d 979.) We reaffirm that such arbitration is not per se unconscionable or contrary to public policy, and as explained above, there are many ways to structure arbitration to facilitate accessible and affordable resolution of wage disputes. (*See ante*, 163 Cal.Rptr.3d at p. 293, 311 P.3d at p. 204.) Our approach to unconscionability insists only that arbitration be so structured, and whether the arbitral process in this case, which includes the litigation-like formalities specified in the arbitration agreement, puts Moreno at such a disadvantage as to be unconscionable is a question to be determined on remand.

As noted, Sonic’s counsel has represented that the arbitral process at issue here includes features not disclosed in the arbitration agreement, and the trial court may consider such features on remand. (*See ante*, 163 Cal.Rptr.3d at pp. 292-293, 311 P.3d at pp. 203-204.) Justice Chin says a court cannot perform this task because “arbitrators have broad discretion in determining the procedures and law governing the

arbitration.” (Conc. & dis. opn., *post*, at p. 321, 311 P.3d at p. 215.) Again, his concern is unfounded. Although arbitrators have discretion to decide on features of arbitration that are not specified in the agreement, courts can and routinely do inquire into the rules that guide the conduct of arbitration in order to resolve unconscionability and related claims. (*See, e.g., Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1475-1478, 92 Cal.Rptr.3d 153 [examining American Arbitration Association’s (AAA) rules to determine if arbitration agreement is contrary to public policy]; *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 863, 98 Cal.Rptr.3d 300 [examining Judicial Arbitration and Mediation Services cost allocation rules to determine whether they adequately protect vindication of statutory claim]; *Gutierrez, supra*, 114 Cal.App.4th at pp. 90-91, 7 Cal.Rptr.3d 267 [examining AAA rules regarding arbitration costs to determine unconscionability]; *Popovich v. McDonald’s Corp.* (N.D.Ill.2002) 189 F.Supp.2d 772, 778 [concluding arbitration agreement unconscionable after examining the fees the employee would have to pay under the AAA commercial arbitration rules]; *Spinetti v. Serv. Corp. Int’l* (3d Cir.2003) 324 F.3d 212, 217 [affirming district court ruling that fees were exorbitant under AAA rules in employment cases].) We see no reason why the trial court cannot do the same on remand.

Justice Chin further contends that our unconscionability inquiry is unworkable because “a determination of unconscionability must be based on the circumstances that existed ‘at the time [the contract] was made’ (Civ.Code, § 1670.5, subd. (a)), not on hindsight in light of subsequent events. [Citations.] Accordingly, . . . a trial court, in determining accessibility and affordability, will have to determine,

not what Moreno can afford today, but what he could have afforded at the time he signed the arbitration agreement.” (Conc. & dis. opn., post, 163 Cal.Rptr.3d at pp. 320-321, 311 P.3d at p. 227.) This is not quite correct. Because a predispute arbitration agreement is an agreement to settle future disputes by arbitration, the proper inquiry is what dispute resolution mechanism the parties reasonably expected the employee to be able to afford. Absent unforeseeable (and thus not reasonably expected) circumstances, there is no reason to think that what an employee can afford when a wage dispute arises will materially differ from the parties’ understanding of what the employee could afford at the time of entering the agreement. The dissent’s concern that the affordability inquiry is “difficult, if not impossible” (*id.* at p. 320, 311 P.3d at p. 227) is, once again, overblown. (See, e.g., *Gutierrez, supra*, 114 Cal.App.4th at pp. 90-91, 7 Cal.Rptr.3d 267 [examining affordability of arbitration in the course of determining unconscionability “as of the time the contract is made”].)

Finally, Justice Chin quotes *Sonic I*’s statement that a trial court confronted with a petition to compel arbitration “‘is in no position to determine’ ‘whether and to what extent a particular wage claimant will benefit from the Berman hearing process.’” (Conc. & dis. opn., post, 163 Cal.Rptr.3d at p. 324, 311 P.3d at p. 230, quoting *Sonic I, supra*, 51 Cal.4th at p. 683, 121 Cal.Rptr.3d 58, 247 P.3d 130.) But this quotation, as the dissent presents it, is stripped of its essential context. In *Sonic I*, we rejected Sonic’s argument that instead of imposing a categorical prohibition on Berman waivers, we should take a case-by-case approach, like the ad hoc approach to class action waivers we adopted in *Gentry*. (See *Gentry, supra*, 42 Cal.4th at pp. 462-464, 64 Cal.Rptr.3d 773, 165 P.3d

556.) In finding *Gentry* “readily distinguishable,” we observed that whereas a class action is “a judicially devised procedure” whose efficiencies and practicalities a trial court is ““ideally situated to evaluate,”” a trial court “is in no position to determine” “whether and to what extent a particular wage claimant will benefit from the Berman hearing process.” (*Sonic I*, at p. 683, 121 Cal.Rptr.3d 58, 247 P.3d 130.) It is clear in context that we made this latter statement in support of the point that courts are in no position to second-guess, on an ad hoc basis, the Legislature’s “judgment about the special protections and procedural rights that should be afforded to persons with wage claims in order to ensure that such claims be fairly resolved.” (*Id.* at p. 683, 121 Cal.Rptr.3d 58, 247 P.3d 130.) Indeed, in the paragraph right before the one in which the statement appears, we said: “The purpose of the Berman hearing statutes is to empower wage claimants by giving them access to a Berman hearing with all of its advantages.” (*Id.* at p. 682, 121 Cal.Rptr.3d 58, 247 P.3d 130.) Our point in *Sonic I* that courts are in no position to disclaim the benefits of the Berman procedures on a case-by-case basis does not remotely suggest that courts are in no position to consider such benefits in determining whether an arbitration agreement is unconscionable. If anything, the relevant passage in *Sonic I* points the other way. (*Id.* at pp. 682-683, 121 Cal.Rptr.3d 58, 247 P.3d 130.)

C.

In addition to the concerns discussed above, Justice Chin argues that our approach to unconscionability violates the FAA as interpreted in *Concepcion* and *Italian Colors*. Again, the dissent’s contention does not withstand scrutiny.

The dissent's fundamental error is its characterization of *Concepcion*'s holding in the following terms: "The FAA, as the high court has construed it, precludes state courts from finding an arbitration provision unconscionable based on the need to protect 'small-dollar claims that might otherwise slip through the legal system,' even though that goal may be 'desirable.' (*Concepcion, supra*, 563 U.S. at p. —, 131 S.Ct. at p. 1753.) It 'trumps any interest in ensuring the prosecution of low-value claims' and 'favor[s] the absence of litigation when that is the consequence of following its 'command' to enforce arbitration agreements 'according to their terms.' (*Italian Colors, supra*, 570 U.S. at p. —, 133 S.Ct. at p. 2312, fn. 5, *italics added.*)" (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 326, 311 P.3d at p. 232.) This is a misreading of *Concepcion* and, in turn, *Italian Colors*.

If the broad principle that arbitration agreements must be enforced according to their terms, notwithstanding the desirability of state laws protecting small-dollar claims, were the decisive principle in *Concepcion*, then why would the high court have bothered to spill so much ink explaining why class proceedings are incompatible with "fundamental attributes of arbitration"? (*Concepcion, supra*, 563 U.S. at pp. — – — 131 S.Ct. at pp. 1748–1753.) That entire discussion would have been unnecessary on Justice Chin's account of *Concepcion*. The holding of *Concepcion* is that "[r]equiring the availability of classwide arbitration *interferes with fundamental attributes of arbitration* and thus creates a scheme inconsistent with the FAA." (*Id.* at p. 1748, *italics added.*) *Italian Colors*, another case involving a class waiver, restated *Concepcion*'s holding in exactly

the same terms: “There [in *Concepcion*] we invalidated a law conditioning enforcement of arbitration on the availability of class procedure *because that law ‘interfere[d] with fundamental attributes of arbitration.’* 563 U.S. at ____, 131 S.Ct., at 1748.” (*Italian Colors, supra*, 570 U.S. at p. ____, 133 S.Ct. at p. 2312, italics added.) When footnote 5 of *Italian Colors* is read together with the paragraph in the main text that precedes it, the high court’s statement that *Concepcion* established that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims” means that no such interest can save a state law from FAA preemption where “that law ‘interfere[s] with fundamental attributes of arbitration.’” (*Italian Colors*, at p. ____ & fn. 5, 133 S.Ct. at p. 2312 & fn. 5; *see ante*, 163 Cal.Rptr.3d at pp. 300-301, 311 P.3d at pp. 210-211.)

Thus, *Concepcion* expressly states, and *Italian Colors* expressly confirms, that the dispositive rationale for *Concepcion*’s preemption holding is that class proceedings interfere with “fundamental attributes of arbitration.” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1748; *see Italian Colors, supra*, 570 U.S. at p. ____, 133 S.Ct. at p. 2312.) Remarkably, however, Justice Chin never mentions the high court’s sustained focus on “fundamental attributes of arbitration” in his rendition of *Concepcion*’s reasoning and result, and even affirmatively disclaims the relevance of such fundamental attributes in characterizing the principle established by *Concepcion*. (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at pp. 325-327, 328-329, 311 P.3d at pp. 231-232, 233-234.)

Justice Chin does claim that “arbitration is more streamlined than the Berman process” and that our approach to unconscionability “is likely to produce procedures that are *less* efficient, *more* costly, *more* formal, and *more* time consuming than arbitration.” (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 327, 311 P.3d at p. 232.) But, as explained above, these bare assertions have no evidentiary support, and this court’s settled understanding that the Berman process provides a speedy, informal, and low-cost method of resolving wage disputes (*see ante*, at pp. 278-279, 294, 303-306, 311 P.3d at pp. 191-192, 205, 213-215) cannot be dislodged by the dissent’s mere disbelief. Although the dissent says “the majority never factors in the trial-de-novo option under the Berman statutes” (conc. & dis. opn., *post*, at p. 327, 311 P.3d at p. 232), it is the dissent that ignores what we have repeatedly said here (*see ante*, at pp. 277, 278, 304, 305, 305, 311 P.3d at pp. 191, 191, 213, 214, 214) and elsewhere (*see Lolley, supra*, 28 Cal.4th at p. 376, 121 Cal.Rptr.2d 571, 48 P.3d 1128; *Sonic I, supra*, 51 Cal.4th at p. 674, 121 Cal.Rptr.3d 58, 247 P.3d 130) about the considerable incentives built into the Berman process to discourage de novo appeals in superior court and thereby promote speed, efficiency, affordability, and informality in dispute resolution. Indeed, it is hardly “self-evident” that the option to appeal necessarily means the Berman process “is not speedier or more streamlined than arbitration” (conc. & dis. opn., *post*, at p. 322, 311 P.3d at p. 228), for surely it matters how often the option is actually used. Moreover, as noted, our approach to unconscionability does not erect a “preliminary litigating hurdle” of the sort prohibited by *Italian Colors*. (*Ante*, at pp. 300-301, 311 P.3d at pp. 210-211.) The FAA’s saving clause contemplates initial resolution of unconscionability claims, and

despite Justice Chin’s determined effort to portray the inquiry as exceedingly complex (*see conc. & dis. opn., post*, at pp. 327-328, 311 P.3d at p. 233), we do not share his lack of confidence in the ability of our trial courts to swiftly examine relevant evidence and resolve such claims.

Instead of coming to grips with *Concepcion*’s core rationale, Justice Chin’s dissent assigns decisive weight to the general proposition that the FAA’s principal purpose is to ensure enforcement of arbitration agreements “according to their terms.” (*Conc. & dis. opn., post*, 163 Cal.Rptr.3d at pp. 325, 326, 326-327, 328, 330, 311 P.3d at pp. 231, 232, 232, 234, 235.) To be sure, this proposition is well established in the high court’s FAA precedents. (See, *e.g., Italian Colors, supra*, 570 U.S. at p. ____, fn. 5, 133 S.Ct. at p. 2312, fn. 5; *Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1748.) But the dissent attributes to the FAA a purpose to “pursue that broadest goal only at the expense of harming other values that the legislature deems important. After all, no statute . . . pursues its ‘broad purpose’ at all costs.” (Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012) p. 21, citing *Pension Benefit Guaranty Corp. v. LTV Corp.* (1990) 496 U.S. 633, 647, 110 S.Ct. 2668, 110 L.Ed.2d 579 [“[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.’ [Citation.]”].) The FAA itself makes explicit the other values at play. The statute’s saving clause says an arbitration agreement may be held unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract” (9 U.S.C. § 2), and the high court in *Concepcion*, after quoting this saving clause, recognized that the FAA “permits agreements to

arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” (*Concepcion*, at p. ____, 131 S.Ct. at p. 1746, italics added.) In reconciling the FAA’s purpose of enforcing arbitration agreements with the FAA’s preservation of an unconscionability defense, *Concepcion* plainly did not hold that the FAA preempts all unconscionability rules; it held that the FAA preempts unconscionability rules that interfere with fundamental attributes of arbitration. By contrast, it is not clear what meaning, if any, Justice Chin would assign to the FAA’s saving clause. His theory that the FAA preempts any unconscionability rule that interferes with enforcement of arbitration agreements according to their terms would authorize even blatant forms of unconscionability, such as an adhesive agreement that gives the drafting party the sole power to choose the arbitrator (*Scissor-Tail*, *supra*, 28 Cal.3d at p. 828, 171 Cal.Rptr. 604, 623 P.2d 165) or imposes a one-sided provision for appealing an arbitral award (*Little*, *supra*, 29 Cal.4th at pp. 1071-1074, 130 Cal.Rptr.2d 892, 63 P.3d 979). (Compare ante, at pp. 289-291, 311 P.3d at pp. 201-202 with conc. & dis. opn., post, at p. 330, fn. 7, 311 P.3d at p. 235, fn. 7.)

Under the dissent’s sweeping view of FAA preemption, no unconscionability rule may take into account the surrender of statutory protections for certain claimants, whether or not those protections interfere with fundamental attributes of arbitration. Waiver of fee-shifting provisions favoring particular litigants (*see Serpa*, *supra*, 215 Cal.App.4th at pp. 709-710, 155 Cal.Rptr.3d 506 [discussing fee-shifting under FEHA]; *Ajamian*, *supra*, 203 Cal.App.4th at p. 800, 137 Cal.Rptr.3d 773 [discussing § 1194]) or statutory protections for small-dollar claims modeled on the very arbitration agreement that the high court

discussed approvingly in *Concepcion* (*see ante*, 163 Cal.Rptr.3d at p. 295, 311 P.3d at p. 206) must apparently count for nothing in a court’s assessment of unconscionability. It is this approach, not ours, that “appears to go far beyond” the high court’s pronouncements on FAA preemption. (Conc. & dis. opn., *post*, at p. 326, 311 P.3d at p. 217.) For the high court has never suggested that unconscionability doctrine must disavow any concerns about cost or other features of arbitration that prevent effective resolution of arbitral disputes.

In *Concepcion* and in *Italian Colors*, the high court rejected a challenge to an arbitration agreement where the only asserted defect was the absence of class proceedings and where the only remedy—to allow class proceedings—was deemed incompatible with fundamental attributes of arbitration. Unlike *Discover Bank*’s rule entitling consumers to class proceedings, and unlike *Sonic I*’s rule entitling wage claimants to pursue a Berman hearing, the unconscionability rule we articulate today requires no such incompatible proceedings. Our rule fully recognizes that parties may opt out of the Berman process with any agreement that provides for accessible, affordable arbitration of wage disputes. Contrary to the dissent’s characterization, our unconscionability rule does not “impose all sorts of arbitration procedures” (conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 328, 311 P.3d at p. 233); instead, it targets practical impediments to the use of arbitration to resolve wage disputes while imposing no specific procedural requirements. Our rule thus serves to *facilitate access to arbitration* without compromising any of its fundamental attributes. How such a rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA]” (*Concepcion, supra*, 563

U.S. at p. ____, 131 S.Ct. at p. 1753) is difficult to fathom. Indeed, the very notion that an arbitration agreement might *increase* the cost and complexity of dispute resolution would have been foreign to the Congress that enacted the FAA. (See Joint Hearings on Sen. No. 1005 and H.R. No. 646 before Subcoms. of Coms. on Judiciary, 68th Cong., 1st Sess., § 15, at pp. 34-35 (1924) [advocating arbitration as a means of lowering the cost of dispute resolution]; Sen.Rep. No. 536, 68th Cong., 1st Sess., § 2, at p. 3 (1924) [same])

2.

Justice Chin also asserts, using various formulations, that our approach to unconscionability discriminates against arbitration. (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 330, 311 P.3d at p. 235 [“construe[s] [an arbitration] agreement in a manner different from that in which [a court] otherwise construes nonarbitration agreements under state law”]; *ibid.* [“crafts different unconscionability rules for arbitration agreements”]; *id.* at p. 331, 311 P.3d at p. 236 [“disfavors arbitration” and “derive [s] [its] meaning from the fact that an agreement to arbitrate is at issue”]) The main problem, the dissent says, is that our unconscionability rule is “not a ground that exists at law or in equity for the revocation of *any* contract, but is . . . merely a ground that exists for the revocation of arbitration provisions in contracts subject to the Berman statutes or to other statutes that ‘legislatively’ afford to ‘a particular class . . . specific protections in order to mitigate the risks and costs of pursuing certain types of claims.’” (*Id.* at p. 329, 311 P.3d at p. 234.)

Again, the reasoning of *Concepcion* is instructive. In calling into question unconscionability rules that “would have a disproportionate impact on arbitration

agreements” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1747), the high court was careful not to suggest that the FAA preempts any such rule. Instead, the high court marshaled a series of examples to show that unconscionability rules nominally applicable to both arbitration and nonarbitration agreements may, in practice, be “aimed at destroying arbitration” or “demand[] procedures incompatible with arbitration.” (*Concepcion*, at p. ____, 131 S.Ct. at p. 1747; *see ibid.* [positing unconscionability rules that require judicially monitored discovery, adherence to the Federal Rules of Evidence, or ultimate disposition by a jury].) In those circumstances, the rule is preempted by the FAA. But we have long recognized that the mere fact that general unconscionability principles are applied to the specific context of arbitration does not mean that the rule is preempted by the FAA. (*See Armendariz, supra*, 24 Cal.4th at p. 119, 99 Cal.Rptr.2d 745, 6 P.3d 669.) The crucial issue is whether the rule undermines the procedural essence of arbitration in some way—that is, whether the rule “interferes with fundamental attributes of arbitration.” (*Concepcion*, at p. ____, 131 S.Ct. at p. 1748.) Where, as here, an unconscionability rule that is equally applicable to arbitration and nonarbitration agreements does not interfere with fundamental attributes of arbitration, the rule cannot be said to discriminate against arbitration simply because it applies more often to arbitration agreements.

Neither *Perry v. Thomas* (1987) 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (*Perry*) nor *Southland Corp. v. Keating* (1984) 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (*Southland*) suggests otherwise. *Perry* held that the FAA preempted a state statute providing that “actions for the collection of wages may be maintained ‘without regard to the existence of any private

agreement to arbitrate.’ [Citation.]” (*Perry*, at p. 484, 107 S.Ct. 2520.) Similarly, *Southland* held that the FAA preempted a decision of this court that had read into the California Franchise Investment Law a “defense to arbitration” that “require[d] judicial consideration of claims brought under [that] state statute.” (*Southland*, at pp. 10, 16, fn. 11, 104 S.Ct. 852.) In *Perry*, the high court explained in a footnote that unconscionability doctrine could not be used to avoid the preemptive rule: “[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of [the FAA’s saving clause]. [Citation.] A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court 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 we hold today the state legislature cannot.” (*Perry*, at pp. 492–493, fn. 9, 107 S.Ct. 2520.)

Under *Perry* and *Southland*, the FAA clearly preempts a state unconscionability rule that establishes an unwaivable right to litigate particular claims by categorically deeming agreements to arbitrate such claims unenforceable. That is what the high court meant by its reference to “[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue.” (*Perry*, *supra*, 482 U.S. at p. 492, fn. 9, 107 S.Ct. 2520.) The

unconscionability rule we set forth today is not at all similar to the preempted state laws in *Perry* and *Southland* or their functional equivalents in unconscionability doctrine. Whereas the state-law rules in those cases overtly discriminated against arbitration in favor of litigation of certain claims, thereby rendering contracts to arbitrate such claims entirely enforceable, our unconscionability rule fully contemplates the enforceability of agreements to resolve wage disputes through arbitration in lieu of the Berman process. Our rule requires only that wage claimants have an accessible and affordable mechanism for dispute resolution, not that the mechanism adopt any particular procedure or assume any particular form. Moreover, the principles informing our rule plainly “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally” (*Perry*, at p. 492, fn. 9, 107 S.Ct. 2520), for the doctrine that courts will not enforce adhesive contracts or terms that are unreasonably one-sided in favor of the drafting party, such as terms that effectively insulate the drafting party from liability, is a body of state law that long predates and subsumes its more recent extension to arbitration agreements. (See *Steven*, *supra*, 58 Cal.2d at pp. 879-882, 27 Cal.Rptr. 172, 377 P.2d 284 [collecting cases].)

Justice Chin’s dissent concludes with the ominous implication that the unconscionability rule we adopt today demonstrates “judicial hostility” toward arbitration agreements. (Conc. & dis. opn., *post*, 163 Cal.Rptr.3d at p. 331, 311 P.3d at p. 236.) But we are well past the day when prevailing judicial sensibilities regarded reasonable state regulation of the employment relationship as an expression of hostility to contractual freedom. Our unconscionability rule does

not treat arbitration agreements differently from nonarbitration agreements, does not remotely foreclose the enforceability of agreements to arbitrate wage disputes, and does not require such agreements to adopt any devices or procedures inimical to arbitration's fundamental attributes. "It should be stressed," as Justice Corrigan observes, "that our decision today does not require trial courts to adopt a new procedure or analytical approach when an unconscionability defense concerns an arbitration provision in an employment contract." (Conc. opn., post, at p. 314, 311 P.3d at p. 222.) In short, our rule does not discriminate against arbitration. The FAA requires courts to place arbitration agreements on equal footing with other contracts. At the same time, the FAA makes clear that the legal footing on which arbitration and nonarbitration agreements may be placed encompasses any "grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2), including "generally applicable contract defenses, such as fraud, duress, or unconscionability" (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1746). Our opinion today is fully consistent with this governing law.

CONCLUSION

The trial court denied the petition to compel arbitration as premature, ruling that arbitration may not be ordered until completion of a Berman hearing. (*Sonic I, supra*, 51 Cal.4th at p. 671, 121 Cal.Rptr.3d 58, 247 P.3d 130.) Although we affirmed that order in *Sonic I*, we now hold, in light of *Concepcion*, that the FAA preempts a state-law rule that categorically prohibits an adhesive arbitration agreement from requiring an employee to waive access to a Berman hearing. A court faced with a petition to compel

arbitration under these circumstances must grant the petition unless the party opposing the petition asserts a valid contract defense. Moreno has asserted an unconscionability defense, whose merits should now be determined by the trial court in the first instance in light of our decision today. Accordingly, we reverse the judgment of the Court of Appeal granting the petition to compel arbitration and remand with directions to remand the case to the trial court for proceedings consistent with this opinion.

WE CONCUR: CANTIL-SAKAUYE, C.J., KENNARD, WERDEGAR, and CORRIGAN, JJ.

Concurring Opinion by CORRIGAN, J.

I concur in the result and much of the analysis in the majority opinion, but I disagree with its failure to articulate a clear standard for assessing the unconscionability of arbitration terms in employment agreements.

The majority refers to several formulations but does not settle on a test for unconscionability. It describes an analysis in which the trial court weighs the Berman advantages waived against the benefits of arbitration to decide if the agreement is “unreasonably one-sided.” (Maj. opn., *ante*, 163 Cal.Rptr.3d at pp. 292, 301, 311 P.3d at pp. 203, 211.) Justice Chin characterizes this approach as interest weighing and criticizes it as insufficiently deferential to arbitration. Whereas the majority would remand for the trial court to determine unconscionability, Justice Chin would have us decide here that the agreement is not unconscionable.

I agree with Justice Chin that the proper test for determining unconscionability here is whether the terms are “so one-sided as to “shock the conscience.”” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217.) Courts are not free to alter terms to which the contracting parties agreed simply because they find the terms unreasonable or ill-advised. (*American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391, 54 Cal.Rptr.2d 477.) The unconscionability defense requires a much stronger showing of unfairness. The majority opinion mentions the “shock the conscience” standard, but only as one of several formulations. (*See* maj. opn., *ante*, 163 Cal.Rptr.3d at p. 291, 311 P.3d at p. 202.) In my view, we should provide clarity here. Courts of Appeal have successfully applied

the “shock the conscience” standard to decide whether contractual employment arbitration terms are substantively unconscionable. (*See, e.g., Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1473-75, 162 Cal.Rptr.3d 545; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 703, 710, 155 Cal.Rptr.3d 506.) We should settle on this clear test. Under the “shock the conscience” standard, arbitration provisions are not unconscionable simply because their enforcement will require the employee to forego Berman procedures.

However, unconscionability is a fact-specific defense. Appellate courts are at a disadvantage when the question is not fleshed out in the trial court. Thus, I agree with the majority that this case should be remanded for the trial court to decide the merits of the unconscionability defense. The majority opinion discusses many considerations to guide the lower court’s analysis. Justice Chin criticizes several of these and faults the majority for requiring “a mini-trial on the comparative costs and benefits of arbitration and the Berman procedure” in every case. (Conc. & dis. opn. of Chin, J., *post*, 163 Cal.Rptr.3d at p. 327, 311 P.3d at p. 233.)

It should be stressed that our decision today does not require trial courts to adopt a new procedure or analytical approach when an unconscionability defense concerns an arbitration provision in an employment contract. Considerations outlined in the majority opinion may be relevant to such an analysis, but lower courts retain discretion to weigh these considerations as appropriate in each particular case. Today’s decision holds only that unconscionability remains a defense to enforcement of an arbitration clause in an employment contract and that, while

the relinquishment of Berman procedures is one factor to be weighed in considering unconscionability, this factor alone is not sufficient to support an unconscionability finding.

With this understanding, I join the majority's decision.

Concurring and Dissenting Opinion by CHIN, J.

In *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 669, 121 Cal.Rptr.3d 58, 247 P.3d 130 (Sonic I), a bare four-to-three majority of this court held that the arbitration provision here at issue is both contrary to our state's public policy and unconscionable—and therefore unenforceable—to the extent it precludes Frank Moreno from pursuing an administrative hearing—known as a “Berman hearing”—before submitting his claim for vacation pay to arbitration. I agree with the majority's conclusion that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 *et seq.*) preempts *Sonic I*'s public policy rationale. However, I disagree with the majority's decision to remand this case on the issue of unconscionability. As I explain below, we should reject Moreno's unconscionability claim for two reasons: (1) he forfeited it by failing to raise and pursue it below; and (2) he has not met, and cannot meet, his burden of showing unconscionability. I also disagree with the majority's advisory opinion regarding the unconscionability principles the trial court should apply on remand. In my view, those principles are both contrary to state law and invalid under—and thus preempted by—the FAA. I dissent from this aspect of the majority's opinion and from the judgment.

I. Factual Background.

Frank Moreno was an employee of *Sonic-Calabasas A, Inc. (Sonic)*. In December 2006, after voluntarily ending his employment, he filed a wage claim with the Labor Commissioner pursuant to Labor Code section 98 et seq.¹ seeking allegedly unpaid “vacation wages” for 63 days at the rate of \$441.29 per day. He also requested “additional wages accrued pursuant to Labor Code Section 203 as a penalty.”

In February 2007, Sonic filed in the superior court a petition to compel arbitration of Moreno’s claim and to dismiss his pending administrative action. It relied on the broad and comprehensive arbitration provision in an agreement Moreno signed on July 14, 2002, which provides in relevant part: “I . . . acknowledge that [Sonic] utilizes a system of alternative dispute resolution that involves binding arbitration to resolve all disputes that may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both [Sonic] and myself, both [Sonic] and I agree that any claim, dispute, and/or controversy (including, but not limited to, any claims of discrimination and harassment . . .) that either I or [Sonic] . . . may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with [Sonic], whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of

¹ All further unlabeled statutory references are to the Labor Code.

claims arising under the National Labor Relations Act . . . , claims for medical and disability benefits under the California Workers Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal.Code Civ. Proc. sec. 1280 *et seq.*, including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However, nothing herein shall prevent me from filing and pursuing administrative proceedings only before the California Department of Fair Employment and Housing, or the U.S. Equal Opportunity Commission.”

Moreno and the Labor Commissioner, who intervened on Moreno's behalf, opposed Sonic's motion to compel. They argued that, insofar as the arbitration agreement deprives Moreno of the benefits of the Berman procedure, it is unenforceable as against public policy.

The superior court denied the petition to compel arbitration, agreeing that the arbitration provision violates public policy insofar as it waives Moreno's right to pursue a Berman hearing. The Court of Appeal reversed, finding “no evidence” in the record “that Moreno or any other wage claimant lacks the knowledge, skills, abilities, or resources to vindicate his or her statutory rights in an arbitral forum.”

As noted above, in *Sonic I*, a narrow majority of this court held that the arbitration provision is both contrary to our state's public policy and unconscionable—and therefore unenforceable—to the extent it precludes Moreno from pursuing a Berman hearing before submitting his claim for vacation pay to arbitration. (*Sonic I, supra*, 51 Cal.4th at p. 669, 121

Cal.Rptr.3d 58, 247 P.3d 130.) The United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to us for consideration in light of *AT & T Mobility LLC v. Concepcion* (2011) 563 U.S. ____, 131 S.Ct. 1740, 179 L.Ed.2d 742 (*Concepcion*).

II. The FAA Preempts *Sonic I*'s Public Policy Rationale.

In my dissent in *Sonic I*, I explained that the FAA, under the United States Supreme Court's binding interpretation of that statute, preempts the *Sonic I* majority's public policy rationale. (*Sonic I, supra*, 51 Cal.4th at pp. 706-712, 121 Cal.Rptr.3d 58, 247 P.3d 130 (dis. opn. of Chin, J.)) After we decided *Sonic I*, the high court held in *Concepcion* that the FAA preempts the California rule, announced by another four-to-three majority of this court in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (*Discover Bank*), that certain waivers of classwide arbitration procedures are unconscionable and unenforceable. (*Concepcion, supra*, 563 U.S. at pp. ____, 131 S.Ct. at pp. 1747-1748.) *Concepcion* confirms my discussion in *Sonic I*. I therefore agree with the majority that the FAA preempts *Sonic I*'s public policy rationale.

III. Moreno Has Forfeited His Unconscionability Claim.

As the majority acknowledges (maj. opn., *ante*, 163 Cal.Rptr.3d at p. 295, 311 P.3d at p. 205), because unconscionability is a contract defense, the party resisting enforcement of an arbitration provision has the burden of proving unconscionability. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236, 145 Cal.Rptr.3d

514, 282 P.3d 1217 (Pinnacle).) In light of this principle, both this court and our Courts of Appeal have held that a party resisting arbitration forfeits the defense of unconscionability by failing to pursue it in the trial court. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681, 108 Cal.Rptr.3d 171, 229 P.3d 83; *Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1266-1267, 147 Cal.Rptr.3d 717.)

The record here supports application of this forfeiture rule to Moreno's unconscionability claim. At no point in the trial court did Moreno claim that the arbitration provision here is "unreasonably one-sided in favor of the employer." (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 274, 311 P.3d at p. 188.) He did allege in his response to Sonic's petition to compel that the arbitration provision is unconscionable because it "fails to provide an arbitral forum in which employees can fully and effectively vindicate their statutory rights to recover unpaid wages." However, he did nothing further in the trial court to pursue either this or any other unconscionability defense. In his briefs, he did not, as the majority asserts, argue that the Berman waiver "was per se unconscionable." (Maj. opn., *ante*, at p. 302, 311 P.3d at p. 212.) Rather, he argued only that the arbitration provision violates public policy. Nor did he assert unconscionability in the Court of Appeal, in the petition for review he filed in this court, or in the opening and reply briefs he filed with us. In fact, Moreno never mentioned unconscionability again until well after briefing closed in this court, when we resurrected the issue by asking the parties to discuss it in supplemental briefs. On this record, Moreno has forfeited the claim that the arbitration provision is unconscionable. The majority fails to explain why it does not apply the forfeiture rule

and why it is giving Moreno a second chance “to develop” a defense that, as the majority acknowledges, he “chose” to abandon below as a matter of litigation strategy. (Maj. opn., *ante*, at p. 302, 311 P.3d at p. 211.)

IV. Under Existing California Law, the Arbitration Provision Is Not Unconscionable.

Were it either necessary or appropriate to reach the unconscionability claim Moreno is now asserting, under existing California law, I would reject it.

Civil Code section 1670.5, subdivision (a), authorizes a court, upon finding “as a matter of law” that a “contract or any clause of the contract” was “unconscionable at the time it was made,” to “refuse to enforce the contract,” to “enforce the remainder of the contract without the unconscionable clause,” or to “so limit the application of any unconscionable clause as to avoid any unconscionable result.” The official Assembly comment accompanying this section explains: “The basic test [of unconscionability] is whether, in light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances at the time of the making of the contract . . . The principle is one of prevention of oppression and unfair surprise [citation] and not of disturbance of allocation of risks because of superior bargaining power.” (Rep. on Assem. Bill No. 510 (1979-1980 Reg. Sess.) 5 Assem. J. (1979-1980 Reg. Sess.) p. 9231, reprinted as Legis. Com. com., 9 West’s Ann. Civ.Code (2011 ed.) p. 74 (Official Comment).) Consistent with this comment, we recently reaffirmed in the context of determining the validity of an arbitration provision that “[a] contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be ‘so one-

sided as to “shock the conscience.” [Citation.]” (*Pinnacle, supra*, 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217.)

Under these principles, the arbitration provision at issue here is not unconscionable. As the majority notes, in evaluating a claim that a contract is unconscionable, we look to the parties’ “overall” agreement, not to a single aspect of the agreement in isolation. (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 301, 311 P.3d at p. 211.) The agreement at issue here is not simply a Berman waiver, and does not target the Berman procedure. Rather, it is a broad, *bilateral* arbitration provision that applies, with certain exceptions, to “all disputes” between the parties “aris[ing] out of the employment context that either [party] . . . may have against the other.” As Sonic observes, this provision “does not inequitably exempt the employer from arbitration of claims more likely to be brought by an employee.” On the contrary, to the extent the provision lacks mutuality, it favors Moreno, by excluding claims that are generally brought by employees. That Moreno’s wage claim is not one of those excluded claims does not render the arbitration provision as a whole one-sided in Sonic’s favor, let alone “so one-sided as to “shock the conscience.” ’ [Citation.]” (*Pinnacle, supra*, 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217.)

Supporting my conclusion is this court’s decision in *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 130 Cal.Rptr.2d 892, 63 P.3d 979. There, a terminated employee sued his former employer for tortious demotion and termination in violation of public policy, breach of an implied contract of continued employment, and breach of the implied covenant of good faith and fair dealing. (*Id.* at p. 1069, 130

Cal.Rptr.2d 892, 63 P.3d 979.) The employer moved to compel arbitration under a provision that, like the one now at issue, specified that the arbitrator must be a retired California superior court judge and made applicable the ordinary civil rules of pleading, rules of evidence, and resolution of disputes by motions. (*Id.* at pp. 1069-1070, 130 Cal.Rptr.2d 892, 63 P.3d 979.) The majority rejected the argument that “incorporation of [these] legal formalities into” the arbitration procedure rendered the arbitration agreement “unconscionable,” explaining: “Without more, . . . we cannot say that these provisions, which make arbitration more closely follow judicial procedures, are unconscionably one-sided. It is not at all obvious that such provisions would inordinately benefit [the employer] rather than [the employee].” (*Little, supra*, 29 Cal.4th at p. 1075, fn. 1, 130 Cal.Rptr.2d 892, 63 P.3d 979.) A similar conclusion is appropriate here.

V. The Majority’s Test for Unconscionability is Vague, Unworkable, and Inconsistent with Existing California Law.

The majority believes that Moreno, who made no attempt in the trial court to show unconscionability, should nevertheless have a second chance. After concluding that, under the FAA, “unconscionability remains a valid defense to a petition to compel arbitration” (maj. opn., *ante*, 163 Cal.Rptr.3d at p. 289, 311 P.3d at p. 201), the majority reasons that, because Moreno did not “develop[]” his unconscionability claim below (maj. opn., *ante*, at p. 274, 311 P.3d at p. 188), remand is appropriate so the trial court can consider that claim “in the first instance” (maj. opn., *ante*, at p. 302, 311 P.3d at p. 211). Because this conclusion “is decisive of the appeal” (*Stockton Theatres, Inc. v.*

Palermo (1956) 47 Cal.2d 469, 474, 304 P.2d 7), the majority's lengthy discussion of various principles and factors it believes should "properly inform" the trial court's "unconscionability inquiry" (maj. opn., *ante*, at p. 295, 311 P.3d at p. 206), which the majority offers "to guide the parties and the trial court on remand" (*id.* at p. 302, 311 P.3d at p. 212), is "obiter dictum" and is not "the law of the case" (*Stockton Theatres, Inc. v. Palermo, supra*, at p. 474, 304 P.2d 7).

Moreover, there are numerous problems with the majority's dicta, starting with its articulation of the general unconscionability standard. According to the majority, the trial court may declare the arbitration provision unconscionable upon finding that it is "unreasonably" one-sided in favor of the employer. (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 274, 311 P.3d at p. 188.) If, by this, the majority means "so one-sided as to 'shock the conscience'" (*Pinnacle, supra*, 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217), then, as discussed above, I agree. And, as explained above, the arbitration agreement is not so one-sided as to shock the conscience simply because it fails to exclude wage claims from the otherwise broad agreement to arbitrate all claims either party may have against the other.

However, if, by "unreasonably one-sided," the majority means something less, then I disagree. As our Courts of Appeal have consistently recognized, the phrase "shock the conscience" is not, as the majority suggests (maj. opn., *ante*, 163 Cal.Rptr.3d at p. 293, 311 P.3d at p. 204), "synonymous with 'unreasonable.'" Basing an unconscionability determination on the reasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis. 'With a concept as nebulous as

“unconscionability” it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience.’ [Citation.]” (*Morris v. Redwood Empire Bancorp.* (2005) 128 Cal.App.4th 1305, 1322-1323, 27 Cal.Rptr.3d 797, quoting *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391, 54 Cal.Rptr.2d 477; see also *Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 647-648, 114 Cal.Rptr.3d 449; *Belton v. Comcast* (2007) 151 Cal.App.4th 1224, 1247, 60 Cal.Rptr.3d 631; *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 809, 49 Cal.Rptr.3d 555; *Wayne v. Staples* (2006) 135 Cal.App.4th 466, 483, 37 Cal.Rptr.3d 544; *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1340, 48 Cal.Rptr.3d 749; *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 214-215, 27 Cal.Rptr.2d 396.)

Unfortunately, it appears the majority does, in fact, mean something less. Early in its opinion, the majority indicates that whether the arbitration provision is unconscionable turns on “the fundamental fairness of the bargain,” which “depend[s] on what benefits the employee may have received under the agreement’s substantive terms and the totality of the circumstances surrounding the formation of the agreement.” (Maj. opn., *ante*, 163 Cal.Rptr.3d at pp. 274-275, 311 P.3d at pp. 188-189.) Later, the majority indicates that the key question is whether the agreement is “unreasonably favorable to one party.” (Maj. opn., *ante*, at p. 294, 311 P.3d at p. 205.) These formulations seem tantamount to asking whether the arbitration provision was a bad bargain, and thus are inconsistent with our statement in *Pinnacle* that a

contract term is not substantively unconscionable merely because it “gives one side a greater benefit.” (*Pinnacle, supra*, 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217.) They are also inconsistent with the Legislature’s intent in enacting the unconscionability statute, Civil Code section 1670.5, subdivision (a), which was to prevent oppression and unfair surprise, “not [to] disturb[] [the] allocation of risks because of superior bargaining power.” (Off. Com., 9 West’s Ann. Civ.Code, *supra*, foll. § 1670.5, p. 74.) And, they endorse the subjective “unreasonableness” standard that, as explained above, California courts have consistently rejected.

In the end, the majority, though purporting to provide guidance to the trial court, refuses to say precisely what standard the court should apply on remand in determining unconscionability. Instead, after asserting that our case law “does not indicate” whether the shock the conscience standard is “different” from the many other standards the majority puts forth, or “is the one true, authoritative standard for substantive unconscionability, exclusive of all others” (maj. opn., *ante*, 163 Cal.Rptr.3d at p. 303, 311 P.3d at p. 212), the majority declines to decide these questions and leaves it to the trial court to determine which of the majority’s “nonexclusive formulations” to apply (maj. opn., *ante*, at p. 304, 311 P.3d at p. 213). In my view, *Pinnacle* settles the question; the arbitration provision at issue is unconscionable only if it is so one-sided as to shock the conscience. (*Pinnacle, supra*, 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217.)

The majority’s dicta regarding how the general unconscionability standard should be applied in this specific case is also problematic. The majority offers a

number of different formulations, indicating that the arbitration agreement's validity turns, variously, on whether the arbitration procedure (1) will enable Moreno to "vindicate his right to recover unpaid wages" (maj. opn., *ante*, 163 Cal.Rptr.3d at p. 289, 311 P.3d at p. 200) or "obtain prompt, affordable, and enforceable resolution of [his] wage claim" (maj. opn., *ante*, at p. 293, 311 P.3d at p. 204); (2) will "impose [] costs and risks . . . that make the resolution of the wage dispute inaccessible and unaffordable, and thereby 'effectively blocks every forum for redress'" (*ibid.*); and (3) will provide "an effective and low-cost approach to resolving wage disputes" (*ibid.*), a "speedy, informal, and affordable resolution" of Moreno's wage claim (maj. opn., *ante*, at p. 295, 311 P.3d at p. 206), or an "accessible" and "affordable" forum for resolving his wage dispute (maj. opn., *ante*, at pp. 292, 294, 295, 311 P.3d at pp. 203, 204-205, 206). These terms are hopelessly vague, uncertain, and subjective. The majority offers no clue as to what it means to be "accessible," "affordable," "low-cost," "speedy," or "effective," and concedes that these terms "are not subject to precise definition." (Maj. opn., *ante*, at p. 306, 311 P.3d at p. 215.) Nor does the majority specify whether the arbitration procedure is to be judged on these measures in the abstract, relative to litigation, or relative to the Berman procedure.

Even were these terms capable of precise definition, the inquiry necessary to apply them would be difficult, if not impossible. Under our law, a determination of unconscionability must be based on the circumstances that existed "at the time [the contract] was made" (Civ.Code, § 1670.5, subd. (a)), not on hindsight in light of subsequent events. (*Setzer v. Robinson* (1962) 57 Cal.2d 213, 217, 18 Cal.Rptr. 524, 368 P.2d 124; *Colton v. Stanford* (1890) 82 Cal. 351, 403, 23 P. 16.)

Accordingly, under the majority's approach, a trial court, in determining accessibility and affordability, will have to determine, not what Moreno can afford today, but what he could have afforded at the time he signed the arbitration agreement. (*Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1583, 98 Cal.Rptr.3d 743 (*Parada*).)² It will also have to determine, not how an arbitration would be conducted today, but how it would have been conducted at the time the parties signed the arbitration agreement. (*O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 281-282, 132 Cal.Rptr.2d 116.) Moreover, whether the inquiry looks to the present or to the future, a court simply cannot perform the task the majority assigns it: determining "the particulars" of Sonic's arbitration process that the agreement does not "reveal." (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 292, 311 P.3d at p. 204.) The particulars of an arbitration process that are not specified in the arbitration agreement or the applicable arbitration rules are for the arbitrator, not the court, to decide (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 [procedural questions are for the arbitrator]), and arbitrators have broad discretion in determining the procedures and law governing the arbitration, including their contractual authority to fashion remedies (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, 36 Cal.Rptr.2d 581, 885 P.2d 994; *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th

² The majority's view that it is enough to determine "what an employee can afford when a wage dispute arises" (maj. opn., *ante*, 163 Cal.Rptr.3d at p. 307, 311 P.3d at p. 216), "is contrary to statute." (*Parada, supra*, 176 Cal.App.4th at p. 1583, 98 Cal.Rptr.3d 743.)

154, 177, 90 Cal.Rptr.3d 818). Thus, until the parties here actually submit the matter to arbitration and the arbitrator determines the arbitration procedures, a trial court cannot know all “the particulars” of the specific arbitration process now at issue (maj. opn., ante, at p. 292, 311 P.3d at p. 204) and, therefore, cannot consider those features in determining unconscionability.

Equally, if not more, problematic is the majority’s view that, in determining unconscionability, a trial court may consider “the value of” the benefits under the Berman procedure that Moreno has surrendered. (Maj. opn., ante, 163 Cal.Rptr.3d at p. 295, 311 P.3d at p. 205.) To begin with, as the majority’s introductory discussion explains, an employee has no entitlement to a Berman hearing; upon receiving a wage claim, the Labor Commissioner has discretion to provide for a hearing, but may also choose to “take no further action on the complaint.” (Maj. opn., ante, at p. 277, 311 P.3d at p. 190; see § 98, subd. (a).) Thus, it was at the time the agreement was signed, and remains today, entirely speculative whether the Berman procedure is of any value to Moreno.

Also speculative is the majority’s assertion that the Berman procedure is speedy, informal, and affordable. Regarding speed, we have previously observed that, because of “the time consumed by the various procedural steps” in Berman proceedings, there is “typically” a four-to-six-month “delay” between the filing date and the Berman hearing. (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 860, 72 Cal.Rptr.2d 687, 952 P.2d 704.) In this case, *Sonic* has documented cases in which commencement of a Berman hearing took a year

or more.³ (*Sonic I, supra*, 51 Cal.4th at p. 681, fn. 5, 121 Cal.Rptr.3d 58, 247 P.3d 130.) After concluding the hearing, the Labor Commissioner has 15 days to file a decision, and that decision, assuming there is no appeal, does not become final for another 10 days. (§§ 98.1, subd. (a), 98.2, subds. (a), (d).) Either side may appeal from the Labor Commissioner’s decision and obtain a trial de novo in court. (§ 98.2, subd. (a)). Finally, the Labor Commissioner has discretion to “stay execution of any [final] judgment” for “good cause” and to “impose the terms and conditions of the stay of execution.” (§ 98.2, subd. (g).) Notably, the majority concedes that it is “unclear”—*i.e.*, it is speculative—how the Labor Commissioner’s statutory discretion to stay execution of a final judgment impacts the Labor Commissioner’s duty to make efforts to ensure that judgments are satisfied. (Maj. opn., ante, 163 Cal.Rptr.3d at pp. 304-305, 311 P.3d at p. 214.) More broadly, despite its claims about the Berman process’s “greater efficiency and speed” (maj. opn., ante, at p. 294, 311 P.3d at p. 205), the majority also concedes that there is “no evidence” a wage claim will be resolved faster through the Berman process than through *Sonic*’s arbitration procedure. (Maj. opn., ante, at p. 304, 311 P.3d at p. 213.) This is not surprising; it is self-evident that the dual fora procedure under the Berman statutes—involving an

³ Under the Berman statutes, the Labor Commissioner has at least 90 days after deciding to proceed with a hearing actually to hold it, and may “postpone or grant additional time before setting a hearing [upon] find [ing] that it would lead to an equitable and just resolution of the dispute.” (§ 98, subd. (a).) The Labor Commissioner’s “understanding” of this provision is that a simple request by one of the parties constitutes an appropriate ground for delay. (*Cuadra v. Millan, supra*, 17 Cal.4th at p. 860, 72 Cal.Rptr.2d 687, 952 P.2d 704.)

administrative hearing potentially followed by a formal trial de novo in superior court—is not speedier or more streamlined than arbitration.

Regarding formality, a Berman hearing is not nearly as informal as the majority suggests. In 2002, when Moreno signed the arbitration agreement, the Labor Commissioner’s published policies and procedures stressed (and still stress today) that Berman hearings “are formal procedures” at which each party has the right to be represented by counsel, to present evidence, to testify under oath and have other witnesses testify under oath, to cross-examine the opposing party and witnesses, and to subpoena witnesses, documents and records. (Dept. of Industrial Relations, Div. of Labor Stds. Enforcement (DLSE), Policies and Procedures for Wage Claim Processing (2001 rev.) pp. 2-4; *see also* DLSE, Policies and Procedures for Wage Claim Processing (2012 rev.) pp. 2-4.) Of course, the trial de novo in superior court to which either side is entitled after a Berman hearing would involve all the formalities of any litigation. It would also greatly increase the cost of the Berman procedure; as this court has observed, because a losing employer has a right to a trial de novo in superior court, “Berman hearings may result in no cost savings to the employee.” (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 464, 64 Cal.Rptr.3d 773, 165 P.3d 556 (Gentry).)⁴ Thus, whether a Berman procedure is

⁴ *Gentry* was not, as the majority states, discussing whether “thousands of individual Berman hearings would . . . result in cost savings as compared to a single class proceeding.” (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 304, 311 P.3d at p. 214.) It was explaining that a losing employer’s right to a trial de novo under the Berman procedure can negate any cost savings of the procedure “to the employee,” *i.e.*, to an individual employee.

speedy, informal, and low cost, either in the abstract or in comparison to Sonic’s arbitration procedure—which does not provide for a formal trial de novo in court—is entirely speculative.

Other asserted benefits of the Berman procedure are likewise speculative. The majority notes that, before the holding of a Berman hearing, the Labor Commissioner’s staff “may attempt to settle claims either informally or through a conference between the parties.” (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 277, 311 P.3d at p. 190, italics added.) However, these efforts are entirely discretionary; in any given case, the Labor Commissioner may choose not to make any informal settlement attempts. The majority also emphasizes the requirement that an employer wishing to file an appeal must post an undertaking with the court in the amount of the award. (Maj. opn., *ante*, at p. 277, 311 P.3d at p. 191.) However, an employee who has agreed to arbitrate a controversy may obtain provisional remedies—such as an attachment or a preliminary injunction requiring payment of wages during the arbitration—in connection with the controversy.⁵ (Code Civ. Proc., § 1281.8.) The majority next emphasizes the Berman procedure’s fee-shifting provision, which specifies that only unsuccessful

(*Gentry, supra*, 42 Cal.4th at p. 464, 64 Cal.Rptr.3d 773, 165 P.3d 556, italics added.)

⁵ If, as the majority asserts, the purpose of the Berman undertaking requirement is to counteract an employer’s efforts “to avoid enforcement of the judgment” (maj. opn., *ante*, 163 Cal.Rptr.3d at p. 277, 311 P.3d at p. 191), then it is unclear why the majority finds it significant that obtaining provisional relief requires a showing that “the award to which the applicant may be entitled may be rendered ineffectual without provisional relief.” (Maj. opn., *ante*, at p. 305, 311 P.3d at p. 214.)

appellants are liable for attorney fees. (Maj. opn., *ante*, at p. 278, 311 P.3d at p. 191.) As the majority notes, this provision may discourage an employer who is unsuccessful in the administrative proceeding from filing an appeal. (Maj. opn., *ante*, at p. 278, 311 P.3d at p. 192) But it likewise may discourage an employee who is unsuccessful in the administrative proceeding—because he or she recovered either nothing at all or less than was sought—from filing an appeal. Of course, we have no evidence regarding the provision’s actual effect on either employers or employees, and any attempt to quantify that effect would be pure speculation. Moreover, although, as the majority notes, the current version of section 98.2, subdivision (c) provides that “[a]n employee is successful [on appeal] if the court awards an amount greater than zero” (§ 98.2, subd. (c); *see* maj. opn., *ante*, at p. 278, 311 P.3d at p. 191), this provision did not exist until the year after Moreno signed the arbitration agreement, so it is irrelevant to determining whether the arbitration agreement in this case was “unconscionable at the time it was made.”⁶ (Civ.Code, § 1670.5, subd. (a).) The majority also emphasizes the Labor Commissioner’s statutory

⁶ In July 2002, when Moreno signed the agreement, the law was unclear as to whether an appealing employee was successful if the award on appeal was not greater than the administrative award, and we had granted review to resolve a split of published authority on the issue. (*Smith v. Rae-Venter Law Group*, *rev.* granted Aug. 29, 2001, S098760.) In December 2002, we held that an appealing employee is “unsuccessful” within the meaning of the fee statute if he or she does not obtain a “more favorable” judgment on appeal. (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 351, 370, 127 Cal.Rptr.2d 516, 58 P.3d 367.) The next year, the Legislature added the sentence the majority quotes. (Stats. 2003, ch. 93, § 2, p. 790.)

authority to represent claimants in de novo proceedings. (Maj. opn., *ante*, at p. 278, 311 P.3d at p. 191.) But that authority applies only to “a claimant financially unable to afford counsel” and, even as to such a claimant, is discretionary unless the claimant “is attempting to uphold the amount awarded by the Labor Commissioner and is not objecting to any part of the Labor Commissioner’s final order.” (§ 98.4.) Given all of these uncertainties, the trial court on remand can only speculate on what, if any, “value” the possibility of a Berman hearing had to Moreno at the time he signed the arbitration agreement.

My conclusion that, at the petition to compel stage, the value of the Berman procedure to a particular employee in a given case is speculative does not, as the majority asserts, “disparage[]” that procedure. (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 305, 311 P.3d at p. 214.) It is, after all, the majority that is requiring the trial court to determine the potential “value” of the Berman procedure to Moreno. (Maj. opn., *ante*, at p. 295, 311 P.3d at p. 205.) Insofar as the majority presumes that the Berman procedure would be beneficial to Moreno and superior to Sonic’s arbitration procedure, and the majority places the burden on Sonic to introduce evidence showing otherwise (*see* maj. opn., *ante*, at p. 292, 311 P.3d at p. 203), the majority reverses our established approach to unconscionability. As earlier noted, Moreno, as the party asserting the defense, has the burden to prove unconscionability. (*Pinnacle, supra*, 55 Cal.4th at p. 236, 145 Cal.Rptr.3d 514, 282 P.3d 1217.) Thus, he should have the burden of proving the value of the Berman procedure in this case and the features, costs, and risks of Sonic’s arbitration procedure. (*See Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 415, 220 Cal.Rptr. 807, 709 P.2d 826 [“the party resisting

arbitration” must show “that the rules under which arbitration is to proceed will deprive it of a fair procedure”].)

Indeed, my conclusion regarding the speculative benefit of a Berman proceeding, and my consequent rejection of the majority’s case-by-case approach, are fully consistent with our existing precedent, including the Sonic I majority’s opinion in this very case. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 111, 99 Cal.Rptr.2d 745, 6 P.3d 669, the court observed that “[t]urning a motion to compel arbitration into a mini-trial on the comparative costs and benefits of arbitration and litigation for a particular employee would not only be burdensome on the trial court and the parties, but would likely yield speculative answers.” In this case, the Sonic I majority extended this analysis to the comparative costs and benefits of arbitration and Berman procedures; in adopting a categorical prohibition against all Berman waivers as a matter of public policy, it expressly rejected the very case-by-case approach the majority now proposes precisely because a trial court, at the petition-to-compel “stage,” “is in no position to determine” “whether and to what extent a particular wage claimant will benefit from the Berman hearing process.” (*Sonic I, supra*, 51 Cal.4th at p. 683, 121 Cal.Rptr.3d 58, 247 P.3d 130.) The majority fails to explain why, in the context of determining unconscionability—rather than public policy—during a petition to compel, a trial court is in any better position to determine “whether and to what extent a particular wage claimant will benefit from the Berman hearing process.” (*Sonic I, supra*, 51 Cal.4th at p. 683, 121 Cal.Rptr.3d 58, 247 P.3d 130.) The majority’s superficial and unpersuasive attempt to distance itself from *Sonic I*’s unqualified statement

(maj. opn., ante, 163 Cal.Rptr.3d at pp. 307-308, 311 P.3d at p. 216), and its embrace of the case-by-case approach it previously rejected in this very case, suggest that the majority, having been rebuffed by the high court in its first attack on this predispute arbitration agreement, is now simply searching for a new plan of attack.

For all of the preceding reasons, the approach to unconscionability the majority's dicta outlines is hopelessly vague and unworkable, and is inconsistent with existing California law.

VI. The Majority's Approach Is Inconsistent with, and Preempted by, the FAA.

In *Sonic I*, it was clear to me that the FAA, as authoritatively construed by the United States Supreme Court, preempts the *Sonic I* majority's public policy rule. (*Sonic I*, supra, 51 Cal.4th at pp. 706-712, 121 Cal.Rptr.3d 58, 247 P.3d 130 (dis. opn. of Chin, J.)) It is equally, if not more, clear that, under the high court's decisions, the FAA preempts the unconscionability analysis the majority's dicta now describes.

Not surprisingly, this conclusion most clearly appears from *Concepcion*, the very decision the high court directed us to consider when it vacated the judgment in *Sonic I* and remanded the case to us. There, as noted above, the high court held that the FAA preempts "the *Discover Bank* rule," which "classifie[s] most collective-arbitration waivers in consumer contracts as unconscionable." (*Concepcion*, supra, 563 U.S. at p. ____, 131 S.Ct. at p. 1746.) In adopting this rule, this court found that such waivers are "exculpatory" because damages in consumer cases are "often [too] small" to warrant individual action.

(*Discover Bank, supra*, 36 Cal.4th at p. 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) Thus, the court reasoned, class arbitrations often are “inextricably linked to the vindication of substantive rights” and provide “the only effective way to halt and redress . . . exploitation” of consumers. (*Ibid.*) In *Concepcion*, the high court rejected that analysis, holding that the FAA precludes a state court from finding an arbitration provision unconscionable based on the need to protect “small-dollar claims that might otherwise slip through the legal system.” (*Concepcion, supra*, at p. ____, 131 S.Ct. at p. 1753.) “States,” the court declared, “cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” (*Ibid.*)

More recently, in *American Express Co. v. Italian Colors Restaurant* (2013) — U.S. ____, ____, 133 S.Ct. 2304, 2310, 186 L.Ed.2d 417 (*Italian Colors*), the high court further explored the “effective vindication” approach that underlies the majority’s unconscionability discussion. (See maj. opn., *ante*, 163 Cal.Rptr.3d at p. 289, 311 P.3d at p. 200 [*Sonic I* “did not address whether any barrier to vindicating such rights would make the arbitration agreement unconscionable”].) There, in resisting a motion to compel arbitration, plaintiffs argued that a class action waiver in the relevant arbitration provision prevented them from effectively vindicating their rights under the federal antitrust laws “because they [had] no economic incentive to pursue their antitrust claims individually in arbitration.” (*Italian Colors, supra*, at p. ____, 133 S.Ct. at p. 2310.) In support, they submitted a declaration showing that their maximum individual recovery would be approximately \$38,000, and the cost of the expert analysis necessary to prove their claims would be at least several hundred

thousand dollars and could exceed \$1 million. (*Id.* at p. ____, 133 S.Ct. at p. 2308.) The high court rejected the argument, explaining: The effective vindication “exception” to the FAA’s requirement that arbitration agreements be enforced according to their terms “finds its origin in the desire to prevent ‘prospective waiver of a party’s right to pursue statutory remedies,’ [citation]. That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. [Citation.] But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. [Citation.]” (*Id.*, at pp. ____, 133 S.Ct. at pp. 2310–2311.) As *Concepcion* “established,” “the FAA’s command to enforce arbitration agreements trumps any interest in *1186 ensuring the prosecution of low-value claims.” (*Italian Colors, supra*, at p. ____, fn. 5, 133 S.Ct. at p. 2312, fn. 5.) Because its ““principal purpose” is the enforcement of arbitration agreements according to their terms,” the FAA “favor[s] the absence of litigation when that is the consequence of a class-action waiver.” (*Ibid.*)

Under these binding precedents, the FAA preempts the approach to unconscionability the majority describes. To the extent an arbitration agreement “forbid[s] the assertion of certain statutory rights,” and “perhaps” to the extent it imposes “filing and administrative fees . . . that are so high as to make access to the forum impracticable,” the FAA may not require enforcement of the agreement according to its term. (*Italian Colors, supra*, — U.S. at p. ____, 133 S.Ct. at p. 2310–2311.) Short of that, under the FAA,

an arbitration provision may not be invalidated as unconscionable because of a court's subjective determination that a given arbitration procedure is not "affordable and accessible" (maj. opn., *ante*, 163 Cal.Rptr.3d at pp. 292, 295, 295, 311 P.3d at pp. 203, 205, 206), or that its costs and risks "effectively" render a wage claim not worth pursuing (maj. opn., *ante*, at p. 293, 311 P.3d at p. 204) and thus erect a "barrier to vindicating [wage] rights" (maj. opn., *ante*, at p. 289, 311 P.3d at p. 200). The FAA, as the high court has construed it, precludes state courts from finding an arbitration provision unconscionable based on the need to protect "small-dollar claims that might otherwise slip through the legal system," even though that goal may be "desirable." (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1753.) It "trumps any interest in ensuring the prosecution of low-value claims" and "favor[s] the absence of litigation when that is the consequence of" following its "command" to enforce arbitration agreements "according to their terms." (*Italian Colors, supra*, at p. 2304, fn. 5, 133 S.Ct. at p. 2312, fn. 5, italics added.) The majority's approach, which appears to go far beyond what the high court has declared the FAA permits, is therefore preempted.

The majority's attempts to reconcile its dicta with these binding precedents are unpersuasive. The majority first asserts that, "because the Berman statutes promote the very objectives of 'informality,' 'lower costs,' 'greater efficiency and speed,' and use of 'expert adjudicators,'" its approach "does not pose an obstacle to the achievement of the FAA's objectives as construed in *Concepcion*." (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 294, 311 P.3d at p. 205.) However, it is obvious that using the unconscionability doctrine to invalidate arbitration agreements and mandate either

Berman procedures or Berman-like procedures frustrates what *Concepcion*, like many high court decisions before it, identified as “[t]he ‘principal purpose’ of the FAA”: “to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’ [Citations.]” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1748; *see also Stolt-Nielsen v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 682, 130 S.Ct. 1758, 176 L.Ed.2d 605 [“we have said on numerous occasions that the central or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms’”].) *Concepcion* and other high court decisions unequivocally establish that this “preeminent” principle (*Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158) applies even to adhesive contracts, even when the state seeks to vest initial jurisdiction of the dispute in another forum, and even if arbitration is not the most streamlined means of resolving a dispute. (*Concepcion, supra*, at pp. ____, 131 S.Ct. at p. 1748-1749; *Preston v. Ferrer* (2008) 552 U.S. 346, 349-350, 128 S.Ct. 978, 169 L.Ed.2d 917; *Dean Witter Reynolds, Inc. v. Byrd, supra*, at pp. 217-221, 105 S.Ct. 1238.)

But here, because arbitration is more streamlined than the Berman process, the majority’s approach also frustrates other FAA objectives the high court emphasized in *Concepcion*. (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1749.) As explained above (*ante*, 163 Cal.Rptr.3d at pp. 278-280, 311 P.3d at pp. 192-193), because the procedural steps of the Berman process cause appreciable delay before an administrative hearing is even held and because any party to that process is entitled to a formal trial de novo in superior court after a Berman hearing, the majority’s approach is likely to produce procedures

that are less efficient, more costly, more formal, and more time consuming than arbitration. In asserting otherwise, the majority never factors in the trial de novo option under the Berman statutes; it makes no attempt to explain how a procedure involving an administrative hearing followed by a full, formal trial de novo in superior court does not interfere with the attributes of arbitration it identifies: lower costs, greater efficiency and speed, and informality. (Maj. opn., ante, at pp. 289-290, 311 P.3d at pp. 200-201.) Moreover, *Concepcion* does not, as the majority suggests, identify the “use of ‘expert adjudicators’” as a benefit of arbitration (maj. opn., ante, at p. 294, 311 P.3d at p. 205); it identifies “the ability to choose expert adjudicators” (*Concepcion, supra*, at p. ____, 131 S.Ct. at p. 1751, italics added). The Berman process eliminates this choice and, contrary to the parties’ agreement, imposes a particular adjudicator. Thus, contrary to the majority’s assertion (maj. opn., ante, at p. 294, 311 P.3d at p. 205), the majority’s approach does contravene *Concepcion*’s preemption principles by “stand[ing] as an obstacle to the accomplishment and execution of the full purposes and of Congress” in passing the FAA. (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1753, italics added).

Moreover, *Italian Colors* establishes that the very process the majority prescribes for determining the accessibility and affordability of the arbitration procedure in a given case poses such an obstacle. There, the high court rejected an approach that would “require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means” and “the size of their claims . . .” (*Italian Colors, supra*, —U.S. at pp. ____, 133 S.Ct. at pp. 2311-2312.) “Such a preliminary litigating hurdle,” the court explained, “would undoubtedly destroy the

prospect of *1188 speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.” (*Id.* at p. ____, 133 S.Ct. at p. 2312.) The majority’s case-by-case inquiry is the very type of “superstructure” the FAA prohibits. (*Ibid.*)

Nothing supports the majority’s unsupported speculation that its case-by-case inquiry will be different, i.e., that a mini-trial on the comparative costs and benefits of arbitration and the Berman procedure for a particular employee will not impose a preliminary litigating hurdle. (Maj. opn., *ante*, 163 Cal.Rptr.3d at pp. 302-303, 311 P.3d at pp. 211-212.) Under the majority’s approach, the parties will be submitting evidence on any number of issues, including the following: what arbitration procedure the employee can currently afford and whether that “materially differ[s]” from what he or she should have afforded when the parties signed the arbitration agreement (maj. opn., *ante*, at p. 307, 311 P.3d at p. 216); what were (and perhaps are) the rules that govern the arbitration; what will the unspecified arbitration procedures be; are Berman procedures “in practice, rarely used and generally unavailable to the employee” (maj. opn., *ante*, at p. 304, 311 P.3d at p. 213); how long will it take to resolve the employee’s wage claim through the Berman procedure, including a possible trial de novo in superior court, and how long will it take to resolve the wage claim through the arbitration procedure (maj. opn., *ante*, at p. 304, 311 P.3d at p. 213); how much will it cost to resolve the employee’s wage claim through the Berman procedure, including a possible trial de novo, and how much will it cost to resolve the wage claim through the arbitration procedure (maj. opn., *ante*, at p. 304, 311

P.3d at p. 213); how often do parties request a trial de novo ((Maj. opn., ante, at p. 309, 311 P.3d at p. 217)? Given the parties' need to litigate all of these matters in the trial court, and the availability of appellate review of the trial court's decision Code Civ. Proc., § 1294, subd. (a); *Parada, supra*, 176 Cal.App.4th at p. 1560, 98 Cal.Rptr.3d 743), the majority's "anticipat[ion]" that its approach will not create the kind of preliminary, arbitration-delaying litigating hurdle Italian Colors discussed (maj. opn., ante, at p. 300, 311 P.3d at p. 210) is just wishful thinking. This conclusion reflects a "lack of confidence" only in the majority's unwarranted optimism, not, as the majority asserts, "in the ability of our trial courts." (Maj. opn., ante, at p. 310, 311 P.3d at p. 218.)

In any event, I disagree with the majority that, so long as states and their courts do not interfere with fundamental attributes of arbitration, *Concepcion* allows them to invalidate arbitration agreements as unconscionable based on a policy judgment that the arbitration procedure is not adequately affordable and accessible. (Maj. opn., ante, 163 Cal.Rptr.3d at pp. 290-303, 311 P.3d at pp. 201-212.) Under the majority's narrow reading of *Concepcion*, the FAA's savings clause permits states, for policy reasons, to impose all sorts of arbitration procedures that are not within the terms of the parties' arbitration agreement, so long as those procedures do not interfere with fundamental attributes of arbitration. This view is contrary to the high court's statement in *Concepcion* that the FAA embodies a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," [citations]." (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1749, italics added.) It is also inconsistent with *Concepcion's* statement that,

although a state's unconscionability rules may "address[] the concerns that attend contracts of adhesion," they may not "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." (Id. at p. ____, fn. 6, 131 S.Ct. at p. 1750, fn. 6, italics added.) Thus, under the FAA, a state court may not, based on principles of unconscionability, refuse to enforce an arbitration agreement according to its terms simply because the arbitration procedure lacks features the Legislature, as a matter of policy, established for "a particular class"—employees—to "mitigate the risks and costs of pursuing" wage claims (maj. opn., ante, at p. 297, 311 P.3d at p. 207) or to make recovery of wages owed more "accessible, informal, and affordable" (maj. opn., ante, at p. 299, 311 P.3d at p. 209). In enacting the FAA, Congress "intended to foreclose [such] legislative attempts to undercut the enforceability of arbitration agreements." (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (Southland).)

Indeed, the majority's assertion that its weighing approach to unconscionability applies, not generally, but only where "a particular class has been legislatively afforded specific protections in order to mitigate the risks and costs of pursuing certain types of claims" (maj. opn., ante, 163 Cal.Rptr.3d at p. 297, 311 P.3d at p. 207) further demonstrates that the majority's approach is inconsistent with, and therefore preempted by, the FAA. The majority premises its approach on the FAA's savings clause, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2; see maj. opn., ante, at p. 289, 311 P.3d at p. 201.) In *Southland*, Justice Stevens

invoked this clause to justify the prohibition against arbitration we had read into California's Franchise Investment Law (Corp.Code § 31000 et seq.). (Southland, *supra*, 465 U.S. at pp. 18–22, 104 S.Ct. 852 (conc. & dis. opn. of Stevens, J.)) He reasoned that, because a contract void as contrary to public policy is revocable at law or in equity, the FAA does not preempt a state law that “provid[es] special protection” to franchisees by declaring agreements to arbitrate claims under the Franchise Investment Law void as a matter of public policy. (*Id.* at pp. 21–22, 104 S.Ct. 852 (conc. & dis. opn. of Stevens, J.)) The majority in Southland rejected this view, finding that the “defense to arbitration” we had read into the Franchise Investment Law was “not a ground that exists at law or in equity ‘for the revocation of any contract’ but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.” (*Id.* at p. 16, fn. 11, 104 S.Ct. 852.) It also rejected the view that “a state policy of providing special protection for franchisees . . . can be recognized without impairing the basic purposes of the [FAA], [citation].” (*Ibid.*) “If we accepted this analysis,” the court explained, “states could wholly eviscerate congressional intent to place arbitration agreements ‘upon the same footing as other contracts,’ [citation] simply by passing statutes such as the Franchise Investment Law. We . . . reject[] this analysis because it is in conflict with the [FAA] and would permit states to override the declared policy requiring enforcement of arbitration agreements.” (*Ibid.*)

The majority's approach is inconsistent with Southland. Like the defense to arbitration we read into the Franchise Investment Law, the defense to arbitration the majority now reads into the Berman

statutes is not a ground that exists at law or in equity for the revocation of any contract, but is, according to the majority's own assertion, merely a ground that exists for the revocation of arbitration provisions in contracts subject to the Berman statutes or to other statutes that "legislatively" afford to "a particular class . . . specific protections in order to mitigate the risks and costs of pursuing certain types of claims." (Maj. opn., ante, 163 Cal.Rptr.3d at p. 297, 311 P.3d at p. 207.) Moreover, it "conflict[s] with" the FAA by enabling our Legislature, "simply by passing statutes such as" the Berman statutes, "to override the declared [federal] policy requiring enforcement of arbitration agreements" and to "wholly eviscerate congressional intent to place arbitration agreements 'upon the same footing as other contracts.'" (*Southland*, supra, 465 U.S. at pp. 16-17, fn. 11, 104 S.Ct. 852.) Under *Southland*, it is, therefore, preempted.

Given this analysis, I disagree with the majority's broad assertion that the FAA does not preempt unconscionability rules that apply "uniquely in the context of arbitration." (Maj. opn., ante, 163 Cal. Rptr.3d at p. 290, 311 P.3d at p. 201.) As the high court has held, in cases where the FAA applies, a state court may not, "in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." (*Perry v. Thomas* (1987) 482 U.S. 483, 492, fn. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426.) In other words, as *Concepcion* explains, "a [state] 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.'" (*Concepcion*, supra, 563 U.S. at p. ____, 131 S.Ct. at p. 1747.) The majority's approach

violates this principle insofar as it departs from our existing law of unconscionability and crafts different unconscionability rules for arbitration agreements.⁷ Under the high court’s decisions, the majority cannot invent a unique rule for implementing a legislative policy decision to confer “specific protections” on “a particular class” (maj. opn., *ante*, at p. 297, 311 P.3d at p. 207) and avoid preemption simply by calling that rule a rule of unconscionability.

Finally, for two reasons, I also disagree with the majority’s view that the high court’s FAA decisions allow us to “consider the value of benefits provided by the Berman statutes” in determining unconscionability. (Maj. opn., *ante*, 163 Cal.Rptr.3d at p. 295, 311 P.3d at p. 205.) First, insofar as this approach will require a complex and speculative inquiry into the purported value of the Berman statutes to a particular employee at the time the contract was signed, it is, as earlier explained, inconsistent with *Italian Colors*, *supra*, — U.S. at pages ____, 133 S.Ct. at pp. 2311-2312. Second, even were it possible for a trial court to assign any meaningful value to these speculative benefits, considering that value would be fundamentally inconsistent with *Concepcion* and *Italian Colors*. In the former, the high court held that state courts may not base a finding of unconscionability on the value of class arbitration to litigants with “small-dollar claims.” (*Concepcion*, *supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1740.) In the latter, the court, expressly applying *Concepcion*, held that an arbitration agreement may not be invalidated

⁷ Whether, under current high court precedent, the FAA preempts any of the other unique unconscionability rules the majority’s dicta discusses (maj. opn., *ante*, 163 Cal.Rptr.3d at pp. 289–291, 311 P.3d at pp. 201–202) is not before us in this case.

based on individualized proof that what the plaintiffs have waived—the right to class arbitration—is so valuable that, without it, the costs of pursuing their claims are prohibitive. (*Italian Colors, supra*, — U.S. at pp. ____, 133 S.Ct. at pp. 2311-2312.) These binding interpretations of the FAA preclude us from invalidating an arbitration provision as unconscionable based on the supposed value to a particular employee of the Berman procedure. As *Concepcion* “established,” “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.” (*Italian Colors, supra*, at p. ____, fn. 5, 133 S.Ct. at p. 2321, fn. 5.) Thus, it is the high court, not I, that has construed the FAA to require adherence to its primary purpose—enforcing arbitration agreements according to their terms—“at the expense of harming other values that the legislature deems important.” (Maj. opn., *ante*, at p. 310, 311 P.3d at p. 218.) The court could hardly have been clearer in *Italian Colors*: the FAA “favor[s] the absence of litigation when that is the consequence of” following its “command” to enforce arbitration agreements “according to their terms.” (*Italian Colors, supra*, at p. ____, fn. 5, 133 S.Ct. at p. 2312, fn. 5.)

For all of the above reasons, the majority’s approach is inconsistent with the FAA. Although the majority purports to be faithfully applying “the FAA’s savings clause” (maj. opn., *ante*, 163 Cal.Rptr.3d at p. 288, 311 P.3d at p. 200), which permits arbitration agreements “to be invalidated by ‘generally applicable contract defenses, such as . . . unconscionability’” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1746; see 9 U.S.C. § 2), it is, in reality and contrary to *Concepcion*, applying the unconscionability defense “in a fashion that disfavors arbitration” (*Concepcion, supra*, at p. ____, 131 S.Ct. at p. 1747) and that “derive[s] [its]

meaning from the fact that an agreement to arbitrate is at issue”(*id.* at p. ____, 131 S.Ct. at p. 1746). Therefore, the majority’s unconscionability approach is preempted by the FAA.

VII. Conclusion.

In *Concepcion*, the high court, in invalidating another of this court’s unconscionability rules for refusing to enforce arbitration provisions, first noted that “judicial hostility” towards arbitration has “manifested itself in ‘a great variety’ of ‘devices and formulas.’” (*Concepcion, supra*, 563 U.S. at p. ____, 131 S.Ct. at p. 1747.) Then, in the very next sentence, it commented: “And although these statistics are not definitive, it is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. [Citations.]” (*Ibid.*) Ignoring the high court’s clear message and undeterred by another reversal, today, the majority “formula[tes]” yet another “device” (*ibid.*) for invalidating arbitration agreements: a case-by-case, hopelessly vague, subjective, and indeterminable assessment of (1) the value of the benefits of the Berman procedure to a particular employee, and (2) the accessibility and affordability to that employee of the specific arbitration procedure to which he or she has agreed. The majority’s approach is inconsistent with California law and is preempted by the FAA. I therefore dissent from that part of the majority’s opinion and from the judgment.

I CONCUR: BAXTER, J.

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APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 10–1450

SONIC-CALABASAS A, INC.,
Petitioner,

v.

FRANK MORENO.

Oct. 31, 2011.

Opinion

Case below, 51 Cal.4th 659, 121 Cal.Rptr.3d 58, 247 P.3d 130.

On petition for writ of certiorari to the Supreme Court of California. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of California for further consideration in light of *AT & T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

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APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA

S174475

Ct.App. 2/4 B204902

SONIC-CALABASAS A, INC.,

Plaintiff and Appellant,

v.

FRANK MORENO,

Defendant and Respondent.

Los Angeles County

Super. Ct. No. BS107161

Under Labor Code section 98 et seq., an employee with a claim for unpaid wages has a right to seek an informal hearing in front of the Labor Commissioner, a so-called “Berman” hearing. If the employee obtains an award at the Berman hearing, the employer may request de novo review of the award in the superior court, which the statute calls an “appeal.” As explained at greater length below, the statutory regime of which the Berman hearing is part contains a number of provisions designed to assist employees during this process and to deter frivolous employer defenses. These provisions include the Labor Commissioner’s representation in the superior court of employees unable to afford counsel, the requirement that the employer post an undertaking in the amount

of the award, and a one-way attorney fee provision that requires an employer that is unsuccessful in the appeal to pay the employee's attorney fees.

In this case, we must decide whether a provision in an arbitration agreement that the employee enters as a condition of employment requiring waiver of the option of a Berman hearing is contrary to public policy and unconscionable. We conclude that it is, and therefore reverse the Court of Appeal's contrary judgment. We nonetheless conclude that arbitration agreements may be enforced after a Berman hearing has taken place, i.e., the appeal from such a hearing may be made, pursuant to a valid arbitration agreement, in front of an arbitrator rather than in court.

Furthermore, we must decide whether a state law rule that a Berman waiver in an arbitration agreement is unconscionable and contrary to public policy is preempted by the Federal Arbitration Act (FAA; 9 U.S.C. § 1, et seq.). In arguing this issue, the parties particularly focus on a recent United States Supreme Court case, *Preston v. Ferrer* (2008) 552 U.S. 346 (*Preston*), holding that a provision in this state's Talent Agencies Act vesting original jurisdiction of all disputes under that statute with the Labor Commissioner was preempted by the FAA. We conclude, as did the Court of Appeal below, that *Preston* is distinguishable and that our holding is not preempted by the FAA.

I. FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. Frank Moreno is a former employee of Sonic-Calabasas A, Inc. (Sonic), which owns and operates an automobile dealership. As a condition of his employment with Sonic, Moreno signed a document entitled "Applicant's Statement

& Agreement.” The agreement set forth a number of conditions of employment, including consent to drug testing and permission to contact former employers, as well as a provision making the employment at will. Critically for our case, the agreement contained a paragraph governing dispute resolution. The agreement required both parties to submit their employment disputes to “binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec. 1280 *et seq.* . . .)” The agreement applied to “all disputes that may arise out of the employment context . . . that either [party] may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum[,] . . . whether based on tort, contract, statutory, or equitable law, or otherwise.” The agreement specified that it did not apply to claims brought under the National Labor Relations Act or the California Workers’ Compensation Act, or to claims before the Employment Development Department. Furthermore, the agreement provided that the employee was not prevented from “filing and pursuing administrative proceedings only before the California Department of Fair Employment and Housing or the U.S. Equal Opportunity Commission.”

At some point, Moreno left his position with Sonic. In December 2006, Moreno filed an administrative wage claim with the Labor Commissioner for unpaid vacation pay pursuant to Labor Code section 98 *et seq.*¹ Moreno alleged that he was entitled to unpaid “[v]acation wages for 63 days earned 7/15/02 to 7/15/06

¹ All statutory references are to this code unless otherwise indicated.

at the rate of \$441.29 per day.” The filing of this claim is the first step toward obtaining a Berman hearing.

In February 2007, Sonic petitioned the superior court to compel arbitration of the wage claim and dismiss the pending administrative action. (Code Civ. Proc., § 1281.2.) Sonic argued Moreno waived his right to a Berman hearing in the arbitration agreement.

The Labor Commissioner intervened below on Moreno’s behalf (§98.5), and Moreno adopted the Labor Commissioner’s arguments. The Labor Commissioner argued that the arbitration agreement, properly construed, did not preclude Moreno from filing an administrative wage claim under section 98 et seq. The Labor Commissioner argued that resort to a Berman hearing was compatible with the arbitration agreement, because the hearing could be followed by arbitration in lieu of a de novo appeal to the superior court that is provided in section 98.2, subdivision (a). The Labor Commissioner contended that a contrary interpretation of the arbitration agreement to waive a Berman hearing would violate public policy, relying on our decision regarding mandatory employment arbitration agreements in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*).

The superior court denied the petition to compel arbitration as premature. Citing *Armendariz*, the superior court stated that, as a matter of “basic public policy . . . until there has been the preliminary non-binding hearing and decision by the Labor Commissioner, the arbitration provisions of the employment contract are unenforceable, and any petition to compel arbitration is premature and must be denied.”

Sonic appealed from the order of denial. (Code Civ. Proc., § 1294, subd. (a).) The Labor Commissioner did not participate in the appeal, nor in proceedings before this court. During the briefing period, the United States Supreme Court decided *Preston*, which held that the Labor Commissioner's original and exclusive jurisdiction under the Talent Agencies Act (Lab. Code, § 1700 et seq.) was preempted when the parties entered into an arbitration agreement governed by the FAA. (*Preston, supra*, 552 U.S. 346.)

The Court of Appeal concluded at the threshold that *Preston* was not dispositive of the appeal, reasoning that *Preston* applied to cases in which a party was challenging the validity of a contract as a whole and seeking to have that challenge adjudicated by an administrative agency; it did not apply to cases in which the party was challenging the arbitration clause itself as unconscionable. The Court of Appeal further concluded that the arbitration agreement, correctly interpreted, constituted a waiver of a Berman hearing. By its terms, the agreement precluded Moreno from pursuing any judicial "or other government dispute resolution forum," subject to certain enumerated exceptions. "Given that neither the Division of Labor Standards Enforcement nor the Labor Commissioner was listed among the stated exceptions, we conclude, as a matter of law, that Moreno was barred from pursuing an administrative wage claim under section 98 et seq."

The Court of Appeal then concluded, for reasons explained below, that a Berman waiver was not contrary to public policy. Moreno petitioned for review, contending the Court of Appeal decided this question incorrectly. Sonic, in its answer to the petition, contended the Court of Appeal was correct, and renewed

its argument that a holding invalidating a Berman waiver would be preempted by the FAA, as construed in *Preston*. We granted review to decide these questions.

II. DISCUSSION

A. The Berman Hearing and Posthearing Procedures

As we have explained: “If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options. The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. (§§ 218, 1194.) Or the employee may seek *administrative* relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8. The latter option was added by legislation enacted in 1976 (Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371) and is commonly known as the ‘Berman’ hearing procedure after the name of its sponsor.” (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 858 (*Cuadra*), disapproved on other grounds in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4.)

Once an employee files a complaint with the Labor Commissioner for nonpayment of wages, section 98, subdivision (a) “provides for three alternatives: the commissioner may either accept the matter and conduct an administrative hearing [citation], prosecute a civil action for the collection of wages and other money payable to employees arising out of an employment relationship [citation], or take no further action on the complaint. [Citation.]” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115.) “If the commissioner decides to accept the matter and

conduct an administrative hearing, he or she must hold the hearing within 90 days.” (*Ibid.*) Moreover, prior to holding a Berman hearing or pursuing a civil action, the Labor Commissioner’s staff may attempt to settle claims either informally or through a conference between the parties. (Dept. of Industrial Relations, Div. of Labor Stds. Enforcement (DLSE), Policies and Procedures for Wage Claim Processing (2001 rev.) pp. 2-3).

A Berman hearing is conducted by a deputy Labor Commissioner, who has the authority to issue subpoenas. (Cal. Code Regs., tit. 8, §§ 13502, 13506.) “The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims. In brief, in a Berman proceeding the commissioner may hold a hearing on the wage claim; the pleadings are limited to a complaint and an answer; the answer may set forth the evidence that the defendant intends to rely on, and there is no discovery process; if the defendant fails to appear or answer no default is taken and the commissioner proceeds to decide the claim, but may grant a new hearing on request. (§ 98.) The commissioner must decide the claim within 15 days after the hearing. (§ 98.1.)” (*Cuadra, supra*, 17 Cal.4th at pp. 858-859.) The hearings are not governed by the technical rules of evidence, and any relevant evidence is admitted “if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” (Cal. Code Regs., tit. 8, § 13502.) The hearing officer is authorized to assist the parties in cross-examining witnesses and to explain issues and terms not understood by the parties. (DLSE, Policies and Procedures for Wage Claim Processing, *supra*, at p. 4.) The parties have a right to have a translator present. (*Ibid.*; see § 105 [“Labor Commissioner shall

provide that an interpreter be present at all hearings and interviews where appropriate.”].)

Once judgment is entered in the Berman hearing, enforcement of the judgment is to be a court priority. (§ 98.2, subd. (e).) The Labor Commissioner is charged with the responsibility of enforcing the judgment and “shall make every reasonable effort to ensure that judgments are satisfied, including taking all appropriate legal action and requiring the employer to deposit a bond as provided in Section 240.” (*Id.*, subd. (i).)

Within 10 days after notice of the decision any party may appeal to the appropriate court, where the claim will be heard de novo; if no appeal is taken, the commissioner’s decision will be deemed a judgment, final immediately, and enforceable as a judgment in a civil action. (§ 98.2.) If an employer appeals the Labor Commissioner’s award, “[a]s a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award.” (§ 98.2, subd. (b).) The purpose of this requirement is to discourage employers from filing frivolous appeals and from hiding assets in order to avoid enforcement of the judgment. (Sen. Corn. on Labor and Industrial Relations, Analysis of Assem. Bill No. 2772 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, p. 4.)

Under section 98.2, subdivision (c), “If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney’s fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal.

An employee is successful if the court awards an amount greater than zero.” This provision thereby establishes a one-way fee-shifting scheme, whereby unsuccessful appellants pay attorney fees while successful appellants may not obtain such fees. (See *Dawson v. Westerly Investigations, Inc.* (1988) 204 Cal.App.3d Supp. 20, 24-25 [construing the predecessor statute, § 98.2, subd. (b)1]² This is in contrast to section 218.5, which provides that in civil actions for nonpayment of wages initiated in the superior court, the “prevailing party” may obtain attorney fees.

Furthermore, the Labor Commissioner “may” upon request represent a claimant “financially unable to afford counsel” in the de novo proceeding and “shall” represent the claimant if he or she is attempting to

² That section 98.2, subdivision (c) is especially protective of employees is evident from the last sentence of that subdivision and the legislative history behind it. Before the statute was amended in 2003, it did not explicitly provide that an employee would be considered successful on appeal if the court awards an amount greater than zero (cf. Stats. 2002, ch. 784, § 522), but Court of Appeal decisions construed the statute in that manner. (*Cardenas v. Mission Industries* (1991) 226 Cal.App.3d 952, 960; *Triad Data Services, Inc. v. Jackson* (1984) 153 Cal.App.3d Supp. 1.) We disapproved of those cases in *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 370-371, concluding that an employee would be considered unsuccessful on appeal, and subject to section 98.2, subdivision (c)’s fee shifting provision, if its award on appeal was less than the Labor Commissioner’s award. The Legislature then amended the statute in 2003 specifically to overrule *Smith v. Rae-Venter* and to restore the law to be in accord with the holdings in *Cardenas* and *Triad*. (See Legis. Counsel’s Dig., Assem. Bill No. 223 (2003-2004 Reg.Sess.)) The legislative history shows that the Legislature was concerned that the *Smith v. Rae-Venter* rule would discourage meritorious appeals by employees and even discourage the use of Belman hearings altogether. (Sen. Corn. on Labor and Industrial Relations, Analysis of Assem. Bill No. 223 (2003-2004 Reg. Sess.) as introduced, p. 3.)

uphold the Labor Commissioner's award and is not objecting to the Commissioner's final order. (§ 98.4.) Such claimants represented by the Labor Commissioner may still collect attorney fees pursuant to section 98.2, although such claimants have not, strictly speaking, incurred attorneys fees, because construction of the statute in this manner is consistent with the statute's goals of discouraging unmeritorious appeals of wage claims. (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 376.)

In sum, when employees have a wage dispute with an employer, they have a right to seek resolution of that dispute through the Labor Commissioner, either through the commissioner's settlement efforts, through an informal Berman hearing, or through the commissioner's direct prosecution of the action. When employees prevail at a Berman hearing, they will enjoy the following benefits: (1) the award will be enforceable if not appealed; (2) the Labor Commissioner is statutorily mandated to expend best efforts in enforcing the award, which is also established as a court priority; (3) if the employer appeals, it is required to post a bond equal to the amount of the award so as to protect against frivolous appeals and evading the judgment; (4) a one-way attorney fee provision will ensure that fees will be imposed on employers who unsuccessfully appeal but not on employees who unsuccessfully defend their Berman hearing award, or on employees who appeal and are awarded an amount greater than zero in the superior court; (5) the Labor Commissioner is statutorily mandated to represent in an employer's appeal claimants unable to afford an attorney if the claimant does not contest the Labor Commissioner's award.

B. Berman Hearings and Arbitration Are Compatible

We note that the Labor Commissioner, who intervened in this case at the trial court level, did not contend that arbitration and Berman hearings are incompatible, or that the present arbitration agreement could not be enforced, but only that “the arbitration agreement should be construed as providing that respondent is entitled to initially pursue his remedy before the Commissioner and is only required to proceed to arbitration if and when a *de novo* appeal is filed.” The trial court’s order did not irrevocably deny the petition to compel arbitration but merely ruled that it could not be granted until a Berman hearing had taken place. This is also Moreno’s position before us. Because, as will appear, the answer to the question whether a Berman hearing and arbitration are compatible will shape our answer to the questions of whether a Berman waiver is contrary to public policy and unconscionable, we address the former question first.

We construe the relevant statutes to permit binding arbitration after a Berman hearing. We recently considered an analogous statutory scheme in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557 (*Schatz*). In that case, a client in a fee dispute with his attorney first resorted to the Mandatory Fee Arbitration Act (MFAA), which provides a nonbinding method of arbitrating attorney-client fee disputes governed by rules established by the State Bar. (Bus. & Prof. Code, § 6200.) When the arbitrators decided in the attorney’s favor, the client, *Schatz*, filed a complaint in superior court for a trial *de novo*, notwithstanding the fact that attorney and client had entered into an agreement for binding

arbitration. Schatz, in resisting a petition to compel arbitration, argued that by its literal terms the MFAA, in Business and Professions Code section 6204, gives either party to an MFAA arbitration the right to a “trial” after the arbitration if a request for a trial is filed within 30 days.

In answering the question of whether Schatz was bound by the arbitration agreement, we framed the analysis in terms of whether the statutory language in the MFAA was designed to impliedly repeal the California Arbitration Act (CAA), which contemplated that binding arbitration agreements be enforced. We noted that all presumptions are against implied repeal, and that, absent an express declaration of legislative intent, courts will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. (*Schatz, supra*, 45 Cal.4th at p. 573.)

We concluded in *Schatz* that there was no such implied repeal. “Nothing in the MFAA makes [a binding] arbitration agreement . . . unenforceable. The MFAA and the CAA create two very different types of arbitration. . . . Both may be given effect. Clients may, if they wish, request and obtain nonbinding arbitration under the MFAA. That arbitration may, and often will, resolve the dispute. But if the client does not request nonbinding arbitration, or if it is held but does not resolve the dispute, then the MFAA has played its role, and the matter would continue without it. Either party may then pursue judicial action unless the parties had agreed to binding arbitration. In that event, the CAA would apply, and the dispute would go to binding arbitration. This conclusion is consistent

with the statutory language of both the MFAA and the CAA and the strong public policy in favor of binding arbitration as a means of resolving disputes.” (*Schatz, supra*, 45 Cal.4th at p. 574.)

As in *Schatz*, we do not construe the Berman hearing procedures as impliedly repealing the CAA’s requirement that arbitration agreements be enforced. Thus, as in *Schatz*, notwithstanding the fact that Berman’s nonbinding dispute resolution procedure contemplates a de novo appeal to the superior court (§ 98.2, subd. (a)), we interpret that language to provide that “[e]ither party may. . . pursue judicial action unless the parties had agreed to binding arbitration. In that event, the CAA would apply, and the dispute would go to binding arbitration.” (*Schatz, supra*, 45 Cal.4th at p. 574.)

Like the Labor Commissioner below, we see no reason why the statutory protections afforded employees following a Berman hearing cannot be made available in an arbitration proceeding. A party to a Berman hearing seeking a de novo appeal via arbitration pursuant to a prior agreement rather than through a judicial proceeding would initially file an appeal in superior court pursuant to section 98.2, subdivision (a), together with a petition to compel arbitration. The superior court would determine whether the appeal is timely and whether it comports with all the statutory requirements, such as the undertaking requirement in subdivision (b). If so, and if the petition to compel arbitration is unopposed, or found to be meritorious, the trial court will grant the petition. The Labor Commissioner, pursuant to section 98.4, may then represent an eligible wage claimant in the arbitration proceeding. The one-way fee-shifting provisions of section 98.2, subdivision (c) will be enforced initially

by the arbitrator, with such judicial review as may be appropriate.

The above framework does not purport to anticipate every problem that may arise from dovetailing the Berman hearing statutes and the CAA. But the Labor Commissioner's position below that the Berman hearing was merely preliminary to, rather than preemptive of, binding arbitration confirms our conclusion that the two statutory schemes are compatible and that having the Berman hearing precede arbitration is workable.

That a Berman hearing and an arbitration pursuant to the CAA are compatible does not, of course, answer the question whether an employer can require an employee to waive a Berman hearing and go directly to arbitration as a condition of employment. We turn now to the question.

C. Does the Waiver of a Berman Hearing Violate Public Policy and Is It Unconscionable?

In determining whether a Berman waiver violates public policy, we first review the law related to mandatory employment arbitration agreements, i.e., arbitration agreements that are conditions of new or continuing employment. In *Armendariz, supra*, 24 Cal.4th 83, we concluded that such agreements were enforceable, provided they did not contain features that were contrary to public policy or unconscionable. (*Id.* at p. 99.) We concluded that "arbitration agreements cannot be made to serve as a vehicle for the waiver of [unwaivable] statutory rights," such as rights under the Fair Employment and Housing Act (FEHA). To ensure that such waiver did not occur, we held that arbitrations addressing such statutory

rights would be subject to certain minimal requirements. As we later summarized these: “(1) the arbitration agreement may not limit the damages normally available under the statute (*Armendariz, supra*, 24 Cal.4th at p. 103); (2) there must be discovery ‘sufficient to adequately arbitrate their statutory claim’ (*id.* at p. 106); (3) there must be a written arbitration decision and judicial review “sufficient to ensure the arbitrators comply with the requirements of the statute” (*ibid.*); and (4) the employer must ‘pay all types of costs that are unique to arbitration’ (*id.* at p. 113).” (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076 (*Little*)). We did not hold that the above requirements were the only conditions that public policy could place on arbitration agreements, and have since recognized other limitations. (See *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 463 (*Gentry*) [prohibition of class arbitration contrary to public policy in some cases].)

Here we must decide whether an employee in the context of an arbitration agreement can waive the right to a Berman hearing and posthearing protections. In concluding that such rights may be waived, the Court of Appeal first acknowledged, correctly, that the right to vacation pay was a vested right and therefore unwaivable under section 227.3.³ (See

³ Section 227.3 states in part: “Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination.”

Suastez v. Plastic Dress-Up Co. (1982) 31 Cal.3d 774, 780, 784.) Having established the vested right to vacation pay, the court framed its inquiry as follows: “We must decide whether the absence of these statutory protections will significantly impair Moreno’s ability to vindicate his wage rights in arbitration. According to *Gentry*. . . , ‘*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.’ (*Gentry, supra*, 42 Cal.4th at p. 463, fn. 7.)”

The court then reasoned that the Berman hearing and post-Berman protections would not significantly impair Moreno’s ability to vindicate his right to vacation pay through arbitration. “Significantly, all of these statutory protections are only available if and when an employer appeals from an adverse administrative ruling. Obviously, it is impossible to determine whether Moreno will prevail at the administrative hearing. Accordingly, it is impossible to determine whether Moreno will lose any statutory protections if the Berman waiver is enforced. Unless enforcing the Berman waiver will pose significant obstacles to the vindication of Moreno’s statutory wage rights, *Armendariz* does not require us to invalidate the waiver. At most, enforcing the Berman waiver will eliminate the possibility of receiving statutory protections that are contingent on an administrative ruling in Moreno’s favor. We are not persuaded that the loss of what are merely contingent benefits can be equated with the significant obstacle to the vindication of statutory rights that *Armendariz* sought to address.”

The Court of Appeal elaborated: “[T]he record contains no evidence that Moreno or any other wage claimant lacks the knowledge, skills, abilities, or resources to vindicate his or her statutory wage rights in an arbitral forum. Even assuming the arbitral process is more difficult to navigate than the Berman process, there is nothing in this record to indicate that enforcing a Berman waiver will significantly impair the claimant’s ability to vindicate his or her statutory rights. In short, Moreno has failed to demonstrate either the inadequacy of the arbitral forum provided by his arbitration agreement or the existence of a factual basis to invalidate all Berman waivers as against public policy.”

In the present case, however, the question is not whether, in a court’s judgment, the absence of statutory protections afforded by the Berman hearing and the potential post-Berman protections would significantly impair Moreno’s ability to vindicate his unwaivable right to vacation pay in arbitration. Rather, the question is whether the employee’s statutory right to seek a Berman hearing, with all the possible protections that follow from it, is itself an unwaivable right that an employee cannot be compelled to relinquish as a condition of employment. We conclude that it is.

The question whether the waiver of a particular statutory protection is contrary to public policy essentially entails discerning legislative intent. Sometimes statutory rights are made expressly unwaivable. (See § 1194 [right to recover minimum wage notwithstanding any agreement]; Civ. Code, § 1751 [waiver of rights under the Consumer Legal Remedies Act unenforceable and void].) In other cases, whether a statute can be waived may be implied from the context

and purpose of the statute. Thus, in *Armendariz*, we deduced the unwaivability of FEHA rights to redress nondiscrimination from the fact that it incorporated this state's strong public policy against various types of employment discrimination. (*Armendariz, supra*, 24 Cal.4th at pp. 100-101.)

There is no question that the lawful payment of wages owed is not merely an individual right but an important public policy goal. As one appellate court correctly summarized the matter: "Civil Code section 3513 provides, in pertinent part, that:

'[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.' [¶] The determination of whether a particular statute is for public or private benefit is for the court in each case (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 645, p. 586). The provisions of the Labor Code, particularly those directed toward the payment of wages to employees entitled to be paid, were established to protect the workers and hence have a public purpose. As was pointed out in *In re Trombley* (1948) 31 Cal.2d 801, 809: 'kit has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due.' (Also see *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326-327.)" (*Henry v. Amrol, Inc.* (1990) 222 Cal.App.3d Supp. 1, 6.)

Although the statutory protections that the Berman hearing and the posthearing procedures afford employees were added piecemeal over a number of years, their common purpose is evident: Given the dependence of the average worker on prompt payment of wages, the Legislature has devised the Berman hearing and posthearing process as a means of affording an employee with a meritorious wage claim certain advantages, chiefly designed to reduce the costs and risks of pursuing a wage claim, recognizing that such costs and risks could prevent a theoretical right from becoming a reality. These procedures, including the employer undertaking and the one-way fee provision, also deter employers from unjustifiably prolonging a wage dispute by filing an unmeritorious appeal. This statutory regime therefore furthers the important and long-recognized public purpose of ensuring that workers are paid wages owed. The public benefit of the Berman procedures, therefore, is not merely incidental to the legislation's primary purpose but in fact central to that purpose. Nor can there be any doubt that permitting employers to require employees, as a condition of employment, to waive their right to a Berman hearing would seriously undermine the efficacy of the Berman hearing statutes and hence thwart the public purpose behind the statutes.

Sonic argues in effect that even if a nonarbitration clause that required a Berman hearing waiver is contrary to public policy, an arbitration clause containing the same waiver would not be, because arbitration offers the same or similar advantages as does the Berman hearing process. We disagree. As the previous part of this opinion makes clear, the choice is not between a Berman hearing and arbitration, because a person subject to binding arbitration and

eligible for a Berman hearing will still be subject to binding arbitration if the employer appeals the Berman hearing award.) The choice is rather between arbitration that is or is not preceded by a Berman hearing. As discussed above, there are considerable advantages for employees to undergo the Berman hearing process before arbitration. First, the Labor Commissioner's staff is directed to settle claims either informally or through a conference between the parties. (DLSE, Policies and Procedures for Wage Claim Processing, *supra*, at pp. 2-3.) If no settlement is obtained, a Berman hearing is to be conducted in "an informal setting preserving the rights of the parties" (§ 98, subd. (a)), conducted, as explained above, without discovery or formal rules of evidence, and with the hearing officer's assistance in cross-examining witnesses and understanding terms and issues. It is thus structured so that an employee can avail himself or herself of the process without the need of counsel. An employee who is successful at a Berman hearing will have the resources of the Labor Commissioner behind him or her to ensure that the judgment is enforced. (§ 98.2, subd. (i).) If the employer appeals, then the employer must post an undertaking in the amount of the award to ensure enforcement of the judgment if the employee ultimately prevails. (§ 98.2, subd. (b).) An employee unable to afford counsel will be represented by the Labor Commissioner if the employer requests arbitration and the employee does not contest the commissioner's award. (§ 98.4.) Moreover, an employee in this circumstance will not be liable for the employer's attorney fees if the employer prevails on appeal. (§ 98.2, subd. (c).)

In contrast, arbitration, notwithstanding its advantages as a reasonably expeditious means of resolving disputes, still generally bears the hallmark of a formal

legal proceeding in which representation by counsel is necessary or at least highly advantageous. The arbitration in question here, for example, is to be conducted by a “retired California Superior Court Judge” and “to the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8.” The arbitrator’s award at either party’s request will be reviewed by a second arbitrator who will “as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial.” A wage claimant undergoing arbitration will need the same kind of legal representation as if he or she were going to superior court.

Thus, an employee going directly to arbitration will lose a number of benefits and advantages. He or she will not benefit from the Labor Commissioner’s settlement efforts and expertise. He or she must pay for his or her own attorney whether or not able to afford it—an attorney who may not have the expertise of the Labor Commissioner. Moreover, what matters to the employee is not a favorable arbitration award per se but the enforcement of that award, and an employee going directly to arbitration will have no special advantage obtaining such enforcement. Nor is there any guaranty that the employee will not be responsible for any successful employer’s attorney fees, for under section 218.5, an employee who proceeds directly against an employer with a wage claim not preceded by a Berman hearing will be liable

for such fees if the employer prevails on appeal.⁴ In short, the Berman hearing process, even when followed by binding arbitration, provides on the whole substantially lower costs and risks to the employee, greater deterrence of frivolous employer claims, and greater assurance that awards will be collected, than does the binding arbitration process alone.⁵

⁴ At oral argument, Sonic's counsel argued that its arbitration in fact resembled a Berman hearing in its informality, and the arbitrator would or might incorporate Berman-like protections such as one-way fee shifting. Nothing in the arbitration agreement, nor anything else in the record before us, confirms these representations. It may be possible for an arbitration system to be designed so that it provides an employee all the advantages of the Berman hearing and posthearing protections. But there is no indication that the present arbitration system is so designed.

⁵ Nor are we persuaded to the contrary by assertions about arbitration's greater expedition. Based on the various statutory deadlines, as well as memoranda by the Labor Commissioner and declarations by labor law attorneys, we concluded in 1998 that the time between filing a complaint with the Labor Commissioner and a Berman hearing date is usually four to six months. (*Cuadra, supra*, 17 Cal.4th at pp. 860-862 & fn. 7.) Sonic, in its petition to compel arbitration below, documented three cases in which the commencement of a Berman hearing took longer than this average, in one case slightly under four years, in two other cases slightly under one year. No doubt the time between the filing of an administrative complaint and commencement of a Berman hearing is subject to variation. Whether the delays represent a backlog in the Labor Commissioner's workload, or were generated by the parties themselves, or how these times compare to the completion of an arbitration, is not clear. It may be the case that once a dispute has arisen, some employees' assessment of the time it will take to conduct a Berman hearing, when compared to the time it will take to resolve a claim by going directly to arbitration, will weigh in favor of the latter course. That an employee may make this assessment does not alter the fact that he or she gains no advantage, and places himself or herself at a possible significant disadvantage, by agreeing to

Sonic argues that we can construe the arbitration agreement, as we did in *Armendariz*, to provide protections equivalent to those available during and after a Berman hearing. The argument is without merit. In *Armendariz*, we recognized that in some cases, terms in an arbitration agreement that are unconscionable or contrary to public policy may be severed and the rest of the agreement enforced. (*Armendariz, supra*, 24 Cal.4th at pp. 123-124; see *Little, supra*, 29 Cal.4th at pp. 1075-1076.) We also construed an arbitration agreement that was silent about some matters, such as costs, so as to make it conform to public policy. (*Armendariz, supra*, at p. 113.) Here, Sonic does not ask us to sever an unlawful provision or to construe a provision in a manner that renders it lawful, but rather to, in effect, reform a statute. As reviewed above, the statutory protections pursuant to sections 98.2 and 98.4 are contingent on the Labor Commissioner's findings in a Berman hearing that an employee's claim is meritorious. For this court to order the Labor Commissioner or arbitrator to provide those protections when there has been no prior favorable determination in a Berman hearing is contrary to statute and beyond our authority.⁶

waive the option of a Berman hearing in advance as a condition of employment.

⁶ This is not to say that *Armendariz* is irrelevant in the context of post-Berman-hearing arbitration. As Sonic appears to have conceded at oral argument, *Armendariz's* procedural protections, and in particular its fee-shifting requirement, are applicable. A wage claimant who has undergone a Berman hearing cannot be compelled to bear arbitration forum costs he or she would not be required to pay if the employer appealed to superior court. (See *Armendariz, supra*, 24 Cal.4th at p. 113.) A contrary rule that would subject a wage claimant to either the risk or the reality of

Contrary to Sonic's suggestion, and that of the dissent, the fact that the Berman hearing is merely an option for employees, who may also go directly to court (§ 218), does not alter the nonwaivability of the Berman hearing protections, for it is precisely that *option* which an employer may not foreclose in a predispute agreement. The purpose of the Berman hearing statutes is to empower wage claimants by giving them access to a Berman hearing with all of its advantages. Allowing an employee the freedom to choose whether to resort to a Berman hearing when a wage claim arises, after evaluating in light of the particular circumstances whether such a hearing is advantageous, is wholly consistent with the public policy behind the Berman hearing statutes. A requirement that the employee surrender the option of a Berman hearing as a condition of employment is not. As we recognized in *Armendariz*, our concern is with the impermissible waiver of certain rights and protections as a condition of employment before a dispute has arisen. (See *Armendariz, supra*, 24 Cal.4th at p. 103, fn. 8)⁷ We therefore find the argument that, because the Legislature intended an employee to have the option of a Berman hearing when a wage claim arises, the Legislature also must have intended to

being saddled with substantial arbitration costs that could either diminish or nullify a potential award or discourage employees from seeking such an award in the first place would be in fundamental conflict with the purpose of a Berman hearing to provide employees a low-cost and effective means of vindicating such claims.

⁷ We thus do not decide whether it is contrary to public policy to knowingly and voluntarily waive the right to seek a Berman hearing as part of a freely negotiated, nonstandard contract, such as may exist between an employer and a highly compensated executive employee.

permit employers to require employees to waive that option as a condition of employment, to be unpersuasive.

Sonic finds support for the Court of Appeal's holding in *Gently*, in which we concluded that some class arbitration waivers are unlawful but declined to categorically declare invalid all such waivers. *Gentry* is readily distinguishable. Class arbitration is a judicially devised procedure. We acknowledged that class actions or arbitrations were not categorically necessary to vindicate statutory rights, and that under some circumstances, those rights could be adequately enforced by individual action. (*Gentry, supra*, 42 Cal.4th at pp. 462, 464.) We further recognized the well-established principle that “[t]rial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action” (*Id.* at pp. 463-464, quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) In the present case, in contrast, the Berman hearing and posthearing procedures have been mandated by the Legislature to be available to all employees with wage complaints that fall within the scope of the statute. As discussed above, that mandate represents a legislative judgment about the special protections and procedural rights that should be afforded to persons with wage claims in order to ensure that such claims be fairly resolved. The judgment that such a waiver is contrary to public policy is not contingent upon the determination of a trial court, during a petition to compel arbitration, about whether and to what extent a particular wage claimant will benefit from the Berman hearing process. Indeed, as the Court of Appeal acknowledged, the trial court at that stage is in no position to determine such matters.

Moreover, notwithstanding the Court of Appeal's and Sonic's suggestions, Berman hearings and post-hearing protections are by their own terms made available to all statutorily eligible wage earners, not merely low-wage workers. This legislative determination cannot be modified by a judicial determination that employees earning something more than a low wage do not really require these protections and therefore can be required to waive them as a condition of employment. Sonic suggests that the fact that Moreno had been earning over \$100,000 at the time he left his employment means that he would not be in the class of persons unable to afford counsel and eligible for representation by the Labor Commissioner in the event of an appeal. But extending this suggestion into an argument that a Berman waiver as applied to Moreno is not contrary to public policy suffers from at least three flaws. First, as Moreno's counsel points out, there is nothing in the record regarding Moreno's present financial condition. Second, the determination of whether a claimant is unable to afford counsel is vested solely in the Labor Commissioner under section 98.4, and a superior court deciding a petition to compel arbitration is in no position to guess what the commissioner's determination will be. Third and most fundamentally, even if it could be determined that Moreno's financial condition was such that he would not be represented by the Labor Commissioner, the Berman statutes provide, as explained, many advantages to all wage claimants, not only indigent ones. These include the informal hearing itself, the commissioner's settlement efforts, the bonding requirement ensuring that wage awards to employees actually be enforced, and the one-way fee-shifting provision discouraging frivolous employer appeals and encouraging the pursuit of meritorious claims without

fear of financial penalty.⁸ We therefore conclude the Berman waiver at issue here is contrary to public policy.⁹

⁸ Sonic also cites in support *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276. In that case, a high-ranking executive sued his former employer for breach of contract and for nonpayment of statutory wages under section 200 et seq. The Court of Appeal, in upholding the employer's petition to compel arbitration, rejected the argument that the *Armendariz* requirements applied in that case, which it characterized as a "garden-variety" breach of contract action. (*Giuliano, supra*, at p. 1289.) The plaintiff in *Giuliano* did not seek a Berman hearing but filed an action directly in court. That case is therefore inapposite.

⁹ The dissent goes to great lengths in its attempts to show that a Berman waiver is not contrary to public policy. Yet it does not contest in any concrete way that Berman hearings and posthearing protections provide important advantages to employees not present if the employee went directly to arbitration, or that permitting a Berman hearing waiver as a condition of employment would substantially undermine the legislative policy behind the Berman hearing statutes. It is true, as discussed above, that a given employee may choose to forgo a Berman hearing and go directly to arbitration, perhaps concluding, for example, that his or her strong case may be resolved more quickly. But whatever advantages arbitration without a Berman hearing may have for an employee will be realized if the employee is given a *choice*, once a wage dispute arises, of going directly to arbitration or going first to the Labor Commissioner. It is precisely this choice that the Berman statutes authorize and the predispute waiver at issue in this case, which the dissent would uphold, seeks to revoke. Moreover, the dissent's conjecture that employers who cannot insert Berman waivers into arbitration agreements will likely abandon arbitration of wage claims (dis. opn., *post*, at p. 28, fn. 8) is groundless speculation. The dissent also seeks to minimize the public importance of the Berman hearing legislation, notwithstanding venerable case law discussed above affirming that the collection of wages owed not only vindicates individual rights but fulfills an important public purpose. (See *Armendariz, supra*, 24 Cal.4th at pp. 100-101 [anti-employment-discrimination statutes unwaivable notwithstanding

Our conclusion is the same if we analyze the issue in terms of unconscionability.¹⁰ One common formulation of unconscionability is that it refers to “an

significant individual benefit to employees].) Nor does the dissent’s lengthy discussion of the case law of the United States Supreme Court and this court (see dis. opn., *post*, at pp. 11-16)—case law that merely stands for the uncontroversial proposition that statutory claims are generally arbitrable—shed light on the present case. Nor is the dissent correct when it asserts that our public policy arguments are at odds with those of Moreno. Moreno argues vigorously that the Berman waiver, by forcing employees to forego the various statutory advantages discussed above and in great detail in his briefs, “limits the remedies that would otherwise be available to enforce employees’ statutory rights [e.g., one-way fee-shifting and undertaking requirements], and . . . imposes costs exceeding those that the employee would normally incur [e.g., costs of counsel].” We agree.

¹⁰ We requested supplemental briefing on the unconscionability issue, which was not argued in the courts below. Sonic contends that we should not address unconscionability, principally arguing that it was not afforded the opportunity to produce evidence regarding unconscionability. (See Civ. Code, § 1670.5, subd. (b).) It is true, as has been stated, that “[u]nconscionability is a question of law for the court. [Citations.] Nonetheless, factual issues may bear on that question.” (*Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 480.) When, however, there is no dispute as to the evidence, the court may resolve the unconscionability issue in the context of a petition to compel arbitration without resort to such a hearing and testimony. (See, e.g., *Armendariz, supra*, 24 Cal.4th at pp. 115-121.) Here, the only issue that Sonic specifically cites as requiring further factual or evidentiary exploration is that of surprise. As will appear below, however, we do not rely on the element of surprise in our procedural unconscionability analysis, but on the uncontested fact that the agreement was one of adhesion and imposed as a condition of employment.

Moreover, Moreno did raise the unconscionability issue below as an affirmative defense to the petition to compel arbitration. Although as a matter of general policy we do not decide issues not raised in the Court of Appeal (Cal. Rules of Court, rule

absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” (*Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1170, and authorities cited therein.) As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. “The procedural element of an unconscionable contract generally takes the form of a contract of adhesion,”” which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. (*Little, supra*, 29 Cal.4th at p. 1071.)

“Substantively unconscionable terms can take various forms, but may generally be described as unfairly one-sided. One such form, as in *Armendariz*, is the arbitration agreement’s lack of a “modicum of bilaterality,” wherein the employee’s claims against the employer, but not the employer’s claims against the employee, are subject to arbitration. (*Armendariz, supra*, 24 Cal.4th at p. 119.) Another kind of substantively unconscionable provision occurs when the party imposing arbitration mandates a post-arbitration

8.500(c)(1)), we may depart from that policy when an important countervailing purpose would be served. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6-7 & fn. 2 [this court has the discretion to consider important issues of law not argued by the parties below].) Here, as explained below, the issues of public policy and unconscionability are closely linked, and a decision on both issues will serve to clarify the scope of our holding, as well as more fully explain our conclusion that a rule generally prohibiting a Berman waiver as a condition of employment is not preempted by the FAA.

proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed.” (*Little, supra*, 29 Cal.4th at pp. 1071-1072.) In determining unconscionability, our inquiry is into whether a contract provision was “unconscionable at the time it was made.” (Civ. Code, § 1670.5, subd. (a).)

Here, the arbitration agreement was a contract of adhesion indisputably imposed as a condition of employment. Moreover, we have recognized that contract terms imposed as a condition of employment are particularly prone to procedural unconscionability. “[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.” (*Armendariz, supra*, 24 Cal.4th at p. 115.) Moreover, many employees may not give careful scrutiny to routine personnel documents that employers ask them to sign. (See *Gentiy, supra*, 42 Cal.4th at p. 471.)

Furthermore, for reasons suggested above, significant substantive unconscionability is also present. As explained, Berman hearing and posthearing procedures were designed to provide wage claimants with meritorious claims unique protections that lower the costs and risks of pursuing such claims, leveling a playing field that generally favors employers with greater resources and bargaining power. Requiring employees to forgo these protections as a condition of employment can only benefit the employer at the expense of the employee. Nor can we say, as also explained, that the benefits the employee gains from arbitration

compensates for what he or she loses by forgoing the option of a Berman hearing.

In sum, rather than being justified by “legitimate commercial needs” (see *Armendariz, supra*, 24 Cal.4th at p. 117), the main purpose of the Berman waiver appears to be for employers to gain an advantage in the dispute resolution process by eliminating the statutory advantages accorded to employees designed to make that process fairer and more efficient. We conclude the waiver is markedly one-sided and therefore substantively unconscionable. This substantive unconscionability, together with the significant element of procedural unconscionability, leads to the conclusion that the Berman waiver in the arbitration agreement at issue here is unconscionable.

We note that the public policy and unconscionability defenses, albeit similar in some ways, are different in important respects. A public policy defense is concerned with the relationship of the contract to society as a whole, and targets contractual provisions that undermine a clear public policy, such as an unwaivable statutory right designed to accomplish a public purpose. (See *Armendariz, supra*, 24 Cal.4th at pp. 100-101.) Unconscionability is concerned with the relationship between the contracting parties and one-sided terms (*id.* at p. 114), such that consent in any real sense appears to be lacking. Contracts can be contrary to public policy but not unconscionable (see *Board of Education v. Round Valley Teachers Assn* (1996) 13 Cal.4th 269, 287-288 [provision in a negotiated collective bargaining contract conflicts with a statute and is therefore unenforceable]) and vice versa (see *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 493 [warranty disclaimer and exclusion of consequential damages in particular

commercial contract unconscionable].) But there is sometimes an overlap between these two defenses to contract enforcement.

Such is the case here. On the one hand, to permit employers to require employees to waive the right to a Berman hearing as a condition of employment would gravely undermine the public policy behind the Berman hearing statutes, as discussed above. On the other hand, because the Berman hearing statutes accomplish their public policy goal of ensuring prompt payment of wages by according employees special advantages in their effort to obtain such payment, a provision in a contract of adhesion that requires the employee to surrender such advantages as a condition of employment is oppressive and one-sided, and therefore unconscionable.¹¹

D. Our Holding Is Not Preempted by the FAA

Sonic contends that a holding that a predispute waiver of a Berman hearing in an arbitration agreement is contrary to public policy and unconscionable

¹¹ The dissent argues that the agreement “viewed from a broader perspective is not unconscionable” because the agreement binds both parties to arbitrate all disputes, subject to certain exceptions. (Dis. opn., *post*, at pp. 28-29.) The argument is off the mark. It is true that an arbitration agreement may be unconscionable when it requires “arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party.” (*Armendariz, supra*, 24 Cal.4th at p. 119.) But that is not the only form unconscionability may take. In the present case, as discussed, the Berman statutes were part of a public policy designed to advantage employees seeking wages owed. This arbitration agreement requires the employee to forgo these advantages, without seeking any comparable sacrifice from the employer. To contend that this agreement is simply a bilateral agreement to arbitrate ignores that important reality.

would be preempted by the FAA. To address this claim, we begin by reviewing some basic principles pertaining to the enforcement of arbitration agreements and FAA preemption. “California law, like federal law, favors enforcement of valid arbitration agreements. [Citation.] . . . Thus, under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’ (*Armendariz, supra*, 24 Cal.4th at pp. 97-98; see also 9 U.S.C. § 2; Code Civ. Proc., § 1281.) In other words, although under federal and California law, arbitration agreements are enforced ‘in accordance with their terms’ (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468 (*Volt*)), such enforcement is limited by certain general contract principles “‘at law or in equity for the revocation of any contract.’” (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 163 (*Discover Bank*)). Thus, “under section 2 of the FAA, a state court may refuse to enforce an arbitration agreement based on ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” (*Little, supra*, 29 Cal.4th at p. 1079, quoting *Doctor’s Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687)¹²

¹² We note that in general, the question whether an arbitration agreement is unconscionable or contrary to public policy is for the court, not the arbitrator, to decide. (*Discover Bank v. Superior Court, supra*, 36 Cal.4th at p. 171.) Recently, the Supreme Court held, in a case brought in federal court, that the question of unconscionability of an arbitration agreement may be for the arbitrator to decide when the agreement has clearly and unmistakably delegated that issue to the arbitrator. (*Rent-A-Center v. Jackson* (2010) __U.S. __ [130 S.Ct. 2772, 2778-2779].) Sonic has not contended that the arbitration agreement delegates responsibility to the arbitrator to decide questions of the

The doctrine of unconscionability cannot be used, however, in a way that discriminates against arbitration agreements. In *Perry v. Thomas* (1987) 482 U.S. 483 (*Perry*), for example, the court held that section 229, which provides in pertinent part that “[a]ctions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate,” was preempted by the FAA in all cases in which the FAA applies. The court concluded that the requirement under section 229 “that litigants be provided a judicial forum for resolving wage disputes” stood in direct conflict with the FAA. (*Perry, supra*, at p. 491.) The *Perry* court further made clear that the doctrine of unconscionability could not be used to save section 229 from FAA preemption. “[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. [Citations.] A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law

agreement’s unconscionability or violation of public policy. We thus have no need to decide whether *Rent-A-Center’s* five-to-four decision applies to actions brought in state court (see *Preston, supra*, 552 U.S. 346, 363 (dis. opn. of Thomas, J.) [reaffirming the view of Justice Thomas that the FAA does not apply to state court proceedings]), nor whether we would adopt a similar rule as a matter of state law.

holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.” (*Perry, supra*, 482 U.S. at pp. 492-493, fn. 9.)

Here, our conclusion that Berman waivers are contrary to public policy and unconscionable does not discriminate against arbitration agreements. We neither construe the arbitration agreement “in a manner different from that in which [we would] construe[] nonarbitration agreements” nor do we “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” (*Perry, supra*, 482 U.S. at p. 492, fn. 9.) Rather, our conclusion that a Berman waiver is contrary to public policy and unconscionable is equally applicable whether the waiver appears within an arbitration agreement or independent of arbitration. Our holding does not disfavor arbitration agreements, but neither does it permit them “to harbor terms, conditions and practices’ that undermine public policy.” (*Discover Bank, supra*, 36 Cal.4th at p. 166.)

In arguing that the FAA preempts a state law rule precluding Berman waivers, Sonic relies in particular on *Preston, supra*, 552 U.S. 346, and a careful examination of that decision is therefore necessary. In *Preston*, the United States Supreme Court considered a California case arising from a dispute between a television personality, Judge Alex Ferrer, and Attorney Arnold Preston regarding fees allegedly owed the latter. The agreement between them called for dispute resolution via arbitration. Ferrer claimed, however, that the attorney had been acting as a talent agent without a license in violation of the Talent Agencies Act (TAA; § 1700 et seq.), and that therefore under the terms of that statute the contract was invalid and

unenforceable. (*Preston, supra*, 552 U.S. at p. 350.) Ferrer sought to adjudicate the matter in the first instance before the Labor Commissioner, with whom the TAA vests primary jurisdiction to adjudicate disputes arising under that statute, permitting an appeal within 10 days to the superior court for a de novo hearing. (§ 1700.44.) Preston sought instead to compel arbitration, but the trial court denied the petition on the ground that the Labor Commissioner had primary jurisdiction, and the Court of Appeal affirmed. After we denied review, the United States Supreme Court granted Preston’s petition for a writ of certiorari. (*Preston, supra*, 552 U.S. at pp. 350-351.)

The Supreme Court reversed, holding that the TAA’s grant of primary jurisdiction to the Labor Commissioner, inasmuch as it thwarted the arbitration agreement, violated the FAA. Section 2 of the FAA, which requires enforcement of arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract” (9 U.S.C. § 2) “declare[s] a national policy favoring arbitration’ of claims that parties contract to settle in that manner. *Southland Corp. [v. Keating]* (1984) 465 U.S. [1], 10. That national policy, we held in *Southland*, ‘appli[es] in state as well as federal courts’ and ‘foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.’ *Id.*, at 16. The FAA’s displacement of conflicting state law is ‘now well-established [citations]. . . .’” (*Preston, supra*, 552 U.S. at p. 353.)

“A recurring question under § 2 is who should decide whether ‘grounds. . . exist at law or in equity’ to invalidate an arbitration agreement. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967), we held that attacks on the validity of an

entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken. [¶] The litigation in *Prima Paint* originated in federal court, but the same rule, we held in *Buckeye [Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440 (*Buckeye*)), applies in state court. 546 U.S., at 447-448. The plaintiffs in *Buckeye* alleged that the contracts they signed, which contained arbitration clauses, were illegal under state law and void *ab initio*. *Id.*, at 443, 126 S.Ct. 1204. . . [W]e held that the plaintiffs' challenge was within the province of the arbitrator to decide. See 546 U.S., at 446, 126 S.Ct. 1204." (*Preston, supra*, 552 U.S. at p. 353.)

The *Preston* court then concluded that "*Buckeye* largely, if not entirely, resolves the dispute before us. The contract between Preston and Ferrer clearly 'evidenc[ed] a transaction involving commerce,' 9 U.S.C. § 2, and Ferrer has never disputed that the written arbitration provision in the contract falls within the purview of § 2. Moreover, Ferrer sought invalidation of the contract as a whole. In the proceedings below, *he made no discrete challenge to the validity of the arbitration clause*. [Citation.] Ferrer thus urged the Labor Commissioner and California courts to override the contract's arbitration clause on a ground that *Buckeye* requires the arbitrator to decide in the first instance." (*Preston, supra*, 552 U.S. at p. 354, fn. omitted, italics added.)

The Supreme Court then rejected Ferrer's argument that the case was distinguishable from *Buckeye* because "the TAA merely requires exhaustion of administrative remedies before the parties proceed to arbitration." (*Preston, supra*, 552 U.S. at p. 354.) "The TAA permits arbitration in lieu of proceeding before the Labor Commissioner if an arbitration provision 'in a contract

between a talent agency and [an artist]’ both ‘provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings’ and gives the Commissioner ‘the right to attend all arbitration hearings.’ § 1700.45. This prescription demonstrates that there is no inherent conflict between the TAA and arbitration as a dispute resolution mechanism. But § 1700.45 was of no utility to Preston. He has consistently maintained that he is not a talent agent as that term is defined in § 1700.4(a), but is, instead, a personal manager not subject to the TAA’s regulatory regime. [Citation.] To invoke § 1700.45, Preston would have been required to concede a point fatal to his claim for compensation—*i.e.*, that he is a talent agent, albeit an unlicensed one—and to have drafted his contract in compliance with a statute that he maintains is inapplicable.

“Procedural prescriptions of the TAA thus conflict with the FAA’s dispute resolution regime in two basic respects: First, the TAA, in § 1700.44(a), grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate, see *Buckeye*, 546 U.S., at 446; second, the TAA, in § 1700.45, imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally, see *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. at 687.” (*Preston*, *supra*, 552 U.S. at pp. 355-356.)

The Supreme Court further rejected Ferrer’s contention “that the TAA is nevertheless compatible with the FAA because § 1700.44(a) merely postpones arbitration until after the Labor Commissioner has exercised her primary jurisdiction” and that after that proceeding “either party could move to compel arbitration under Cal.Civ.Proc.Code Ann. § 1281.2

(West 2007), and thereby obtain an arbitrator's determination prior to judicial review." (*Preston, supra*, 552 U.S. at p. 356.) The court noted that this position was inconsistent with the position Ferrer took below, and with a literal reading of the statute, that *de novo* review may be sought in superior court, not with an arbitrator. (*Preston, supra*, 552 U.S. at pp. 356-357.) But the court announced a broader holding: "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.' [Citations.] That objective would be frustrated even if *Preston* could compel arbitration in lieu of *de novo* Superior Court review. Requiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." (*Preston, supra*, 552 U.S. at pp. 357-358.)

The *Preston* court distinguished the case before it from *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279. In the latter case, the court had held that an arbitration agreement between an employer and an employee did not preclude the Equal Employment Opportunity Commission (EEOC) from exercising the independent prosecutorial authority granted it by Congress to pursue in court individual relief, or as the court phrased it, "victim-specific judicial relief," such as backpay, reinstatement, and damages, on behalf of employees subject to arbitration agreements. (*Id.* at p. 282; see *id.*, at p. 287.) The EEOC was not a party to the arbitration agreements, and it exercises its prosecutorial duties without the consent or supervision of the employees on whose behalf it brings its action. (*Id.* at p. 291.) As the *Preston* court stated, *Waffle House* was distinguishable because "in proceedings under § 1700.44(a), the Labor Commissioner functions not as an advocate advancing a cause before a tribunal authorized to find the facts and apply the

law; instead, the Commissioner serves as an impartial arbiter. That role is just what the FAA-governed agreement between Ferrer and Preston reserves for the arbitrator. In contrast, in *Waffle House* . . . , the Court addressed the role of an agency, not as adjudicator but as prosecutor, pursuing an enforcement action in its own name or reviewing a discrimination charge to determine whether to initiate judicial proceedings.” (*Preston, supra*, 552 U.S. at p. 359.)

The Court of Appeal below, treating the federal preemption issue as a threshold matter, rejected Sonic’s argument that *Preston* governs this case: “As the Supreme Court in *Preston* explained: (1) the artist was seeking to invalidate the *entire* contract based on the personal manager’s alleged violations of the TAA, which is an issue that *Buckeye* requires the arbitrator to decide in the first instance; (2) the validity and substantive rights of the *arbitration* clause were not in dispute; and (3) the only issue was whether the fee dispute should be resolved in an arbitral or administrative forum. The parties did not litigate in *Preston* whether there were any generally applicable contract defenses, such as fraud, duress, or unconscionability, which would invalidate or restrict the *arbitration* agreement.” The court then concluded that because the issue in the case before it was the unconscionability of the arbitration clause, *Preston* was not dispositive.

We agree with the Court of Appeal that *Preston* is distinguishable. In this case, unlike in *Buckeye* and in *Preston*, the challenge is to a portion of the arbitration agreement—the Berman waiver—as contrary to public policy and unconscionable, rather than to the contract as a whole. *Buckeye* therefore does not apply. These cases are distinguished not merely because of

the nature of the litigants' challenges, but also because of the fundamental differences between the two statutory regimes at issue. The statute in *Preston*, the TAA, merely lodges primary jurisdiction in the Labor Commissioner, and does not come with the same type of statutory protections as are found in the Berman hearing and posthearing procedures discussed above.¹³ In fact, notwithstanding Fener's argument that those in his position would be deprived of the Labor Commissioner's expertise (*Preston, supra*, 552 U.S. at p. 358), the *Preston* court recognized that section 1700.45 explicitly authorizes predispute agreements that allow parties to bypass the Labor Commissioner to resolve TAA issues through arbitration, albeit with certain conditions that could not lawfully be applied in that case (*Preston*, at p. 356). A predispute agreement that provides for such arbitration of TAA disputes, therefore, cannot be unconscionable or contrary to public policy. This is in marked contrast to the Berman hearing statutes, which have no comparable provision authorizing arbitration agreements that bypass the Labor Commissioner, and which we have construed as not permitting such agreements as a condition of employment.

Sonic makes much of a paragraph in *Preston* that it argues supports its position. As noted above, the court stated: "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious

¹³ Section 1700.44, subdivision (a) does require that a party wishing to stay the Labor Commissioner's monetary award on appeal post a bond not exceeding twice the amount of the judgment. This provision applies to whichever party to a TAA proceeding seeks a stay, in contrast to section 98.2, subdivision (b), which imposes an undertaking requirement exclusively on the employer.

results.’ [Citations.] That objective would be frustrated even if Preston could compel arbitration in lieu of *de novo* Superior Court review. Requiring initial reference of the parties’ dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy.” (*Preston, supra*, 552 U.S. at pp. 357-358.)

This statement cannot be read, as Sonic urges, to mean that any state law procedure that delays the commencement of arbitration is preempted by the FAA. Rather, the *Preston* court’s statement, read in context, is quite narrow. It merely affirms that a violation of the *Buckeye* rule will not be excused if the administrative agency displacing the arbitrator’s jurisdiction does so only preliminarily and is subject to *de novo* review in arbitration, because such displacement is not costless, but in fact would lead to delay. (*Preston, supra*, 552 U.S. at pp. 357-358.) But here *Buckeye* does not apply, because of Moreno’s meritorious challenge to a provision in the arbitration agreement itself. The above quoted statement explaining why the *Buckeye* rule applies notwithstanding the fact that arbitration may be delayed rather than denied cannot justifiably be expanded into a statement asserting that any time an arbitration is delayed by application of a state statute, even when *Buckeye* does not apply, the statute must be invalidated.

In arriving at this conclusion, we make clear that a state legislature or court cannot insulate itself from an FAA preemption challenge merely by declaring that the waiver of an administrative forum in an arbitration agreement is against public policy. (See *Perry, supra*, 482 U.S. at p. 492, fn. 9.) A public policy based solely on the supposed superiority of an

administrative forum over arbitration could no more survive FAA preemption than could a policy based on the supposed superiority of a judicial forum. (See *Perry*, at p. 492, fn. 9.) But neither do we understand the FAA to preempt a state's authority to impose various preliminary proceedings that delay both the adjudication and the arbitration of a cause of action in order to pursue important state interests. In the FEHA, for example, before a civil action can be filed, a party must file a complaint with the Department of Fair Employment and Housing and exhaust the administrative remedy. (Gov. Code, §§ 12960, 12965; see *Blum v. Superior Court* (2006) 141 Cal.App.4th 418, 422.) The Supreme Court has never suggested that the FAA requires that these preliminary proceedings be bypassed in order to go directly to arbitration. Indeed, under our state's law, a statutory cause of action for employment discrimination under the FEHA cannot succeed in court, nor presumably in an arbitration applying California law, unless administrative remedies have been exhausted. (See *Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 115-118.) Exhaustion of these administrative remedies may delay the commencement both of arbitration and litigation.

So, too, a state Legislature may, as it has done with the Berman hearings, advance a certain public policy by offering certain classes of litigants the option of an informal nonbinding administrative hearing serving as a gateway to obtaining special protections that enable the vindication of their claims. State law may also prescribe that this option is not waivable as a condition of employment. We do not understand *Preston* to stand for the proposition that this state public policy, which neither favors nor disfavors arbitration, must be invalidated because it may result in some delay

in the commencement of arbitration. We do not believe that the fact the state has chosen to condition access to special procedural protections on success at a nonbinding administrative hearing, rather than, for example, on a preliminary administrative investigation, is significant from the standpoint of FAA preemption. Nor do we believe the FAA requires a wage claimant to come to an arbitration stripped of the protections and advantages state law authorizes her or him to have in court.¹⁴

¹⁴ The dissent, in arguing for preemption of the public policy defense, cites a number of United States Supreme Court cases affirming the proposition that a state may not, in the name of public policy and the supposed superiority of litigation over arbitration, require the substitution of a judicial forum for an arbitral one. (See dis. opn., *post*, at pp. 17-26; see also *Carter v. SSC Odin Operating Co., LLC* (Ill. 2010) 927 N.E.2d 1207.) No party to this litigation contests the truth of that proposition. But those cases do not address the question before us: Whether a state may forbid a predispute waiver of access to preliminary administrative proceedings designed to further public policy by giving special advantages to a disadvantaged group, when that antiwaiver policy applies equally to litigation and arbitration. Only *Preston* addresses the substitution of an administrative forum for a judicial one, and only one paragraph in *Preston* considers the validity of an administrative forum preliminary to an arbitral one; but as discussed above, the plaintiff in *Preston* did not, nor could he have, raise legitimate public policy or unconscionability defenses at issue here. “[I]t is axiomatic that cases are not authority for propositions not considered.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) That axiom applies with equal force to the one *post-Preston* case cited by the dissent that considers Berman hearing waivers, *Ruff v. Splice* (Ill. App. Ct. 2010) 923 N.E.2d 1250. In that case, the plaintiff, the former CEO of the defendant company, never raised public policy or unconscionability defenses to arbitration, nor is it clear that he could have, but rather argued primarily that the defendant had waived its right to arbitration. (*Id.* at p. 1253.) Finally, the dissent is simply incorrect in asserting that two cases holding that

We reach the same conclusion regarding Moreno's unconscionability defense. Under both the CAA and the FAA, the validity and enforceability of an arbitration agreement are based on the consent of the parties to that agreement. (See *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) __U.S.__ [130 S.Ct. 1758, 1774-1775]; *Cable Connections, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1358.) As discussed above, a provision of an arbitration agreement that is unconscionable lacks the meaningful consent of one of the parties due to that party's actual lack of choice and the one-sided nature of the terms imposed, notwithstanding the outward trappings of consent. Again, an unconscionability defense based simply on an employee having to relinquish a judicial or administrative forum in favor of arbitration is precluded by the FAA. (See *Perry, supra*, 482 U.S. at pp. 492-493, fn. 9.) But here, when an employee is compelled as a condition of employment to forgo other important statutory advantages the Legislature has afforded to vindicate wage claims without gaining any significant offsetting advantages, we have no difficulty concluding that the lack of meaningful consent in that situation places the employee's unconscionability claim beyond the scope of FAA preemption.

In short, our holding invalidating Berman waivers neither falls within the purview of *Preston* and *Buckeye*, nor relies on rules of contract law that particularly disfavor arbitration, but rather is based

certain types of public injunctions are inarbitrable, *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 (cases in which the author of the dissent also dissented) are overruled by *Buckeye*. (See dis. opn., *post*, at p. 24, fn. 5.) The latter case did not even remotely consider the arbitrability of such injunctions.

on the generally applicable contract defenses of unconscionability and violation of public policy. We therefore conclude our holding is not preempted by the FAA.

III. DISPOSITION

As noted, the superior court order stated that “until there has been the preliminary non-binding hearing and decision by the Labor Commissioner, the arbitration provisions of the employment contract are unenforceable, and any petition to compel arbitration is premature and must be denied.” The judgment of the Court of Appeal is reversed and the cause is remanded with directions to reinstate the superior court’s order.

MORENO, J.

WE CONCUR: KENNARD, ACTING C. J.

WERDEGAR, J.

GEORGE, J.*

* Retired Chief Justice of California, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISSENTING OPINION BY CHIN, J.

Both California and federal law strongly favor judicial enforcement of arbitration agreements according to their terms. The majority’s conclusion that the arbitration agreement in this case is contrary to public policy—and therefore unenforceable—is inconsistent with the state and federal policies favoring enforcement of arbitration agreements and is inconsistent with decisions of both this court and the United States Supreme Court. Moreover, because, as the United States Supreme Court recently held, federal law—the Federal Arbitration Act (FAA) (9 U.S.C. § 1 *et seq.*)—“supersede[s]” state laws that “lodg[e] primary jurisdiction” over a dispute the parties have agreed to arbitrate in an “administrative” forum (*Preston v. Ferrer* (2008) 552 U.S. 346, 349-350 (*Preston*)), California’s statutory scheme, as the majority construes it, is preempted. I therefore disagree with the majority’s conclusion.

I also do not join the majority’s holding that the arbitration provision in this case is unconscionable—and therefore unenforceable—insofar as it precludes the wage claimant from requesting an administrative hearing—known as a “Berman hearing”—before submitting his claim for vacation pay to arbitration. Procedurally, we should not reach this issue, because the claimant did not pursue it in the trial court, in the Court of Appeal, or in this court until we requested briefing on it. Substantively, the majority errs by discounting the benefits to the employee of waiving the right to pursue a Berman hearing. It also errs in focusing narrowly only on what it calls the “Berman waiver.” (Maj. opn., *ante*, at p. 2.) In assessing substantive unconscionability, we should instead focus broadly on the purpose and benefits of the

arbitration provision as a whole. Viewed from this broader perspective, the arbitration provision is not unconscionable. For these reasons, I dissent.

I. Factual Background.

Frank Moreno was an employee of Sonic-Calabasas A, Inc. (Sonic). In December 2006, after voluntarily ending his employment, Moreno filed a wage claim with the Labor Commissioner pursuant to Labor Code section 98 et seq.¹ seeking allegedly unpaid “vacation wages” for 63 days at the rate of \$441.29 per day, for a total of \$18,203.54. He also requested “additional wages accrued pursuant to Labor Code Section 203 as a penalty.”

In February 2007, Sonic filed in the superior court a petition to compel arbitration of Moreno’s claim and to dismiss his pending administrative action. It relied on the broad and comprehensive arbitration provision in an agreement Moreno had signed, which provides in relevant part: “I . . . acknowledge that [Sonic] utilizes a system of alternative dispute resolution that involves binding arbitration to resolve all disputes that may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both [Sonic] and myself, both [Sonic] and I agree that any claim, dispute, and/or controversy (including, but not limited to, any claims of discrimination and harassment . . .) that either I or [Sonic] . . . may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum arising from, related to, or having any rela-

¹ All further unlabeled statutory references are to the Labor Code.

tionship or connection whatsoever with my seeking employment with, employment by, or other association with [Sonic], whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act . . . , claims for medical and disability benefits under the California Workers Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec. 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However, nothing herein shall prevent me from filing and pursuing administrative proceedings only before the California Department of Fair Employment and Housing, or the U.S. Equal Opportunity Commission.”

Moreno and the Labor Commissioner, who intervened on Moreno's behalf, opposed Sonic's motion to compel. They argued that, insofar as the arbitration agreement may be interpreted to preclude Moreno from pursuing a Berman hearing, it substantially burdens his ability to vindicate his right to vacation pay and, therefore, is unenforceable as against public policy.

The superior court denied the petition to compel arbitration, finding that the arbitration provision violates public policy insofar as it waives Moreno's right to pursue a Berman hearing. The Court of Appeal reversed, finding that this waiver does not substantially burden Moreno's ability to vindicate his right to vacation pay and, therefore, is not unenforceable as against public policy.

II. Enforcement of the Arbitration Provision Does Not Violate California's Public Policy.

Through enactment of a comprehensive statutory scheme regulating private arbitration, the Legislature “has expressed a ‘strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.’ [Citations.]” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*)). “The policy of [California’s] law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.” (*Utah Const. Co. v. Western Pac. Ry. Co.* (1916) 174 Cal. 156, 159.) Thus, California law establishes “a presumption in favor of arbitrability.” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971 (*Engalla*)).

The clearest expression of California’s policy favoring arbitration appears in Code of Civil Procedure section 1281, which declares that “[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.” This section establishes the “fundamental policy” of California’s arbitration scheme: “that arbitration agreements will be enforced *in accordance with their terms*.” (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 836, fn. 10.) To implement this policy, Code of Civil Procedure section 1281.2 directs that, on petition, a court “shall order” arbitration “if it determines that an agreement to arbitrate the controversy exists, unless it determines that” one of only three specified exceptions applies: (1) the petitioner has waived the

right to compel arbitration; (2) grounds exist for revoking the agreement; or (3) a party to the agreement is also a party to a pending legal proceeding with a third party that arises out of the same transaction, and a possibility exists of conflicting rulings on common legal or factual issues.

In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 171, the majority indicated that one ground for revoking an arbitration agreement is that the agreement is “contrary to public policy.” However, because public policy requires and encourages the making of contracts upon all valid and lawful considerations, and because the courts’ power to declare a contract void as against public policy is “very delicate and undefined,” courts should exercise this power “only in cases free from doubt,” where “it is entirely plain” that the contract violates sound public policy. (*Stephens v. Southern Pacific Co.* (1895) 109 Cal. 86, 89 (*Stephens*.) This general principle of contract law applies with added force where an arbitration agreement is at issue, given California’s public policy favoring arbitration. Because arbitration is, under California law, “a highly favored means of settling [employment] disputes,” courts must “indulge every intendment to give effect to such proceedings” and “should endeavor to reach a result [that] comports with the ‘strong public policy’ favoring arbitration.” (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189 (*Doers*.) The party challenging the contractual arbitration provision bears the burden of showing that its enforcement would violate “settled public policy.” (*Stephens, supra*, at p. 90.)

In several relatively recent decisions, we have discussed the scope of the public policy exception to the statutory rule that arbitration agreements are

enforceable according to their terms. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 91 (*Armendariz*), we considered the validity of an agreement, imposed by the employer as a condition of employment, that required an employee to arbitrate a discrimination claim brought under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). We first found that, because “the statutory rights established by the FEHA are ‘for a public reason’” (*Armendariz, supra*, at p. 100), “FEHA rights are unwaivable” (*id.*, at p. 112), and a mandatory arbitration agreement “cannot be made to serve as a vehicle for [their] waiver” (*id.*, at p. 101). We then held that such an agreement is valid and enforceable “if the arbitration permits an employee to vindicate his or her statutory rights. . . . [I]n order for such vindication to occur, the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration.” (*Id.* at pp. 90-91.)

We next took up the issue in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 450 (*Gentry*), which involved the validity of a predispute arbitration agreement that precluded class arbitration of employees’ statutory claims for overtime pay. In a closely divided decision, a bare majority of this court held that, because the statutory right to overtime pay fosters the public health and welfare and is therefore unwaivable, a class arbitration waiver is unenforceable if it significantly and substantially burdens the ability of employees to vindicate their rights to overtime pay by placing serious and formidable obstacles

in the way of prosecuting claims for such pay (*id.*, at pp. 450, 463-466).

Applying the framework of *Armendariz* and *Gently*, the Court of Appeal in this case first considered whether the right to vacation pay is an unwaivable statutory right. Concluding that it is, the court then considered whether arbitration would significantly impair Moreno’s ability to vindicate this right. Finding nothing in the record to indicate that it would, the Court of Appeal held that the arbitration provision is enforceable.

The Court of Appeal correctly applied *Armendariz* and *Gentry*. As the majority observes, “[t]he Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims.” (Maj. opn., *ante*, at p. 6.) Arbitration is similarly designed; our public policy favors arbitration precisely because it is a speedy, informal, and relatively inexpensive means of dispute resolution. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1080 (*Broughton*); *Moncharsh, supra*, 3 Cal.4th at p. 9.) It is true, as the majority explains, that a Berman hearing may offer some employees certain procedural advantages that may, in a given case, make it somewhat easier to recover unpaid vacation wages. (Maj. opn., *ante*, at pp. 16-18.) But that circumstance does not establish that arbitration according to the terms of arbitration agreements would not “permit[]” employees “to vindicate” their statutory right to vacation pay—which is the relevant inquiry under *Armendariz, supra*, 24 Cal.4th at page 90—or would significantly and substantially burden their ability to vindicate that right by placing serious and formidable obstacles in the way of prosecuting their claims for overtime pay—which appears to be the inquiry under

the *Gentry* majority's reformulation of *Armendariz*. (*Gentry, supra*, 42 Cal.4th at pp. 450, 463-466.) Because California's public policy favoring arbitration requires us to "indulge every intendment to give effect to" an arbitration provision (*Doers, supra*, 23 Cal.3d at p. 189), and because we should not declare a contract to be void as against public policy unless that conclusion is "free from doubt" and "entirely plain" (*Stephens, supra*, 109 Cal. at p. 89), that some claimants might be somewhat better off with a Berman hearing does not justify a holding that a predispute waiver of the right to request a Berman hearing is void as against public policy.²

There are several indications that the Legislature agrees with this conclusion. To begin with, nothing in the language of the statutes setting forth the Berman procedures (the Berman statutes) even hints that those procedures are nonwaivable or that an employee may not agree to arbitrate a claim. Moreover, under the statutes, there is, in fact, no right to a Berman hearing; there is only a right to file a complaint *requesting* a Berman hearing. As the majority observes, in response to the filing of such a complaint, the

² Moreover, upon examination, the potential procedural advantages of a Berman hearing are not as great as the majority indicates. Ironically, what the majority views as a vice of the arbitration agreement here at issue—the provision for discovery (maj. opn., *ante*, at p. 16)—we held in *Armendariz* to be a virtue—indeed a *requirement*—of a valid and enforceable arbitration agreement. (*Armendariz, supra*, 24 Cal.4th at pp. 90-91.) Also, the holding of a Berman hearing may actually hinder an employee's ability to vindicate his or her right to vacation pay; the Berman statutes *discourage* employees who lose at Berman hearings from seeking judicial review by providing that they *must*, if unsuccessful on appeal, pay their employers' costs and attorney's fees. (§ 98.2, subd. (c).)

Labor Commissioner has three options: (1) hold a Berman hearing; (2) prosecute a civil action; or (3) take no action on the complaint. (Maj. opn., *ante*, at p. 5.) The benefits of a Berman hearing are potentially available only if the Labor Commissioner chooses the first option. Finally, as the majority also observes, an employee may choose to skip the administrative procedure entirely and go directly to court. (Maj. opn., *ante*, at p. 5.) The Legislature's failure to make a Berman hearing mandatory and the absence of any language prohibiting waiver suggest that, in the Legislature's view, an employee may adequately vindicate the statutory right to vacation pay in an alternative forum, such as arbitration. I see no reason to reject the Legislature's view.

Notably, the majority does not contend otherwise. It does not assert that requiring Moreno to arbitrate according to his agreement would either eliminate or substantially burden his ability to vindicate his right to vacation pay. In fact, according to the majority, notwithstanding *Armendariz* and *Gentry*, that is not even the relevant inquiry. Instead, the majority asserts, "the question [here] is whether [an] employee's statutory right to seek a Berman hearing, with all the possible protections that follow from it, is itself an unwaivable right that an employee cannot be compelled to relinquish as a condition of employment." (Maj. opn., *ante*, at p. 14.) The majority then concludes that this right is unwaivable (*ibid.*), reasoning, "permitting employers to require employees, as a condition of employment, to waive their right to a Berman hearing would seriously undermine the efficacy of the Berman hearing statutes and hence thwart the public purpose behind the statutes" (*id.*, at pp. 15-16).

Initially, I note that the majority's formulation of the issue here is completely at odds with Moreno's. As he did in the trial court and the Court of Appeal, Moreno has consistently argued in this court that the arbitration agreement is against public policy—and thus unenforceable—because arbitration lacks some of the procedural advantages that may come with a Berman hearing and therefore “would drastically undercut his ability to vindicate” his nonwaivable, statutory right to vacation pay. Indeed, according to Moreno, analyzing whether the alleged benefits of a Berman hearing “are substantive, unwaivable rights in their own”—which is precisely what the majority does—“confuses what it is that is unwaivable—the underlying statutory right to payment of accrued vacation wages upon separation of employment—with the remedial tools that flow from the Labor Commissioner's wage adjudication process.” Thus, the majority's analysis will, no doubt, come as a surprise to the parties.

Substantively, as to whether an employee's statutory right to request a Berman hearing is itself waivable, irrespective of an employee's ability to vindicate his or her right to vacation pay in arbitration, the “established rule” in California is that “rights conferred by statute may be waived unless specific statutory provisions prohibit waiver.” (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049, fn. 4 (*Bickel*)). “As we have recognized for over a century, the law ‘will not compel a man to insist upon any benefit or advantage secured to him individually.’ [Citation.] Accordingly, a party may waive compliance with statutory conditions intended for his or her benefit, so long as the Legislature has not made those conditions mandatory. [Citation.]” (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 426-427 (*Sharon S.*)). Thus,

under the majority's approach, the starting point for the inquiry should be "whether there is any [statutory] language . . . prohibiting a waiver" of an employee's right to request a Berman hearing. (*Bickel, supra*, at p. 1049.)

Here, the relevant statutes contain no language even hinting that the right to request a Berman hearing is unwaivable or that the holding of a Berman hearing is mandatory. Indeed, by allowing employees to skip the administrative process entirely and go directly to court, the statutory language suggests just the opposite, i.e., that employees may waive their right to request a Berman hearing. Moreover, nothing in the statutory language indicates that an employee's ability to waive this right exists only after a dispute has arisen. In short, the statutory language offers no support for the majority's conclusion. Nor does anything in the relevant legislative history support the majority's view.

Again, the majority does not assert otherwise. Instead, in concluding that the right to request a Berman hearing is unwaivable, the majority invokes the principle that a law established for a public reason may not be contravened by a private act or agreement. (Maj. opn., *ante*, at pp. 14-16.)

For several reasons, the majority's analysis is unpersuasive. First, given that the Legislature has already established a public policy of allowing waiver—by not making a Berman hearing mandatory and by allowing employees to go directly to court without requesting a Berman hearing—it seems inappropriate for this court to adopt a contrary view of public policy. Second, as the court's opinion in *Bickel* explained, "[s]ome public benefit is . . . inherent in most legislation." (*Bickel, supra*, 16 Cal.4th at

p. 1049.) Thus, “[t]he pertinent inquiry” under the principle the majority invokes “is not whether the law has *any* public benefit, but whether that benefit is merely incidental to the legislation’s primary purpose.” (*Ibid.*, italics added.) Unquestionably, the *primary* purpose of the Berman statutes is to assist the *individual employee* in recovering unpaid wages. Although the public may benefit from such recovery, that benefit is merely incidental to the statutes’ primary purpose. Moreover, because, as I have explained, arbitration would enable Moreno to vindicate his right to vacation pay, waiver of his right to request a Berman hearing would not “seriously compromise any public purpose” the statutes were “intended to serve’ [citation].” (*Sharon S.*, *supra*, 31 Cal.4th at p. 426.) Therefore, the principle on which the majority relies does not apply here to preclude employees, by agreeing to arbitration, from waiving their right to request a Berman hearing.

This conclusion is consistent with analogous authority from both this court and the United States Supreme Court. In *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 640 (*Mitsubishi Motors*), the high court held that a federal antitrust claim is arbitrable under an arbitration clause in an agreement embodying an international commercial transaction. A contrary result, the court explained, could not be justified by “the fundamental importance to American democratic capitalism of the regime of the antitrust laws. [Citations.]” (*Id.* at p. 634.) Although acknowledging that an antitrust claim is not merely a private matter, that the antitrust laws are designed to promote the national interest in a competitive economy, that an antitrust plaintiff acts as a private attorney general who protects the public’s interest, and that the treble damages provision of

the antitrust law is a chief tool in the antitrust enforcement scheme, the court explained: “The [public] importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court. Notwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable an injured competitor to gain compensation for that injury. (*Id.* at p. 635) “And, of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit [citation] and the private antitrust plaintiff needs no executive or judicial approval before settling one. It follows that, at least where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution, the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies.[¶] . . . [S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [antitrust] statute will continue to serve both its remedial and deterrent function.” (*Id.* at pp. 636-637.)

In *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220 (*McMahon*), the court held valid and enforceable a predispute agreement to arbitrate a claim brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.). In reaching its conclusion, the court rejected the argument that “the public interest in the enforcement of RICO precludes” submission of a RICO claim to arbitration. (*McMahon*, at p. 240.) The court found that, like the antitrust treble damages provision at issue in *Mitsubishi Motors*, RICO’s treble damages remedy has primarily a “remedial purpose,” and that

its “policing function . . . , although important, [is] a secondary concern. [Citation.]” (*McMahon*, at pp. 240-241.) Because RICO plaintiffs “may effectively vindicate their RICO claim[s] in an arbitral forum, . . . there is no inherent conflict between arbitration and the purposes underlying [RICO].” (*McMahon*, at p. 242.)

In *Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477 (*Rodriguez de Quijas*), the court held that predispute agreements to arbitrate claims under the federal Securities Act of 1933 (1933 Act) (15 U.S.C. § 77A et seq.) are valid and enforceable. About 35 years earlier, in *Wilko v. Swan* (1953) 346 U.S. 427 (*Wilko*), the court held otherwise, relying largely on the fact that the 1933 Act conferred on buyers of securities special procedural advantages, including broadened venue and nationwide service of process in federal court, no amount-in-controversy requirement for diversity cases, and concurrent jurisdiction in state and federal courts without the possibility of removal. (*Wilko*, at pp. 431-435.) Congress provided these advantages, the court explained in *Wilko*, in recognition of “the disadvantages under which buyers labor” vis-à-vis sellers, i.e., less opportunity to investigate and appraise factors affecting a security’s value. (*Id.* at p. 435.) Predispute arbitration agreements are problematic, the *Wilko* court reasoned, because the buyer is “surrender[ing] . . . the [procedural] advantages the [1933] Act gives him . . . at [precisely] a time when he is less able to judge the weight of the handicap the [1933] Act places upon his adversary.” (*Ibid.*) In this regard, the *Wilko* court declared, “a waiver in advance of a controversy stands upon a different footing” than a post-dispute waiver. (*Id.* at p. 438.) When the high court later overruled *Wilko*, it held that a buyer’s procedural advantages in litiga-

tion are not “so critical that they cannot be waived [in a predispute arbitration agreement] under the rationale that the [1933] Act was intended to place buyers of securities on an equal footing with sellers.” (*Rodriguez de Quijas, supra*, at p. 481.) Among other things, the court reasoned, “the grant of concurrent jurisdiction constitutes explicit authorization for [buyers] to waive” the other procedural advantages “by filing suit in state court without possibility of removal to federal court.” (*Id.* at p. 482.)

In *Gilmer v. Interstate/Johnson Lane Co* (1991) 500 U.S. 20, 23 (*Gilmer*), the high court held that a mandatory, predispute employment agreement to arbitrate an age discrimination claim brought under federal law is valid and enforceable. In reaching this conclusion, the court rejected the argument that the arbitration agreement was unenforceable because the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. § 621 et seq.) “is designed not only to address individual grievances, but also to further important social policies. [Citation.]” (*Gilmer*, at p. 27.) The court explained: “We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. . . . Both [arbitration and judicial dispute resolution] . . . can further broader social purposes ‘[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.’ [Citation.]” (*Id.* at p. 28.) The court also rejected the argument that arbitration was inadequate because it offered more limited discovery than litigation in court, explaining: “[T]here has been no showing in this case that the [arbitration] discovery provisions . . . will prove

insufficient to allow ADEA claimants . . . a fair opportunity to present their claims. Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’ [Citation.]” (*Id.* at p. 31.) Finally, the court rejected the claim that the mandatory, predispute employment arbitration clause should be unenforceable because “there often will be unequal bargaining power between employers and employees.” (*Id.* at p. 33.) “Mere inequality in bargaining power,” the court explained, “is not a sufficient reason to hold that [mandatory, predispute] arbitration agreements are never enforceable in the employment context.” A “claim of unequal bargaining power,” the court held, “is best left for resolution in specific cases” on specific facts. (*Ibid.*)

In several decisions, we have followed these high court precedents to uphold the validity of predispute arbitration agreements. In *Broughton, supra*, 21 Cal.4th at page 1084, at issue was a predispute agreement to arbitrate a damage claim under the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.). In holding that the agreement was valid and enforceable, we explained: “Such an action is primarily for the benefit of a party to the arbitration, even if the action incidentally vindicates important public interests. [Citation.] In the context of statutory damages claims, the United States Supreme Court has consistently rejected plaintiffs’ arguments that abbreviated discovery, arbitration’s inability to establish binding precedent, and a plaintiffs right to a jury trial render the arbitral forum inadequate, or that submission of resolution of the claims to arbitration is in any sense a waiver of the substantive rights

afforded by statute. [Citations.] ‘By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’ [Citation.]” (*Broughton, supra*, at p. 1084.)

In *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 317-318 (*Cruz*), we held that a predispute agreement to arbitrate a claim for restitution and disgorgement under the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) is valid and enforceable. In reaching this conclusion, we rejected the argument that such a claim is inarbitrable because “restitution under the UCL accomplishes a public purpose by deterring unlawful conduct,” explaining: “[T]he same could be said of damages under the CLRA or under various federal statutes. This deterrent effect is, however, incidental to the private benefits obtained from those bringing the restitutionary or damages action. [Citation.] The Supreme Court has made clear that such actions, notwithstanding the public benefit, are fully arbitrable under the FAA.”³ (*Cruz*, at p. 318.)

³ In *Broughton*, a bare majority of the court also held that a predispute agreement to arbitrate a CLRA for *injunctive* relief is not enforceable, based on its view that such relief “is for the benefit of the general public rather than the party bringing the action.” (*Broughton, supra*, 21 Cal.4th at p. 1082.) Any benefit to the individual plaintiff, the majority argued, would likely “be incidental to the general public benefit . . . (*Id.* at p. 1080, fn. 5.) In *Cruz*, a bare majority of the court reaffirmed this holding and extended it to consumer claims for injunctive relief under the UCL and for false advertising. (*Cruz, supra*, 30 Cal.4th at pp. 312-316.) Such relief, the majority asserted, is “designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff.” (*Id.* at p. 316.)

These authorities support the conclusion that the arbitration agreement here at issue is valid and enforceable according to its terms. Like the claims at issue in those cases, a claim for recovery of vacation pay is a remedial claim that primarily benefits the individual employee. Thus, any public benefit from such a claim is merely incidental to the legislation's primary purpose. Like the procedures at issue in *Rodriguez de Quijas*, the potential procedural advantages of a Berman hearing are not "so critical that they cannot be waived" in a predispute arbitration agreement under the rationale that the Berman statutes were intended to place employees on an equal footing with employers (cf. *Rodriguez de Quijas*, *supra*, 490 U.S. at p. 481), or, as the majority puts it, to "level[]" the "playing field" (maj. opn., *ante*, at p. 25). The Legislature itself has established this fact by providing that an employee may skip the administrative process and go directly to court, and that the Labor Commission may take no action on a claim or file a civil claim without holding a Berman hearing. These provisions, like the provision granting concurrent jurisdiction in *Rodriguez de Quijas*, "constitute[] explicit authorization for [employees] to waive" the potential procedural advantages of a Berman hearing.⁴ (*Id.* at p. 482.) Moreover, as I have previously explained, even without a Berman hearing's potential procedural advantages, employees may effectively vindicate their statutory right to unpaid vacation pay in arbitration. Finally, as *Gilmer* establishes, the majority's concern that employees have fewer resources

⁴ Moreover, in light of these provisions, enforcing an employee's waiver of the right to pursue a Berman hearing does not, as the majority asserts, "undermine the legislative policy behind the Berman hearing statutes." (Maj. opn., *ante*, at p. 22, fn. 9.)

and less “bargaining power” than employers (maj. opn., *ante*, at p. 25) “is not a sufficient reason to hold that [mandatory, predispute] arbitration agreements are never enforceable in the employment context.” (*Gilmer*, *supra*, 500 U.S. at p. 33) A “claim of unequal bargaining power is best left for resolution in specific cases” on specific facts.⁵ (*Ibid.*) Under these decisions—which the majority completely ignores, while offering none in support of its conclusion—the arbitration agreement in this case is enforceable according to its terms.

III. The Berman Statutes, as the Majority Construes Them, Are Preempted by the FAA.

As the high court has explained, the FAA not only declares a liberal federal policy favoring arbitration agreements, it creates a body of federal substantive law that requires courts to enforce privately negotiated arbitration agreements within the FAA’s coverage according to their terms. (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 478; *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24.) This federal policy and substantive law apply “notwithstanding any state substantive or procedural policies to the contrary.” (*Moses H. Cone Hospital*, 460 U.S. at p. 24.) In other words, Congress, in enacting the FAA, “intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements” (*Southland Corp. v. Keating* (1984) 465

⁵ Contrary to *Gilmer*, the majority holds that mandatory, predispute agreements to arbitrate a claim for vacation pay are generally unenforceable, but leaves open the possibility that such an agreement is enforceable “as part of a freely negotiated, nonstandard contract, such as may exist between an employer and a highly compensated executive employee.” (Maj. opn., *ante*, at p. 20, fn. 7.)

U.S. 1, 16 (*Southland*)), and “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration” (*id.*, at p. 10). In short, the FAA “embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ [Citation.] . . . [N]othing in the [FAA] indicat[es] that the broad principle of enforceability is subject to any additional limitations under state law.’ [Citation.]” (*Perry v. Thomas* (1987) 482 U.S. 483, 489-490.)

In *Preston*, the high court recently made clear that the FAA preempts not only state laws that require a judicial forum for resolution of disputes the parties have agreed to arbitrate, but also “state statutes that refer [such] disputes initially to an administrative agency.” (*Preston, supra*, 552 U.S. at p. 349.) At issue there was the constitutionality of a California statute very much like the Berman statutes in that it required the Labor Commissioner to “hear and determine” disputes arising under California’s Talent Agencies Act (TAA) (§ 1700 et. seq.), “subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo.” (§ 1700.44, subd. (a).) In *Preston*, an attorney who performed services in the entertainment industry sought recovery of fees for services rendered to a former Florida judge who appeared on television. (*Id.* at p. 350.) The attorney demanded arbitration based on the parties’ agreement to arbitrate any dispute relating to their contract. The former judge responded by filing a petition with the Labor Commissioner charging that their contract was illegal because, in violation of the TAA, the attorney had acted as a talent agent

without the required license. (*Preston, supra*, at p. 350.) A California trial court denied the motion to compel arbitration, and the California Court of Appeal affirmed that decision, reasoning that section 1700.44, subdivision (a), “vest[ed] ‘exclusive original jurisdiction’ over the dispute in the Labor Commissioner. [Citation.]” (*Preston, supra*, at p. 351.) The high court reversed, holding that the statute “conflict[ed] with the FAA’s dispute resolution regime” by “grant[ing] the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate [citation]” (*Preston, supra*, at p.356.) In reaching its conclusion, the court rejected the claim that, because de novo review of the Labor Commissioner’s decision could proceed as an arbitration, the TAA was “nevertheless compatible with the FAA.” (*Preston, supra*, at p. 356.) This approach, the court explained, would frustrate “a prime objective” of an arbitration agreement: “to achieve ‘streamlined proceedings and expeditious results.’ [Citation.]” (*Id.* at p. 357.) “Requiring initial reference of the parties’ dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy.” (*Id.* at p. 358.) Thus, the court held, “[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.” (*Id.* at p. 359.)

The majority holds that the Berman statutes do precisely what *Preston* says, under the FAA, a state statute may not do: lodge primary jurisdiction over a dispute in an administrative agency notwithstanding the parties’ agreement to arbitrate that dispute. Under *Preston*, the Berman statutes, so construed, directly conflict with the FAA and violate the supremacy clause of the United States Constitution (U.S. Const.,

art. VI, cl. 2). *Preston* also establishes that the availability of arbitration after a Berman hearing, as part of the statutory de novo review process, does not permit a different conclusion. What the high court said about the TAA in *Preston* fully applies to the Berman statutes, as the majority construes them: “Requiring initial reference of the parties’ dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy.” (*Preston, supra*, 552 U.S. at p. 358.) In this regard, the majority acknowledges that we noted in 1998 that the time between filing a complaint with the Labor Commissioner and a Berman hearing date was usually four to six months, and that Sonic has documented cases in which the commencement of a Berman hearing took a year or more. (Maj. opn., *ante*, at p. 18, fn. 5.) Moreover, as we have previously observed, because either party to a Berman hearing “has a right to a trial de novo in superior court, where the ruling of the Labor Commissioner’s hearing officer is entitled to no deference,” “Berman hearings may result in no cost savings” to the parties. (*Gentry, supra*, 42 Cal.4th at p. 464.) Thus, the prospect of arbitration after a Berman hearing does not alter the conclusion that the Berman statutes, as the majority construes them, are incompatible with the FAA. In short, as an Illinois appellate court held just last year, “*Preston* makes it clear that the [FAA] preempts” the Berman statutes insofar as they “vest[] [primary] jurisdiction in the [Labor] Commissioner rather than an arbitration proceeding . . . as provided in [a] contract.” (*Ruff y. Spline* (Ill. Ct. App. 2010) 923 N.E.2d 1250, 1253.)

The majority’s grounds for distinguishing *Preston* are unpersuasive. The majority first observes that unlike *Preston*, which involved a challenge to the parties’ “contract as a whole,” this case involves a chal-

lenge only “to a portion of the arbitration agreement.” (Maj. opn., *ante*, at p. 32.) This observation, although accurate, is irrelevant. In *Preston*, the circumstance that the challenge was to the contract as a whole, rather than only to its arbitration clause, was material only to the court’s threshold determination that the dispute between the parties presented an issue that, but for the TAA, would be for the arbitrator to decide in the first instance. (*Preston, supra*, 552 U.S. at p. 353.) It played no part in the court’s subsequent holding—which is the part of *Preston* that governs here—that the FAA preempts the TAA insofar as the TAA confers on the Labor Commissioner primary jurisdiction to decide an issue the parties have agreed to arbitrate. Here, it is undisputed that Moreno’s claim for vacation pay presents issues that, but for the majority’s construction of the Berman statutes, would be for the arbitrator to decide in the first instance. Thus, that *Preston* involved a challenge to the contract as a whole does not diminish the controlling force of its unqualified and unequivocal holding that the FAA preempts state laws that lodge in an administrative agency primary jurisdiction over an issue the parties have agreed to arbitrate. (*Preston, supra*, at pp. 349-350.)

The majority next asserts that *Preston* is distinguishable because of “the fundamental differences” between the TAA and the “statutory regime[]” now before us. (Maj. opn., *ante*, at p. 32.) According to the majority, because the TAA “does not come with the same type of statutory protections as are found in the Berman hearing and posthearing procedures,” *Preston* does not govern. (Maj. opn., *ante*, at p. 32.)

The potential procedural advantages the Legislature has attached to a Berman hearing do not render

Preston inapplicable. Under *Preston*, were our Legislature, based on its view of public policy, to enact a statute requiring administrative determination of a claim before resort to any other forum, the FAA would preempt that statute's enforcement where the parties have agreed, in a predispute agreement evidencing interstate commerce, to arbitrate that claim. Indeed, this conclusion follows not just from *Preston*, but from other decisions in which the high court has expressly "rejected the proposition that the enforceability of [an] arbitration agreement turn[s] on [a] state legislature's judgment concerning the forum for enforcement of [a] state-law cause of action. [Citation.]" (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 446 (*Buckeye*)). The Legislature may not circumvent this proscription simply by attaching advantageous procedures to the administrative process and declaring—either expressly or, as the majority finds here, impliedly—those procedures to be unwaivable as a matter of public policy. As the high court has made clear, the FAA's preemptive policy requiring enforcement of arbitration agreements according to their terms applies "notwithstanding any state substantive or procedural policies to the contrary." (*Moses H. Cone Hospital, supra*, 460 U.S. at p. 24, italics added.)

Nor, contrary to the majority's analysis, may a state legislature—or in this case, a state court—avoid this FAA proscription by invoking the rule that the FAA permits revocation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The high court has twice expressly rejected this very approach. In *Southland*, the court held that the FAA preempted California's Franchise Investment Law (Corp. Code § 31000 et seq.) insofar as we had con-

strued it to prohibit enforcement of agreements to arbitrate claims under that law. (*Southland, supra*, 465 U.S. at p. 10.) Justice Stevens dissented from this holding, relying on the same FAA enforceability exception the majority now invokes: revocation “based on ‘such grounds as exist at law or in equity for the revocation of any contract.’” (*Id.*, at p. 18 (conc. & dis. opn. of Stevens, J.)) He reasoned that, because a contract void as contrary to public policy is revocable at law or in equity, the FAA does not preempt a state law that “provid[es] special protection” to franchisees by declaring agreements to arbitrate claims under the Franchise Investment Law void as a matter of public policy. (*Id.* at p. 21). The *Southland* majority rejected this view, explaining: “We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity ‘for the revocation of *any* contract’ but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. Moreover, under [Justice Stevens’s] view, ‘a state policy of providing special protection for franchisees . . . can be recognized without impairing the basic purposes of the federal statute.’ [Citation.] If we accepted this analysis, states could wholly eviscerate congressional intent to place arbitration agreements ‘upon the same footing as other contracts,’ [citation] simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the [FAA] and would permit states to override the declared policy requiring enforcement of arbitration agreements.” (*Id.*, at pp. 16-17, fn. 11.)

The majority's analysis is inconsistent with *Southland*. Contrary to the majority's conclusion, under *Southland*, "the defense to arbitration" the majority has read into the Berman statutes—based on a state public policy that precludes waiver of a Berman hearing's potential procedural advantages—"is not a ground that exists at law or in equity 'for the revocation of any contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to" the Berman statutes. (*Southland*, *supra*, 465 U.S. at p. 16, fn. 11; see *Carter v. SSC Odin Operating Co., LLC* (Ill. 2010) 927 N.E.2d 1207, 1218 (*Carter*) (antiwaiver provisions of state Nursing Home Care Act, although based on public policy, "are not a defense generally applicable to 'any contract'" because they "invalidate arbitration agreements [only] in a specific type of contract—those involving nursing care"].) Also contrary to *Southland*, the majority's view that California may implement a "a state policy of providing special protection for" a class of individuals—in this case, employees—will permit California "wholly [to] eviscerate congressional intent to place arbitration agreements 'upon the same footing as other contracts,' [citation] simply by passing statutes such as" the Berman statutes. (*Southland*, at p. 16, fn. 11.) In this regard, the majority's approach, *Southland* declares, "conflict[s] with" the FAA and, therefore, is impermissible. (*Ibid.*)

The majority's analysis is also inconsistent with the high court's more recent decision in *Buckeye*, *supra*, 546 U.S. 440. In *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 402-404, the court held that, as a matter of substantive federal arbitration law, a contract's arbitration provision is severable from the rest of the contract, and challenges to the validity of the contract as a whole, as opposed to the

arbitration provision itself, must be arbitrated in the first instance. Notwithstanding this decision, in *Cardegna v. Buckeye Check Cashing, Inc.* (Fla. 2005) 894 So.2d 860, 864-865, the Florida Supreme Court held that, where the party resisting arbitration alleges that the entire contract is illegal and thus unenforceable as a matter of state public policy, a Florida court, and not an arbitrator, must first determine the contract's legality. In *Buckeye, supra*, 546 U.S. at page 446, the high court reversed the Florida court's decision, explaining that, under the FAA, Florida's public policy of refusing to enforce an arbitration provision in an illegal contract is "irrelevant." The court explained: "[I]n *Southland*, . . . [w]e . . . rejected the proposition that the enforceability of [an] arbitration agreement turned on the state legislature's judgment concerning the forum for enforcement of the state-law cause of action. [Citation.] So also here, we cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law' [citation]." (*Buckeye, supra*, 546 U.S. at p. 446.) Under *Buckeye*, the majority's conclusion that Moreno's predispute waiver of his right to request a Berman hearing violates state public policy is simply "irrelevant," and its view that the arbitration provision's enforceability "should turn on 'California public policy and contract law'" is erroneous as a matter of federal law. (*Buckeye, supra*, 546 U.S. at p. 446.) As *Buckeye* firmly establishes, contrary to the majority's view, the FAA does not permit either the Legislature or a majority of this court to refuse to enforce an arbitration agreement based on its "judgment concerning the forum for

enforcement of the state-law cause of action” for vacation pay.⁶ (*Buckeye, supra*, at p. 446.)

Despite these decisions, the majority declares that it does not “understand the FAA to preempt a state’s authority to impose various preliminary proceedings that delay both the adjudication and the arbitration of a cause of action in order to pursue important state interests.” (Maj. opn., *ante*, at p. 35.) According to the majority, the high court has never suggested that the FAA preempts state laws requiring that preliminary administrative steps like the filing of an administrative complaint be pursued before the filing of a civil action. (Maj. opn., *ante*, at pp. 34-35.) “So, too,” the majority continues, consistent with the FAA, “a state Legislature may, as it has done with the Berman hearings, advance a certain public policy by offering certain classes of litigants the [unwaivable] option of an informal, nonbinding administrative hearing serving as a gateway to obtaining special protections that enable the vindication of their claims.” (Maj. opn., *ante*, at p. 35.)

Again, *Preston* conclusively refutes the majority’s understanding of the FAA. There, in holding that the FAA preempts the TAA, the high court distinguished between an agency acting in the role of “adjudicator” and an agency acting in the role of “prosecutor, pur-

⁶ In this regard, *Buckeye* also establishes that this court’s earlier decisions in *Broughton* and *Cruz* are incorrect insofar as they hold that, notwithstanding the FAA, California may prohibit arbitration of claims for injunctive relief under the CLRA, the UCL, and for false advertising, because of injunctive relief’s public purpose and the institutional shortcomings of arbitration as a forum for dealing with public injunctions. (See *Cruz, supra*, 30 Cal.4th at pp. 323-341 (dis. opn. of Chin, J.); *Broughton, supra*, 21 Cal.4th at pp. 1089-1094 (dis. opn. of Chin, J.))

suing an enforcement action in its own name or reviewing a . . . charge to determine whether to initiate judicial proceedings.” (*Preston, supra*, 552 U.S. at p. 359.) In proceedings under the TAA, the court explained, “the Labor Commissioner functions not as an advocate advancing a cause before a tribunal authorized to find the facts and apply the law; instead, the Commissioner serves as impartial arbiter.” Because “[t]hat role is just what the FAA-governed agreement between [the parties] reserves for the arbitrator,” the court explained, the TAA is incompatible with the FAA. (*Preston*, at p. 359.) Similarly, in a Berman hearing, the Labor Commissioner functions not as an advocate advancing a cause before a tribunal authorized to find the facts and apply the law; instead, the Commissioner serves as impartial arbiter. And because that role is just what the FAA-governed agreement between Moreno and Sonic reserves for the arbitrator, the Berman statutes, as interpreted by the majority, are incompatible with the FAA. Thus, the FAA preempts the Berman statutes insofar as the majority construes them, as a matter of public policy, to allow Moreno to pursue a Berman hearing notwithstanding his agreement to forego that option and arbitrate his claim for vacation pay.⁷

⁷ The majority asserts that the FAA does not preempt the Berman statutes insofar as they prohibit “Berman waivers” because that prohibition “does not discriminate against arbitration agreements” and applies “equally” to waivers that “appear [] . . . independent of arbitration.” (Maj. opn., *ante*, at p. 27.) However, as the Illinois Supreme Court recently explained, the California statute the high court found preempted in *Preston* “did not single out or target arbitration agreements explicitly,” but “simply placed [primary] jurisdiction of labor disputes with an administrative agency [citations].” (*Carter, supra*, 927 N.E.2d

IV. The Arbitration Provision Is Not Unconscionable.

The majority alternatively holds that the arbitration provision is unconscionable insofar as it precludes Moreno from requesting a Berman hearing before submitting his claim to arbitration. For both procedural and substantive reasons, I do not join this holding.

Procedurally, we should not reach the issue. In *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681, we recently held that the plaintiff, who was resisting a petition to compel arbitration, had “forfeited” his claim of unconscionability by failing to “raise the issue.” Here, after inserting a boilerplate allegation of unconscionability as an affirmative defense in his response to Sonic’s petition to compel arbitration, Moreno did nothing in the trial court to pursue that defense. In his briefs, he argued only that the arbitration provision violates public policy insofar as it burdens his ability to vindicate his right to vacation pay. Nor did he assert unconscionability in the Court of Appeal, in the petition for review he filed in this court, or in the opening and reply briefs he filed with us. It was not until well after briefing closed in this court, when we resurrected the issue by asking the parties to discuss it in supplemental briefs, that Moreno ever mentioned unconscionability again. On this record, and given that Moreno, as the party asserting unconscionability, bears the burden of proving unconscionability (*Engalla, supra*, 15 Cal.4th at p. 972; *Szetela v. Discover Bank*

at p. 1218.) *Preston* thus “make[s] clear that state statutes are preempted by the FAA if the statutes as applied preclude the enforcement of federally protected arbitration rights, regardless of whether the state statutes specifically target arbitration agreements.” (*Carter*, at p. 1218)

(2002) 97 Cal.App.4th 1094, 1099), Moreno has forfeited or abandoned the issue.

Alternatively, rather than decide the merits, we should remand the issue of unconscionability for consideration in the lower courts, as we did a similar claim in *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 509. There, after reversing a finding that an arbitration provision was unenforceable based on unwaivability, we declined to address an unconscionability claim, noting that “no court ha[d] yet addressed” the issue and stating: “Considerations of judicial economy make it appropriate to leave [this] question[] to the lower courts in the first instance. [Citation.]” (*Ibid.*) Consistent with our decision, several published decisions have since explained that, because a determination of unconscionability requires development of a factual record, an appellate court should not address an unconscionability claim that has not been litigated in the trial court. (*Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1338-1339; *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1293, fn. 7.) Given these authorities and the record here, we should not reach the issue.

Substantively, the majority’s analysis is unpersuasive. The majority finds that a predispute “Berman waiver” is “markedly one-sided” because it “only benefit[s] the employer at the expense of the employee” and the majority finds itself unable to say that the benefits of arbitration “compensate[]” the employee for giving up the option of a Berman hearing. (Maj. opn., *ante*, at p. 25.) Thus, the majority declares, “the main purpose of *the Berman waiver* appears to be for employers to gain an advantage in the dispute resolution process by eliminating the statutory advantages accorded to employees designed to make that process

fairer and more efficient.” (*Id.*, italics added.) However, as previously noted, because of the de novo review process under the Berman statutes, a decision to waive the administrative option potentially saves the employee both time and money. The majority’s analysis disregards these substantial benefits.⁸

Moreover, the focus of the majority’s analysis is inconectly narrow. Contrary to what the majority’s discussion suggests, the agreement at issue here does not contain a “Berman waiver” per se. Rather, as noted above, it contains a broad, *bilateral* arbitration provision that applies, with certain exceptions, to “all disputes that may arise out of the employment context . . . that either [party] . . . may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum.” (*Ante*, p. 2.) It is this broad, bilateral provision for arbitration that encompasses, among other things, what the majority calls “the Berman waiver.” An assessment of substantive unconscionability should consider the purpose and benefits to the employee of

⁸ The majority incorrectly assumes that, under its holding, an employee will necessarily have the choice, after a dispute arises, of going directly to arbitration or pursuing a Berman hearing first. (Maj. opn., *ante*, at p. 22, fn. 9.) In light of the majority’s holding, parties in the future will likely exclude from predispute arbitration agreements claims that would be subject to the Berman statutes. Thus, after a dispute arises, an employee who has signed such an agreement will not be able to choose arbitration absent the employer’s agreement. Indeed, in light of the majority’s holding, it is not even clear in this case that either Moreno or Sonic may, without the other’s agreement, insist on arbitration either before or after a Berman hearing. (Cf. *Gentry*, *supra*, 42 Cal.4th at p. 466 [if trial court invalidates class action waiver provision on public policy grounds, parties may waive arbitration provision and bring matter to court].)

this broad arbitration provision. Thus, the majority errs in focusing narrowly only on the purpose and benefits of the provision insofar as it constitutes a waiver of Berman procedures.

Viewed from a broader perspective, the arbitration provision is not unconscionable. As noted above, it requires *both* the employer and the employee to submit all of their claims against each other to binding arbitration, subject to a limited list of exceptions. Moreover, the claims excluded from the arbitration provision are largely claims that would be brought by an employee. In other words, as Sonic observes, “the arbitration agreement does not inequitably exempt the employer from arbitration of claims more likely to be brought by an employee.” As also noted above, in the arbitration provision, the parties expressly acknowledged that their bilateral agreement to arbitrate *all* of their disputes, subject to enumerated exceptions, would provide “*mutual* benefits (such as reduced expense and increased efficiency).” (Italics added.) Neither Moreno nor the majority has established otherwise. Indeed, by holding that Sonic may pursue arbitration under the parties’ agreement after a Berman hearing (maj. opn., *ante*, at pp. 9-11), the majority implicitly finds that the arbitration provision is not, viewed in its entirety, impermissibly one-sided. In short, I agree with Sonic that “[t]he so-called Berman [w]aiver only looks [one-sided] in a vacuum.” Because neither Moreno, who bears the burden of proof on the issue, nor the majority has shown that the arbitration provision, viewed from the proper perspective, is unconscionable, I do not join the majority’s holding.

V. Conclusion.

The laws of both California and the United States require courts to enforce arbitration agreements according to their terms, absent a ground for revocation of any contract. Because no such ground exists in this case, the arbitration provision at issue is fully enforceable. The majority's contrary conclusion is inconsistent with federal and state law, and renders California's statutory scheme preempted by the FAA.

Of greater concern than the fate of the arbitration provision at issue in this case are the far-reaching implications of the majority's decision for arbitration in California. Under the majority's analysis, for an arbitration agreement to be valid and enforceable, it is no longer enough that arbitration allows full vindication of the substantive statutory right at issue. To invalidate an arbitration agreement, a court need only find some advantageous procedure that the Legislature has attached to a particular forum, and declare—without any indication from the Legislature—that waiver of that procedure is against public policy. Under the majority's analysis, for an arbitration agreement to be valid and enforceable, it also is no longer enough that an employer, like its employee, agrees to arbitrate *all* of its claims, and even provides for exceptions to arbitration that may be invoked only by the employee. To invalidate an arbitration agreement as impermissibly one-sided and unconscionable, a court, isolating one claim from the many the parties have agreed to arbitrate, need only declare itself unable to say that the benefits the employee gains from arbitration *of that isolated claim* compensate for what the employee loses. In these respects, the majority's decision substantially undermines the

public policy *as declared by the Legislature*, which strongly favors enforcement of arbitration agreements according to their terms and requires us to indulge every intendment to give effect to an arbitration provision. The majority's decision also improperly disregards the well-established principles that courts should not declare a contractual provision to be void as against public policy unless that conclusion is free from doubt and entirely plain, and the party resisting arbitration bears the burden of showing that the provision is against public policy or unconscionable. Finally, contrary to the high court's decisions, the majority's decision impermissibly allows states—or their courts—easily to circumvent the federal policy favoring enforcement of arbitration agreements according to their terms. For all of these reasons, I dissent.

CHIN, J.

WE CONCUR:

BAXTER, J.

CORRIGAN, J.

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APPENDIX D

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA SECOND
APPELLATE DISTRICT DIVISION FOUR

[Filed: May 29, 2009]

B204902

(Los Angeles County Super. Ct. No. BS107161)

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

v.

FRANK MORENO,
Defendant and Respondent.

APPEAL from an order of the Superior Court of Los Angeles County, Aurelio N. Munoz, Judge. Reversed.

Fine, Boggs & Perkins, David J. Reese, and John P. Boggs for Plaintiff and Appellant.

Rachel Folberg and Miles E. Locker for Defendant and Respondent.

In this case we consider whether an admittedly valid employment arbitration agreement that is governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq. (FAA)) may be enforced to dismiss a former employee's administrative wage claim against his former employer for unpaid vacation pay. The former employee, respondent Frank Moreno, filed an administrative wage claim with the Labor Commissioner

according to the “Berman” process provided in Labor Code section 98 et seq.¹ (Added by Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371.) Moreno’s former employer, appellant Sonic-Calabasas A, Inc. (Sonic), petitioned the superior court to dismiss the Berman proceeding and compel arbitration in accordance with the parties’ arbitration agreement, which Moreno conceded was a valid agreement. The superior court denied the petition as premature. We reverse the order denying Sonic’s motion to compel arbitration.

Sonic contends that the Labor Commissioner’s jurisdiction over this statutory wage claim was divested by the FAA. Sonic cites as controlling authority the United States Supreme Court’s recent decision in *Preston v. Ferrer* (2008) ___ U.S. ___ [128 S.Ct. 978] (*Preston*), in which the Labor Commissioner’s original and exclusive jurisdiction was held to be divested by the FAA with regard to a contract dispute arising under the Talent Agencies Act (§ 1700 et seq.) (TAA). Alternatively, Sonic argues that even if the minimum requirements for arbitration set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*) apply to this statutory wage claim, a Berman hearing is not a prerequisite to arbitration, either under *Armendariz* or *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*).

We conclude that Moreno waived his right to a Berman proceeding and enforcement of that waiver is not barred by *Armendariz* or *Gentry*.

¹ All further statutory references are to the Labor Code unless otherwise indicated.

BACKGROUND

The facts are undisputed. Frank Moreno is a fowler employee of Sonic, which owns and operates an automobile dealership. As a condition of his employment with Sonic, Moreno signed a predispute agreement that required both parties to submit their employment disputes to “binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec. 1280 et seq. . . .)” By its terms, the arbitration agreement applied to “all disputes that may arise out of the employment context. . . that either [party] may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum[,] . . . whether based on tort, contract, statutory, or equitable law, or otherwise.”

At some point, Moreno left his position with Sonic. In December 2006, Moreno filed an administrative wage claim with the Labor Commissioner for unpaid vacation pay pursuant to section 98 et seq. Moreno alleged that he was entitled to unpaid “[v]acation wages for 63 days earned 7/15/02 to 7/15/06 at the rate of \$441.29 per day.”

In February 2007, Sonic petitioned the superior court to compel arbitration of the wage claim and dismiss the pending administrative action. (Code Civ. Proc., § 1281.2.) The parties agreed that the arbitration agreement applied to the wage claim, but disagreed as to whether the arbitration agreement contained a waiver of the right to a Berman proceeding (Berman waiver), which would bar Moreno’s administrative wage claim under section 98 et seq. Sonic argued that such a waiver was created by the provision of the arbitration agreement requiring arbitration of all

employment disputes that could otherwise be brought in any judicial “or other governmental dispute resolution forum.”

The Labor Commissioner intervened below on behalf of Moreno (§ 98.5), who adopted the Labor Commissioner’s arguments. The Labor Commissioner argued that nothing in the arbitration agreement precluded Moreno from filing an administrative wage claim under section 98 et seq., which could then be followed by arbitration in lieu of the de novo appeal to superior court that is otherwise available under section 98.2. The Labor Commissioner argued against bypassing the Berman process, claiming that, under *Armendariz*, it is a necessary prerequisite to arbitration. The rationale for this conclusion was that, in the event the employee prevailed in the Berman process and the employer then moved to compel arbitration, the arbitrator would be required to provide the employee with all of the protections that would otherwise be available if the employer had sought a de novo appeal in superior court under section 98.2. However, the Labor Commissioner failed to identify any statutory authority to support this conclusion.

The superior court denied the petition to compel arbitration as premature. Citing *Armendariz*, the superior court stated that, as a matter of “basic public policy. . . until there has been the preliminary non-binding hearing and decision by the Labor Commissioner, the arbitration provisions of the employment contract are unenforceable, and any petition to compel arbitration is premature and must be denied.”

Sonic appealed from the order of denial. (Code Civ. Proc., § 1294, subd. (a) [order denying a motion to compel arbitration is appealable].) During the briefing period, the United States Supreme Court decided

Preston, which held that the Labor Commissioner's original and exclusive jurisdiction was divested by the FAA with regard to a contract dispute arising under the TAA. The Labor Commissioner has not filed a respondent's brief in this appeal.

DISCUSSION

“A petition to compel arbitration is resolved in a summary proceeding with the trial court sitting as trier of fact and weighing declarations, documentary evidence and any oral testimony. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) Pursuant to Code of Civil Procedure section 1281.2, unless the petitioner has waived arbitration, grounds exist for revocation of the agreement, or a party to the arbitration agreement is also a party to a pending matter with a third party and there is a possibility of conflicting rulings on a common issue, the trial court ‘shall order’ the parties to arbitrate the controversy ‘if it determines that an agreement to arbitrate the controversy exists.’” (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 684.) ““Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court.”” (*Id.* at p. 685.)

As there were no disputed facts below, we will exercise our independent judgment on appeal.

I. The Right to Wages and the Berman Hearing Process

In *Cuadra v. Millan* (1998) 17 Cal.4th 855, 858-859 (*Cuadra*) (disapproved on other grounds in *Samuels v.*

Mix (1999) 22 Cal.4th 1, 16, fn. 4), the California Supreme Court discussed the employee's right to receive earned wages and engage in the Berman hearing process as follows: "The wage rights of an employee may be provided for in the employment contract between the employee and the employer, whether oral or written, including a collective bargaining agreement. The employee's wage rights are also closely regulated by statute: The Labor Code prescribes such matters as the time and manner of paying wages, minimum wage requirements, and mandatory overtime pay; for certain industries and occupations, minimum wages and overtime pay are also prescribed by administrative regulations known as wage orders, issued by the Industrial Welfare Commission pursuant to statutory authority (see *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700-703). [Fn. omitted.]

"If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options. The employee may seek judicial relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. (§§ 218, 1194.) Or the employee may seek administrative relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8. The latter option was added by legislation enacted in 1976 (Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371) and is commonly known as the "Berman" hearing procedure after the name of its sponsor. [2]

² "Other administrative remedies may also be available, e.g., actions by the commissioner to recover minimum wages and overtime pay on behalf of the employee (§ 1193.6) and to obtain

“The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims. [Fn. omitted.] In brief, in a Berman proceeding the commissioner may hold a hearing on the wage claim; the pleadings are limited to a complaint and an answer; the answer may set forth the evidence that the defendant intends to rely on, and there is no discovery process; if the defendant fails to appear or answer no default is taken and the commissioner proceeds to decide the claim, but may grant a new hearing on request. (§ 98.) The commissioner must decide the claim within 15 days after the hearing. (§ 98.1.) Within 10 days after notice of the decision any party may appeal to the appropriate court, where the claim will be heard de novo; if no appeal is taken, the commissioner’s decision will be deemed a judgment, final immediately and enforceable as a judgment in a civil action. (§ 98.2.) (See generally, 1 Wilcox, Cal. Employment Law (1997) §§ 5.10 to 5.19, pp. 5-16.2 to 5-52)” (*Cuadra, supra*, 17 Cal.4th at pp. 858-859.)

II. The Right to Vacation Pay

Under California law, vacation pay constitutes wages. “The Labor Code defines ‘wages’ as ‘all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.’ (§ 200, subd. (a).) Courts have recognized that ‘wages’ also include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay. (E.g., *Suastez*

statutory penalties for failure to pay wages (§§ 210, 225.5). They are not at issue in this case.”

v. Plastic Dress-Up Co. (1982) 31 Cal.3d 774, 780; *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1091.)” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.)

The right to a paid vacation is a contract right that, once vested, may not be forfeited upon termination. (§ 227.3)³ According to *Suastez v. Plastic Dress-Up Co.*, *supra*, 31 Cal.3d at page 784, “[t]he right to a paid vacation, when offered in an employer’s policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation ‘vests’ as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay. [Fn. omitted.]”

In the absence of an arbitration agreement, it is clear that an employee may pursue a wage claim for vacation pay in either an administrative (§ 98 et seq.) or judicial (§ 229) forum. Also, it is clear that even with an arbitration agreement, an employee may pursue a wage claim in a judicial forum, provided the

³ Section 227.3 provides: “Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. . . .”

agreement is not governed by the FAA. Under California law, section 229 provides that “[a]ctions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. . . .”

However, given that this action is governed by the FAA, we are faced with the following issues: (1) whether *Preston* compels the conclusion that the Labor Commissioner’s jurisdiction over Moreno’s statutory wage claim was divested by the FAA, and, if not, (2) whether Moreno contractually waived the statutory right to pursue his wage claim in an administrative forum (Berman waiver), and, if so, (3) whether the Berman waiver is unenforceable for public policy reasons under *Armendariz* or *Gentry*.

III. *Preston* Is Not Dispositive of This Case

A. *Federal Preemption Generally*

Section 2 of the FAA provides in relevant part: “A written provision in. . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof,. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (9 U.S.C. § 2.)

According to *Preston*, “[s]ection 2 ‘declare[s] a national policy favoring arbitration’ of claims that parties contract to settle in that manner. *Southland Corp. [v. Keating]*, 465 U.S. [1,] 10, 104 S.Ct. 852 [(1984)]. That national policy, we held in *Southland*, ‘appli[es] in state as well as federal courts’ and ‘foreclose[s] state legislative attempts to undercut the enforceability of

arbitration agreements.’ *Id.*, at 16, 104 S.Ct. 852. The FAA’s displacement of conflicting state law is ‘now well-established,’ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), and has been repeatedly reaffirmed, see, e.g., *Buckeye [Check Cashing, Inc. v. Cardegnal]*, 546 U.S. [440,] 445-446, 126 S.Ct. 1204 [(2006)]; *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 684-685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). [Fn. omitted.]” (*Preston, supra*, ___ U.S. at p. ___, 128 S.Ct. at p. 983.)

The FAA “incorporates a strong federal policy of enforcing arbitration agreements, including agreements to arbitrate statutory rights. (See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1074-1075 . . . , and cases cited therein.)” (*Armendariz, supra*, 24 Cal.4th at pp. 96-97.) In light of this strong federal policy, we are required to ““rigorously enforce agreements to arbitrate.”” (*Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220, 226.) [Fn. omitted.]” (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1117-1118.)

B. Federal Preemption Under *Preston*

As previously mentioned, *Preston* involved a contractual dispute involving an alleged violation of the TAA. Under California law, the Labor Commissioner has original and exclusive jurisdiction over disputes arising under the TAA, including the validity of personal management contracts between artists and their managers, and their respective liabilities thereunder. (*Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 357; *Styne v. Stevens* (2001) 26 Cal.4th 42, 54 [disputes arising under the TAA “must be heard by the Commissioner, and all remedies before

the Commissioner *must* be exhausted before the parties can proceed to the superior court”].)

In *Preston*, a personal manager instituted an arbitration proceeding against his client, an artist, for breach of contract, but the artist filed an administrative action with the Labor Commissioner, seeking to invalidate the entire contract based on the manager’s allegedly unlicensed talent agent activities on the artist’s behalf in violation of the TAA.⁴ The artist also filed a judicial action for injunctive and declaratory relief. The manager moved to compel arbitration, which the superior court denied, and the manager appealed from the order of denial. The appellate court affirmed the denial of the motion to compel arbitration in a published decision (*Ferrer v. Preston* (2006) 145 Cal.App.4th 440, review denied Feb. 14, 2007), which was reversed by the United States Supreme Court while this appeal was pending.

Given that the Labor Commissioner was asked to invalidate the parties’ *entire* contract on a TAA-based defense, the Supreme Court concluded the artist had “urged the Labor Commissioner and California courts to override the contract’s arbitration clause on a ground that *Buckeye* requires the arbitrator to decide in the first instance.” (*Preston, supra*, 128 S.Ct. at p. 984.) The Supreme Court pointed out that according to

⁴ As pointed out in *Preston*, under California law, “[c]ourts ‘may void the entire contract’ where talent agency services regulated by the TAA are ‘inseparable from [unregulated] managerial services.’ *Marathon Entertainment, Inc. v. Blasi*, [42 Cal.4th 974, 997-998], 174 P.3d 741, 744 (2008). If the contractual terms are severable, however, ‘an isolated instance’ of unregulated conduct ‘does not automatically bar recovery for services that could lawfully be provided without a license.’ *Ibid.*” (*Preston, supra*, 128 S.Ct. at p. 984, fn. 4.)

Buckeye, supra, 546 U.S. 440, “when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court.” (*Preston, supra*, 128 S.Ct. at p. 981.) “The dispositive issue,” the Supreme Court stated in *Preston*, “is not whether the FAA preempts the TAA wholesale. [Citation.] The FAA plainly has no such destructive aim or effect. Instead, the question is simply who decides whether Preston acted as personal manager or as talent agent.” (*Id.* at p. 983.)

In rejecting the artist’s contentions, the Supreme Court considered whether allowing the administrative hearing to proceed would not violate the FAA because arbitration would merely be postponed until the Labor Commissioner issued a nonbinding ruling on the validity of the artist’s TAA-based defense. The Supreme Court concluded that this was not a viable argument, stating: “Nor does Ferrer’s [the artist’s] current argument—that § 1700.44(a) merely postpones arbitration—withstand examination. Section 1700.44(a) provides for *de novo* review in Superior Court, not elsewhere. [5] Arbitration, if it ever occurred following

⁵ In a footnote, the Supreme Court described the appellate process as follows:

“From Superior Court an appeal lies in the Court of Appeal. Cal. Civ. Proc. Ann. § 904.1(a) (West 2007); Cal. Rule of Court 8.100(a) (Appellate Rules) (West 2007 rev. ed.). Thereafter, the losing party may seek review in the California Supreme Court, Rule 8.500(a)(1) (Appellate Rules), perhaps followed by a petition for a writ of certiorari in this Court, 28 U.S.C. § 1257. Ferrer has not identified a single case holding that California law permits interruption of this chain of appeals to allow the arbitrator to review the

the Labor Commissioner's decision, would likely be long delayed, in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.' *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). If Ferrer prevailed in the California courts, moreover, he would no doubt argue that judicial findings of fact and conclusions of law, made after a full and fair *de novo* hearing in court, are binding on the parties and preclude the arbitrator from making any contrary rulings." (*Preston, supra*, 128 S.Ct. at p. 986.)

The Supreme Court pointed out that "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.' *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). See also *Allied-Bruce Terminix Cos.*, 513 U.S., at 278; *Southland Corp.*, 465 U.S., at 7, 104 S.Ct. 852. That objective would be frustrated even if Preston could compel arbitration in lieu of *de novo* Superior Court review. Requiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." (*Preston, supra*, 128 S.Ct. at p. 986.)

Before concluding that the Labor Commissioner's jurisdiction was preempted by the FAA, the Supreme Court emphasized that the validity and substantive rights of the arbitration agreement were not in dispute, stating: "Finally, it bears repeating that Preston's petition presents precisely and only a question

Labor Commissioner's decision. See Tr. of Oral Arg. 35." (*Preston, supra*, 128 S.Ct. at p. 986, fn. 6.)

concerning the forum in which the parties' dispute will be heard. See *supra*, at 983. 'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral. . . forum.' *Mitsubishi Motors Corp.*, 473 U.S., at 628, 105 S.Ct. 3346. So here, Ferrer relinquishes no substantive rights the TAA or other California law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum." (*Preston, supra*, 128 S.Ct. at p. 987.)

For the above reasons, the Supreme Court concluded that the Labor Commissioner's jurisdiction over the administrative action was divested by the FAA. But it expressed this conclusion in a broadly worded statement: "We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." (*Preston, supra*, 128 S.Ct. at p. 981.) By focusing solely on the breadth of this holding, Sonic argues that, under *Preston*, we are compelled to conclude the FAA preempts the Labor Commissioner's jurisdiction over all wage claims filed under section 98 et seq. We do not read *Preston* so broadly.

As the Supreme Court in *Preston* explained: (1) the artist was seeking to invalidate the entire contract based on the personal manager's alleged violations of the TAA, which is an issue that *Buckeye* requires the arbitrator to decide in the first instance; (2) the validity and substantive rights of the arbitration clause were not in dispute; and (3) the only issue was whether the fee dispute should be resolved in an arbitral or administrative forum. The parties did not

litigate in *Preston* whether there were any generally applicable contract defenses, such as fraud, duress, or unconscionability, which would invalidate or restrict the arbitration agreement. “Only ‘generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate [or restrict] arbitration agreements without contravening § 2’ of the FAA. (*Doctor’s Associates, supra*, 517 U.S. at p. 687.)” (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 385.)

In this case, the parties disagree as to whether it would be unconscionable under *Armendariz* or *Gentry* to restrict the arbitration clause by invalidating the Berman waiver. Accordingly, the issues in this case are distinguishable from those that were addressed in *Preston*. We therefore disagree with Sonic’s position that *Preston* is dispositive of this case.

IV. The Agreement Contained a Berman Waiver

Under California law, an arbitration agreement may not be enforced to preclude an employee from pursuing a statutory wage claim in a judicial forum under section 229. But in *Perry v. Thomas, supra*, 482 U.S. at page 492, the United States Supreme Court held that the FAA preempted section 229, thereby denying a judicial forum to those employees whose arbitration agreements are governed by the FAA. Two years after *Perry* was decided, the Labor Commissioner refused to consider an employee’s administrative claim for overtime pay in *Baker v. Aubrey* (1989) 216 Cal.App.3d 1259, on the ground that his statutory jurisdiction under section 98 et seq. was preempted by the FAA. The Labor Commissioner’s jurisdictional ruling was upheld by the superior court in a writ of mandate proceeding, which was affirmed on appeal. The employee argued on appeal that because the right to

overtime pay is statutory and cannot be waived, it is therefore not subject to arbitration. In rejecting this argument and concluding that the arbitration agreement was enforceable to preclude an administrative forum for the wage claim, the appellate court stated that “[r]esolution of Baker’s overtime pay claim by arbitration does not deprive her of her substantive rights. It only changes the forum in which they will be resolved. [Citation.]” (*Id.* at p. 1268.)

In this case, the Labor Commissioner exercised jurisdiction over Moreno’s wage claim on the theory that the arbitration agreement did not preclude him from engaging in the Berman process prior to arbitration. Whether the Labor Commissioner’s interpretation of the arbitration agreement was correct presents solely a question of law, given that no extrinsic evidence was presented below as to the meaning of the contract. The interpretation of a contract is purely a legal issue for the court “unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, ‘An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].’ [Citations.]” (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866, fn. omitted.)

According to the arbitration agreement, Moreno was precluded from pursuing any judicial “or other governmental dispute resolution forum,” with “the *sole* exception” of “claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers

Compensation Act[] and Employment Development claims.” In addition, the agreement stated that Moreno was allowed to file “administrative proceedings *only* before the California Department of Fair Employment and Housing, or the U.S. Equal Opportunity Commission.” (Italics added.)

As shown by the above contractual provisions, the parties contemplated that Moreno could pursue only those administrative remedies that were listed as exceptions to the agreement. Given that neither the Division of Labor Standards Enforcement nor the Labor Commissioner was listed among the stated exceptions, we conclude, as a matter of law, that Moreno was barred from pursuing an administrative wage claim under section 98 et seq. Having concluded that the arbitration agreement contained a Berman waiver, we turn to the issue of whether the waiver is unenforceable for public policy reasons under *Armendariz* or *Gentry*.

V. The Berman Waiver Is Not Unenforceable Under *Armendariz* or *Gentry*

According to *Armendariz*, “arbitration agreements that encompass *unwaivable* statutory rights must be subject to particular scrutiny.” (*Armendariz*, *supra*, 24 Cal.4th at p. 100.) “[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights.” (*Id.* at p. 101.)

Armendariz enumerated several minimum requirements for arbitration that apply “to unwaivable claims that are ‘carefully tethered to statutory or constitutional provisions’ (*Boghos v. Certain Underwriters at Lloyd’s of London* (2005) 36 Cal.4th 495, 508. . . , such as discrimination in violation of the California Fair Employment and Housing Act (FEHA)

(Gov. Code, § 12900 et seq.) or wrongful discharge in violation of public policy (i.e., claims under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167).” (*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App. 4th 1276, 1280 (*Giuliano*)). The Supreme Court explained in *Gentry, supra*, 42 Cal.4th. 443, that it imposed the *Armendariz* requirements because they are “‘necessary to enable an employee to vindicate. . . unwaivable rights in an arbitration forum.’” (*Little [v. Auto Stiegler, Inc.* (2003)] 29 Cal.4th [1064,] 1077.)” (*Gentry, supra*, at p. 457.) It stated that even though a party who is compelled to arbitrate unwaivable rights “‘does not waive them, but merely “submits to their resolution in an arbitral, rather than a judicial, forum”’ [citation], arbitration cannot be misused to accomplish a de facto waiver of these rights.’” (*Little, supra*, 29 Cal.4th at p. 1079.)” (*Gentry, supra*, at p. 457.)

Gentry summarized the *Armendariz* requirements as follows: “(1) the arbitration agreement may not limit the damages not normally available under the statute (*Armendariz, supra*, 24 Cal.4th at p. 103); (2) there must be discovery “sufficient to adequately arbitrate their statutory claim” (*id.* at p. 106); (3) there must be a written arbitration decision and judicial review “sufficient to ensure the arbitrators comply with the requirements of the statute” (*ibid.*); and (4) the employer must “pay all types of costs that are unique to arbitration” (*id.* at p. 113).’” (*Little v. Auto Stiegler, Inc.*, *supra*,] 29 Cal.4th [at p.] 1076. . . .)” (*Gentry, supra*, 42 Cal.4th at pp. 456-457.)

A. *The Right to Vacation Pay, Once Vested, Is Unwaivable*

Sonic contends that the superior court erroneously applied the *Armendariz* requirements to this case

because the right to vacation pay is not an unwaivable right. We disagree.

As previously discussed, the right to a paid vacation is a contract right that, once vested, may not be forfeited upon termination. (§ 227.3; *Suastez v. Plastic Dress-Up Co.*, *supra*, 31 Cal.3d at p. 784.) However, Sonic relies on *Giuliano*, *supra*, 149 Cal.App.4th 1276, as persuasive authority for its position that vacation pay, like the bonus and severance pay claims that were at issue in *Giuliano*, is not an unwaivable right that is subject to *Armendariz*.

In *Giuliano*, we held that an employee's contract claim for a "\$5 million to \$8 million bonus and a \$500,000 severance payment" was not subject to *Armendariz*. (149 Cal.App.4th at p. 1289.) We distinguished the employee's multimillion dollar contract claim from the more modest claims that generally are involved in minimum wage and statutory overtime pay cases. (*Id.* at p. 1290; see *Gentry*, *supra*, 42 Cal.4th at pp. 458-459 [employees bringing overtime pay suits typically have modest means and recover modest awards].) We concluded that the plaintiff's multimillion dollar contract claims for bonus and severance pay were not subject to *Armendariz* because they were "not based on the FEHA or a fundamental public policy that is tied to a constitutional or statutory provision. [Citations.]" (*Giuliano*, at pp. 1290-1291.)

Sonic contends that "Moreno is much more akin to Mr. Giuliano than he is to a minimum- or lower-wage earner," but "would have the Court view his individual claim for more than \$40,000 (when penalties are included) as [a] simple claim for a more modest sum." Sonic asserts that Moreno's claim is "large enough to provide sufficient individual incentive to vigorously pursue. There is no need to further incentivize his

claim by grafting the preempted, nonbinding administrative process into his arbitration agreement by deeming it a fundamental source of unwaivable rights.”

Regardless of the size of Moreno’s vacation pay claim, section 227.3, which precludes the forfeiture of a vested right to vacation pay, distinguishes this case from *Giuliano*. The right to vacation pay, once vested, is statutorily protected from forfeiture as a matter of public policy. We therefore conclude that Moreno’s vacation pay claim is subject to *Armendariz* because it is tied to a statutory provision.

B. *Suitability of the Arbitral Forum*

Sonic contends that the record fails to show that the Berman waiver is unenforceable for public policy reasons under *Armendariz* or *Gentry*. We agree.

1. *Gentry and Class Arbitration Waivers*

Gentry involved an employee’s purported class action lawsuit against his employer for statutory overtime pay under sections 510 and 1194.⁶ The employer

⁶ “Section 510 provides that nonexempt employees will be paid one and one-half their wages for hours worked in excess of eight per day and 40 per week and twice their wages for work in excess of 12 hours a day or eight hours on the seventh day of work. Section 1194 provides a private right of action to enforce violations of minimum wage and overtime laws. [Fn. omitted.] That statute states: ‘*Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.*’ (§ 1194, subd. (a), italics added.) By its terms, the rights to the legal minimum wage and legal overtime compensation conferred by the statute are unwaivable. ‘Labor

moved to compel individual arbitration of each claim pursuant to an employment arbitration agreement containing a class arbitration waiver. Although the superior court severed and invalidated two provisions of the arbitration agreement (cost splitting and limitation of remedies), it enforced the remainder of the agreement, including the class arbitration waiver, and required the plaintiff to submit to individual arbitration. After the appellate court denied the employee's writ of mandate petition, the Supreme Court granted review.

Among the issues decided in *Gentry* was “whether a class arbitration waiver would lead to a de facto waiver of statutory rights, or whether the ability to maintain a class action or arbitration is ‘necessary to enable an employee to vindicate . . . unwaivable rights in an arbitration forum.’” (*Little, supra*, 29 Cal.4th at p. 1077.)” (*Gentry, supra*, 42 Cal.4th at p. 457.) The Supreme Court concluded these questions must be decided on a case-by-case basis, as there are some circumstances when a class arbitration waiver “would lead to a de facto waiver [of statutory rights] and would impermissibly interfere with employees’ ability to vindicate unwaivable rights and to enforce the overtime laws.” (*Ibid.*)

According to *Gentry*, “when it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court

Code section 1194 confirms “a clear public policy. . . that is specifically directed at the enforcement of California’s minimum wage and overtime laws for the benefit of workers.” (*Say-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.)” (*Gentry, supra*, 42 Cal. 4th at p. 455.)

must consider the [following] factors . . . : the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration. If it concludes, based on these factors, that a 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, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can 'vindicate [their] unwaivable rights in an arbitration forum.' (*Little, supra*, 29 Cal.4th at p. 1077.) [Fn. omitted.]” (*Gentry, supra*, 42 Cal.4th at p. 463.)

2. Denial of Statutory Protections

Moreno contends that unless the Berman waiver is invalidated, he will forgo the following statutory protections afforded by sections 98.2 and 98.4 that will apply in a de novo appeal by Sonic of an adverse administrative ruling: (1) the employer must post an undertaking in the amount of the Labor Commissioner's award (§ 98.2, subd. (b)); (2) if the award is affirmed on appeal, the appellant (presumably, the employer) must pay for costs and attorney fees on appeal of the respondent (presumably, the employee) (§ 98.2, subd. (c)); and (3) if an employee is financially unable to afford counsel for the de novo review, the employee may request counsel from the Labor Commissioner, provided the employee is not objecting to

any part of the Labor Commissioner's final order and is seeking to uphold the award (§ 98.4).

We must decide whether the absence of these statutory protections will significantly impair Moreno's ability to vindicate his wage rights in arbitration. According to *Gentry*, "*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." (*Gentry, supra*, 42 Cal.4th at p. 463, fn. 7.)

Significantly, all of these statutory protections are only available *if* and *when* an employer appeals from an adverse administrative ruling. Obviously, it is impossible to determine whether Moreno will prevail at the administrative hearing. Accordingly, it is impossible to determine whether Moreno will lose any statutory protections if the Berman waiver is enforced. Unless enforcing the Berman waiver will pose significant obstacles to the vindication of Moreno's statutory wage rights, *Armendariz* does not require us to invalidate the waiver. At most, enforcing the Berman waiver will eliminate the possibility of receiving statutory protections that are contingent on an administrative ruling in Moreno's favor. We are not persuaded that the loss of what are merely contingent benefits can be equated with the significant obstacle to the vindication of statutory rights that *Armendariz* sought to address.

Moreover, Moreno provided no supporting authority for his assertion that invalidating the Berman waiver will entitle him to these "essential" statutory protections in an arbitral forum. He simply asserts that "the possibility that an employee could access the Berman process remedies without prior recourse to the Labor

Commissioner is an illusion. The reality is that there is no statutory authority or basis for providing these remedies to an employee unless and until the Labor Commissioner holds a hearing and issues a ruling favorable to the employee. In other words, without a hearing, there can be none of the essential remedies provided by the Berman process.”

However, the statutory scheme provides for de novo review only in a judicial, not arbitral, forum. The relevant statutes do not require an arbitrator to provide Moreno with the same protections that might be available to him in a de novo review in superior court. As far as the Berman process is concerned, the statutory protections are only available, if at all, during a de novo review in superior court.

3. *Delay of Arbitration*

Sonic objected to postponing arbitration in order to engage in a nonbinding Berman process that could take months or even years to complete. Sonic provided evidence below of the time consumed by the Berman process in several other cases, which it summarized as follows: “(See Reese Reply Decl., at ¶¶ 2-4 and Exhibit I [initial claim filed 10/17/2001; hearing held 6/24/2004; decision issued 8/3/2005]; Exhibit J [claim filed 9/4/2002; hearing held 8/1/2003]; Exhibit K [claim filed 9/13/2006; hearing held 7/30/2007; decision issued 8/27/2007].)” This evidence was not refuted.

In *Preston*, the artist, like Moreno, similarly argued that he was entitled to the Labor Commissioner’s adjudication of his TAA-based defense, which would then be subject to de novo review in arbitration. In rejecting this argument, the Supreme Court pointed out that the TAA only “provides for *de novo* review in Superior Court, not elsewhere. [Fn. omitted.]

Arbitration, if it ever occurred following the Labor Commissioner's decision, would likely be long delayed, in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.' *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). If [the employee] prevailed in the California courts, moreover, he would no doubt argue that judicial findings of fact and conclusions of law, made after a full and fair *de novo* hearing in court, are binding on the parties and preclude the arbitrator from making any contrary rulings." (*Preston, supra*, 128 S.Ct. at p. 986, fn. omitted.)

We conclude that the same rationale applies here. The record in this case is devoid of any evidence that the Berman process will save employees time or money. As the California Supreme Court pointed out in *Gentry*, "It is true that an employee may seek administrative relief from overtime violations with the Labor Commissioner through a 'Berman' hearing procedure pursuant to sections 98 to 98.8. (Added by Stats. 1976, ch. 1190, §§ 4-11, pp. 5368-5371.) But a losing employer has a right to a trial *de novo* in superior court, where the ruling of the Labor Commissioner's hearing officer is entitled to no deference. (§ 98.2, subs. (b), (c); *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1116) Thus, Berman hearings may result in no cost savings to the employee." (*Gentry, supra*, 42 Cal.4th at p. 464.) "[E]ven if [Sonic] could compel arbitration in lieu of *de novo* Superior Court review[, r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." (*Preston, supra*, 128 S.Ct. at p. 986.)

4. *Public Policy*

Moreno contends that Berman waivers should be invalidated as a matter of public policy because forcing employees to undergo a case-by-case determination of each waiver's validity "would completely subvert" the goal in *Gentry* of providing a substantially more effective way of vindicating statutory rights. Moreno argues that "[i]nstead of a quick cost-free determination of their right to the remedial tools they need in order to meaningfully litigate their claims, employees would now be forced, in every case, to immediately engage in court litigation without the very tools they need in order to conduct litigation."

As we previously stated, however, Moreno has failed to persuade us that enforcing the Berman waiver in this case would deprive him of rights that are necessary to the vindication of a statutory wage claim. Moreover, the record contains no evidence that Moreno or any other wage claimant lacks the knowledge, skills, abilities, or resources to vindicate his or her statutory wage rights in an arbitral forum. Even assuming the arbitral process is more difficult to navigate than the Berman process, there is nothing in this record to indicate that enforcing a Berman waiver will significantly impair the claimant's ability to vindicate his or her statutory rights. In short, Moreno has failed to demonstrate either the inadequacy of the arbitral forum provided by his arbitration agreement or the existence of a factual basis to invalidate all Berman waivers as against public policy.

DISPOSITION

The order denying the petition is reversed with directions to enter a new order granting the petition

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and dismissing the administrative proceedings. Sonic
is entitled to its costs on appeal.

CERTIFIED FOR PUBLICATION

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.

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APPENDIX E

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

[Filed: 11/06/07]

BS107161

SONIC-CALABASAS A INC.,
Plaintiff,

vs.

FRANK B MORENO,
Defendant.

HONORABLE AURELIO MUNOZ JUDGE

NATURE OF PROCEEDINGS:

COURT ORDER;

Order denying petition to compel arbitration submitted by counsel for Intervenor is GRANTED as fully outlined in the order.

The Order is signed by the Court, filed and placed in the court file by reference this date.

Moving party is to give notice.

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SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY OF
LOS ANGELES CENTRAL DISTRICT

[Filed: Nov. 02 2007]

Case No. BS107161

SONIC-CALABASAS A, INC., dba ACURA 101 WEST,
Petitioner,

v.

FRANK R. MORENO,
Respondent.

LABOR COMMISSIONER, CHIEF OF THE DIVISION
OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS,
LABOR AND WORKFORCE DEVELOPMENT
AGENCY, STATE OF CALIFORNIA,
Intervenor.

Date: October 16, 2007

Time: 8:30 a.m.

Place: Department 47

Judge: Aurelio N. Munoz

ORDER DENYING PETITION TO
COMPEL ARBITRATION

The petition to compel arbitration of petitioner Sonic Calabasas A, Inc., dba Acura 101 West came on for hearing before the court on October 16, 2007, at 8:30 a.m., in Department 47, the Honorable Aurelio N.

Munoz, Judge, presiding. John P. Boggs appeared and was heard on behalf of petitioner. William A. Reich, attorney for the California Labor Commissioner, appeared and was heard on behalf of intervenor Labor Commissioner, Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, Labor and Workforce Development Agency, State of California. Respondent Frank R. Moreno appeared and was heard on his own behalf.

Having read and considered the petition, the answers to the petition, and the points and authorities, briefs, and declarations submitted by the parties, and having heard argument, the Court finds as follows:

The arbitration provision in this case seeks to avoid the basic public policy principle of this state: the employee in a wage dispute is entitled to a quick, non binding hearing before the Labor Commissioner as to the merits of the employee's contentions. In this proceeding, for which he or she can be assessed no costs, the employee is entitled to represent himself or herself. The claim is investigated and heard by the Labor Commissioner which issues a non-binding decision. (See Labor Code §98 et seq.) This protection by the state for the individual wage earner is so basic that it cannot be lightly disregarded or contracted away under the guise of arbitration. (See *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Ca1.4th 83, 100.) If there is a request for a trial de novo following the Commissioner's decision, then the right to arbitrate may be invoked. But until there has been the preliminary non-binding hearing and decision by the Labor Commissioner, the arbitration provisions of the employment contract are unenforceable, and any petition to compel arbitration is premature and must be denied.

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THEREFORE, IT IS ORDERED that at this time
the petition to compel arbitration is denied.

AURELIO MUNOZ _____
AURELIO MUNOZ
Judge of the Superior Court

Dated: NOV 02, 2007

APPENDIX F**APPLICANT'S STATEMENT & AGREEMENT**

In the event of my employment to a position in this Company, I will comply with all rules and regulations of this Company. I understand that the Company reserves the right to require me to submit to a test for the presence of drugs in my system prior to employment and at any time during my employment, to the extent permitted by law. I also understand that any offer of employment may be contingent upon the passing of a physical examination. I consent to the disclosure of the results of any physical examination and related tests to the Company. I also understand that I may be required to take other tests such as personality and honesty tests, prior to employment and during my employment. I understand that should I decline to sign this consent or decline to take any of the above tests, my application for employment may be rejected or my employment may be terminated. I understand that bonding may be a condition of hire. If it is, I will be so advised either before or after hiring and a bond application will have to be completed.

I understand that the company may investigate my driving record and my criminal record and that an investigative consumer report may be prepared whereby information is obtained through personal interviews with my neighbors, friends, personal references, and others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics, and mode of living. I understand that I have the right to make a written inquiry within a reasonable period of time to receive additional detailed information about the nature and scope of this investigation. I further

understand that the Company may contact my previous employers and I authorize those employers to disclose to the Company all records and information pertinent to my employment with them. In addition to authorizing the release of any information regarding my employment, I hereby fully waive any rights or claims I have or may have against my former employers, their agents, employees, and representatives, as well as other individuals who release information to the Company, and release them from any and all liability, claims, or damages that may directly or indirectly result from the use, disclosure, or release of any such information by any person or party, whether such information is favorable or unfavorable to me. I authorize the persons named herein as personal references to provide the Company with any pertinent information they may have regarding myself.

I also acknowledge that the Company utilizes a system of alternative dispute resolution that involves binding arbitration to resolve all disputes that may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, both the Company and I agree that any claim, dispute, and/or controversy (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other state or federal laws or regulations) that either I or the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) may have against the other which would otherwise require or allow resort to any court or

other governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (With the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers= Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act=s other mandatory and permissive rights to discovery). However, nothing herein shall prevent me from filing and pursuing administrative proceedings only before the California Department of Fair Employment and Housing, or the U.S. Equal Opportunity Commission. In addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to,

notions of “just cause”) other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement’s modifications to the Act’s procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator’s written reasoned opinion and, at either party’s written request within 10 days after issuance of the award, shall be subject to affirmation, reversal or modification, following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial. Should any term or provision, or portion thereof, be declared void or unenforceable it shall be severed and the remainder of this agreement shall be enforceable. I UNDERSTAND BY VOLUNTARILY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY OF ANY CLAIM I OR THE COMPANY MAY HAVE AGAINST EACH OTHER.

I further understand that this voluntary alternative dispute resolution program covers claims of discrimination or harassment under Title VII of the Civil Rights Act of 1964, as amended. By marking the box to the right, I elect to give up the benefits of arbitrating Title VII claims. []

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I hereby state that all the information that I provided on this application or any other documents filled out in connection with my employment, and in any interview is true and correct. I have withheld nothing that would, if disclosed, affect this application unfavorably. I understand that if I am employed and any such information is later found to be false or incomplete in any respect, I may be dismissed.

If hired, I agree as follows: My employment and compensation is terminable at-will, is for no definite period, and my employment and compensation may be terminated by the Company (employer) at any time and for any reason whatsoever, with or without good cause at the option of either the Company or myself. No implied, oral, or written agreements contrary to the express language of this agreement are valid unless they are in writing and signed by the President of the Company (or majority owner or owners if Company is not a corporation). No supervisor or representative of the Company, other than the President of the Company (or majority owner or owners if Company is not a corporation), has any authority to make any agreements contrary to the foregoing. This agreement is the entire agreement between the Company and the employee regarding the rights of the Company or employee to terminate employment with or without good cause, and this agreement takes the place of all prior and contemporaneous agreements, representations, and understandings of the employee and the Company.

If you have any questions regarding this statement, please ask a Company representative before

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signing. I hereby acknowledge that I have read the above statements and understand the same.

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE STATEMENT & AGREEMENT

/s/ Frank Moreno

SIGNATURE OF APPLICANT

7-4-02

DATE

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APPENDIX G

SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF LOS ANGELES CENTRAL DISTRICT
[Filed: Aug. 14 2007]

Case No. BS 107161

SONIC-CALABASAS A, INC., *dba* Acura 101 West,
Petitioner,

v.

FRANK B. MORENO,
Respondent.

CALIFORNIA STATE LABOR COMMISSIONER,
Intervenor.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION TO COMPEL ARBITRATION

Hearing:

Date: October 16, 2007

Time: 8:30 a.m.

Dept: 47

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INTRODUCTION

Respondent agreed to arbitrate any employment-related disputes he had with his former employer, Sonic-Calabasas A, Inc., which operates the Acura 101 West automobile dealership in Los Angeles County where Plaintiff was employed. Despite his obligation to arbitrate such claims, Respondent filed a claim against Petitioner with the California Labor Commissioner, Division of Labor Standards Enforcement. By filing and pursuing an administrative claim with the DLSE, Respondent has refused to comply with his obligation to arbitrate this controversy in accordance with the parties' arbitration agreement. Accordingly, the Court should now order Respondent to honor his agreement and arbitrate his claims.

Furthermore, the California Labor Commissioner, Division of Labor Standards Enforcement ("DLSE") has intervened in this action to preclude or delay enforcement of the arbitration agreement between Petitioner and Respondent. Respondent and the Intervenor argue that California law permits an employee bound by an arbitration agreement to first seek relief through the DLSE's nonbinding administrative adjudicatory process notwithstanding the preemptive effect of the Federal Arbitration Act and controlling United States Supreme Court Authority that expressly precludes states from interfering with the enforcement of arbitration agreements. Because the arbitration agreement in this case is subject to the Federal Arbitration Act, this Court should reject the attempt by Respondent and Intervenor to avoid or delay arbitration and hold definitively-as other California Courts have recently confirmed, including another Department of this Court-that the Federal

Arbitration Act does not permit the DLSE to require parties to an arbitration agreement to participate first in the nonbinding, state-constructed agency adjudicatory process before the arbitration agreement may be enforced.

STATEMENT OF FACTS

Respondent Frank Moreno was employed by Petitioner Sonic-Calabasas A, Inc. and agreed, in writing, to submit all claims against his employer to binding arbitration. (*See* Petition to Compel Arbitration, at ¶¶ 2-5. Following his voluntary termination of his employment to take a position with another dealership, Moreno filed a wage claim against Petitioner with the State Labor Commissioner, Division of Labor Standards Enforcement (*See* Petition, at ¶ 6.) Petitioner brought this action to secure enforcement of the arbitration agreement.

Following the filing of the initial Petition in this action, the DLSE contacted the Petitioner, through counsel, seeking to intervene to challenge the enforceability of the arbitration agreement where a claimant has sought to use the administrative adjudicatory process administered by the Labor Commissioner through its DLSE. (*See* Declaration of David Reese in Support of Petition to Compel Arbitration, submitted herewith Meese Decl.”), at ¶ 9.) As Intervenor, the DLSE is now expected to raise its jurisdictional arguments.

But this is not the first time that the DLSE has raised these jurisdictional arguments. Last summer, the California Labor Commissioner-through its attorney, Mr. Reich and acting behind-the-scenes on behalf of an *in pro per* Respondent-prepared (and/or assisted in the preparation of) opposition papers

seeking to avoid enforcement of an arbitration agreement. In opposing the arbitration petition, the employee submitted arguments identical to those expected here: the arbitration agreement is enforceable, but must be deferred until after the Labor Commissioner conducts its nonbinding adjudicative process. These arguments were rejected by the Los Angeles Superior Court, which compelled the matter to binding arbitration. (*See* Order of the Hon. Malcolm Mackey, dated August 16, 2006, attached to the accompanying Declaration of David Reese as Exhibit E, and factual discussion in Reese Decl., at ¶¶ 7-8.)

When the Petitioner in this case first filed its Petition, Sonic-Calabasas A, Inc. received notice that Respondent Frank Moreno had filed a wage claim with the Labor Commissioner notwithstanding a written agreement to submit all claims to binding arbitration, it filed this Petition seeking an order enforcing the arbitration agreement. The Petition was initially assigned to Judge Mackey—the same Judge who had rejected the Labor Commissioner’s arguments in the *Taravella* case. It was thus no coincidence that Respondent immediately challenged Judge Mackey under Section 170.6, which saw this case reassigned to this Department (*See* Reese Decl., at 10-11.)

While surely relieved to have avoided Judge Mackey again, the Labor Commissioner was apparently not entirely pleased with the new assignment. Shortly after the assignment to this Department, the Labor Commissioner (through a different attorney, but utilizing opposition papers identical to those filed in the *Taravella* case) intervened in a similar Petition action in Monterey County Superior Court. (*See* Reese Decl., at ¶ 12.) This case was briefed and argued, and like Judge Mackey in the *Taravella* matter, the court

rejected the Labor Commissioner's argument that the its optional procedure established nonwaivable statutory rights. A proposed order was circulated and the Labor Commissioner's revisions were adopted. On May 7, 2007, the Monterey County Superior Court adopted the proposed order, ruling that

Because the arbitration agreement's requirement that Respondent forego initial resort to the administrative remedy afforded by the Labor Commissioner was not contrary to public policy or unconscionable, and because Petitioner timely requested arbitration, the Labor Commissioner was precluded from exercising administrative adjudicatory jurisdiction over the wage claim filed by Respondent with the Commissioner.

(See Order of May 7, 2007, attached as Exhibit G to the Reese Decl.)

Despite the repeated and unequivocal rejection of its position that its optional administrative proceedings establish substantive rights that preclude or delay enforcement of arbitration agreements protected under the Federal Arbitration Act, the Labor Commissioner persists in seeking yet another bite at the apple. Indeed, the *Taravella* and *Russo* cases are only among the latest in a much longer history of anti-arbitration animus by the Labor Commissioner that has been repeatedly rejected by the courts. And yet the Labor Commissioner continues to push the same button.

While in some contexts such perseverance is lauded (*e.g.*, "If at first you don't succeed, try, try again"), in this setting, repeated relitigation of the same issue is barred by principles of collateral estoppel. Moreover, because the issue has been adjudicated repeatedly

in favor of prompt enforcement of arbitration agreements, and because these retread arguments presented by the Labor Commissioner fail to offer any compelling reason to turn against the growing list of courts which have rejected the Labor Commissioner's position, this Court should reject the Labor Commissioner's position whether or not the Court relies on the principle of collateral estoppel.

LAW AND ARGUMENT

I. Plaintiff Must Be Ordered to Arbitrate His Wage Claims.

Under Section 12812 of the California Code of Civil Procedure, courts must order to arbitration any controversy covered by a written arbitration agreement

On [motion] of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court *shall* order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists. . . .

(Cal. Civ. Proc. Code § 1281.2 [*emphasis added*].)

As the United States Supreme Court has held, employee claims covered by an arbitration agreement between an employee and an employer are subject to mandatory, binding arbitration, and must proceed to arbitration on motion or petition by one of the parties. (*Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105; *see also* Cal. Civ. Proc. Code § 1290; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.)

Moreover, consistent with this State's strong public policy in favor of arbitration (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9), the California Supreme Court has held that claims by an employee against her employer, whether based on statute, common law, or otherwise, must proceed to binding arbitration in the face of a valid agreement between the parties to arbitrate employment-related claims. (*Armendariz, supra*, 24 Cal.4th 83; *see also 24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199.)

Several years after the *Armendariz* decision, the California Supreme Court decided the case of *Little v. Auto Stiegler*. ((2003) 29 Cal.4th 1064). In *Little*, the Supreme Court addressed the enforceability of an arbitration agreement in an employment context that contained the identical operative language that is at issue in the present case and held the agreement enforceable.¹ The *Little* decision is controlling precedent on the identical language and issues raised by this Petition. Accordingly, Plaintiffs claims alleged in this lawsuit, and any other claim he may have that arises from or is somehow related to his employment, do not belong in this forum; rather, they must proceed to arbitration.

¹ The only agreement provisions found unenforceable by the Court in *Little*—and judicially severed to ensure the enforceability of the remainder of the agreement—set forth a limited appeal right; no such provision exists in the agreement at issue in this matter.

II. Because the Federal Arbitration Act Blocks State Laws and Policies Which Have the Purpose or Effect of Frustrating the Enforcement of Agreements to Submit Disputes to Binding Arbitration, The DLSE Cannot First Require Petitioner to Proceed in its Nonbinding Administrative Adjudicatory Proceeding.

The law is well-settled that the FAA precludes enforcement of any state law or policy that would place conditions on enforcement of arbitration agreements that do not apply generally to other contracts. (*Perry v. Thomas* (1987) 482 U.S. 489 [California statute restricting arbitration enforcement unconstitutional].) Section 2 of the FAA, for example, expressly provides that written arbitration provisions are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” (9 U.S.C. § 2.) “Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions.” (*Doctor’s Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687 [*emphasis in original*].) In other words, only generally-applicable contract defenses (such as fraud, duress, or unconscionability) may be applied to invalidate arbitration agreements to which the FAA applies.

A. The DLSE Cannot to Articulate Any Generally-Applicable Contract Defense That Would Permit the Labor Commissioner to Require Application of its Adjudicatory Procedure Notwithstanding an Acknowledged Arbitration Agreement,

In this case, there is no argument of fraud, duress or unconscionability to interfere with the prompt enforcement of the agreement In opposition to this Petition, Intervenor is expected to argue—having

raised this argument previously in this action as well as in other actions—that California law requires a set of “minimum standards” to ensure that nonwaivable statutory rights may be effectively vindicated in arbitration proceedings. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) In *Armendariz*, the Court reasoned that an arbitration agreement which proscribed substantive remedies might be unenforceable not because it involved arbitration, but because the agreement ran afoul of generally applicable contract defenses which prohibit a party from contracting away (a) responsibility for willful liabilities (see Cal. Civ. Code § 1668); and (b) advantages of a law established for a public benefit (Cal. Civ. Code § 3513). (*Armendariz, supra*, 24 Cal.4th at 99-101 [citing *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628].)

But review of the facts and circumstances that led to the *Armendariz* decision demonstrates that reliance by the DLSE on that case as a template for avoiding arbitration at this time is misplaced. The Court in *Armendariz* struck down the arbitration agreement in that case because its provisions *affirmatively excluded specific remedies* established by the statute at issue (FEHA). Specifically, the agreement expressly limited recovery to back pay. (*Armendariz, supra*, 24 Cal.4th at 103-04.) The court noted that this restriction—artificially insulating the employer from possible punitive damages and an award of attorneys’ fees—rendered the agreement contrary to public policy and unenforceable. *Id.* .) In the arbitration agreement between Petitioner and Respondent, there is no suggestion that any substantive remedies are not available to the Respondent.

B. The Supposed Nonwaivable, Public Rights Articulated by the DLSE Are Neither Nonwaivable Nor Public in Nature And, Therefore, Cannot Be the Basis of a Refusal to Honor the Parties Arbitration Agreement.

In opposing arbitration in this case, the DLSE will argue that enforcement of the agreement to preclude participation in the Labor Commissioner's nonbinding adjudicatory process would effectively deprive Respondent of nonwaivable, public rights provided by statute. To get there, the DLSE necessarily must rely on the faulty premise that its nonbinding procedural process provides substantive, nonwaivable, public rights. Because the procedural "rights" trumpeted by the DLSE are neither public in nature nor unwaivable, neither federal nor state law will permit the nonbinding DLSE adjudicatory process to sidestep the preemptive power of the FAA and the United States Constitution.

The description by the DLSE of a "two-step process" of a nonbinding adjudicatory action followed by a *de novo* review (if appealed) is a blatantly incomplete illustration of the options available to an aggrieved employee. In addition to the two-step process hawked by the DLSE, any aggrieved employee may "sue directly . . . for any wages or penalty due him" under the Labor Code article governing payment of wages. (Cal. Labor Code § 218.) Because the employee can ignore the administrative process from the outset, it cannot be said to be a nonwaivable public right.

The DLSE has admitted that an arbitration agreement under the FAA may be readily enforced to preclude resort to the Superior Court following the adjudicatory proceeding. By the same reasoning, an employee who eschews the adjudicatory process to

proceed directly to Superior Court with his or her claim may be compelled immediately to proceed to binding arbitration under the FAA. indeed, such an employee may choose to invoke the arbitration agreement immediately against the employer! But under the position espoused by the DLSE, an employer whose employee chooses to invoke the adjudicatory procedures of the Labor Commissioner is barred by this optional adjudicatory procedure from realizing the benefits of its arbitration bargain. This one-sided obstacle to arbitration enforcement is precisely the type of impediment to arbitration that the FAA has been designed and implemented to preempt.

C. The DLSE Cannot Identify Any Substantive Right from Which the Wage Claimant Would Be Barred If the Claim Were Required to Go to Binding Arbitration Without First Going to the Adjudicatory Process.

As noted above, the “rights” highlighted by Plaintiff are neither public nor unwaivable, and thus the discussion should end at that. However, even if one were to postulate, *arguendo*, that these rights must be protected in an arbitration proceeding, there remains no obstacle to immediate enforcement of the arbitration agreement in this case, because there is nothing in the arbitration agreement that would prevent the agreement from effectively vindicating these rights for the wage claimant (*See, e.g., Armendariz,, supra*, 24 Cal.4th at 110-11 [arbitration permissible, as long as key rights (such as insulation from added forum expenses) are vindicated in the process].)

The *Armendariz* decision did not hold that arbitration agreements must necessarily provide the same rights and procedures as would otherwise apply in the absence of arbitration, only that there must be

sufficient procedural rights to ensure the vindication of substantive rights. For example, in discussing whether an invocation of the California Arbitration Act provisions on discovery would be sufficient to protect the employee's right to conduct adequate discovery, the Supreme Court noted that it was enough that the employee was "at least entitled to discovery sufficient to adequately arbitrate their statutory claim" whether or not they were provided the "full range of discovery" provided for in the code. (See *Armendariz, supra*, 24 Cal.4th at 105-06.) Similarly, California law will not require verbatim inclusion of procedural rights under Section 98, as long as procedures will enable the employee to adequately arbitrate their statutory claims.

According to the DLSE, the undertaking requirement "is designed to insure that at the end of the day wage earners will not face enforcement or collection problems. . . ." ² There is nothing in the parties' arbitration agreement to prevent the arbitrator from adopting measures designed specifically to avoid enforcement or collection problems. For example, the arbitrator may require the employer to post a bond, if warranted by a risk of enforcement problems. Indeed, the California Arbitration Act specifically provides that either party may apply for a provisional remedy

² See DLSE Opposition to Petition of Victory Dealership Group, at 6:18-19. This Brief, attached as Exhibit F to the Reese Declaration filed herewith, was presented by the Labor Commissioner in another case in which the DLSE intervened in a Petition action in an unsuccessful effort to challenge the enforceability of an arbitration agreement with identical substantive provisions. (See Reese Decl., at ¶¶ 12-14, *citing Victory Dealership Grow) v. Russo*, Monterey Superior Court Case No. M83401.)

(*e.g.*, writ of attachment, etc.) if the anticipated arbitration award “may be rendered ineffectual without the provisional relief.” (*See* Cal. Code Civ. Proc. § 1281.1 [relief even available through Superior Court].)

Similarly, Petitioner is not aware of any agreement provision to bar the DLSE from acting as counsel to an employee in the arbitration proceeding. DLSE attorneys have certainly provided legal assistance to claimants prior to an adjudicatory hearing in connection with issues of arbitrability.³ What would prevent them from representing low- and moderate-income wage claimants in their arbitration proceedings?

Finally, if the attorneys-fee “safe haven” noted by the DLSE is a nonwaivable public right (notwithstanding the ready waiver by employees who choose to go straight to court), then as a substantive right under California law it must be taken into consideration by the arbitrator, who is bound to follow California law in reaching his reasoned decision. The DLSE has not articulated any reason why this critical right cannot be vindicated in an arbitration proceeding.

³ The present case is, of course, a prime example. In addition, DLSE attorney William Reich has expressly acknowledged having advised and assisted at least one wage claimant in opposing a Petition to Compel arbitration. (*See* Reese Decl., at ¶ 7 [referring to *HOP, LLC v. Taravella*].)

III. The DLSE Is Barred by Principles of Collateral Estoppel from Raising the Arguments It Will Raise in its Opposition Brief, as the Courts Have Determined on Multiple Occasions That the DLSE Has No Jurisdiction to Entertain a Claim Covered by an Arbitration Agreement under the FAA

In the past, the DLSE has taken an official position that where an arbitration agreement subject to the FAA exists, the agency does not have jurisdiction to hear the claim. (See, e.g., Division of Labor Standards Enforcement, “Enforcement Policies and Interpretations Manual” (June 2002), at § 36.3 [Labor Code section 229 inapplicable where FAA arbitration exists]; *Baker v. Aubrey* (1989) 216 Cal.App.3d 1259.) Indeed, in *Baker*, the DLSE dismissed the administrative wage claim for want of jurisdiction and both the Superior Court and the Court of Appeal refused to issue a writ of mandate requiring the agency to adjudicate the claim, holding that the FAA and its “body of federal substantive law of arbitrability” trumped “any state substantive or procedural policies to the contrary.” (*Baker, supra*, 216 Cal.App.3d at 1265.)

More recently, the DLSE has argued that the California Supreme Court decision in *Armendariz, supra*, relieves the agency of the burden of complying with the *Baker* decision, claiming that the argument it presses here was never raised in that case. But in *Baker*, the Court of Appeal dedicated a substantial portion of the opinion to addressing that claimant’s argument that her statutory rights could not be waived through any agreement to arbitrate. (See *Baker, supra*, 216 Cal.App.3d at 1265-68.) The court specifically rejected the argument that legislature-created rights could not be subject to arbitration, finding

instead that the broad language of the arbitration agreement and the strong federal policy favoring arbitration of such agreement mandated arbitrability of the claim. (*Baker, supra*, 216 Cal.App.3d at 1266-67.) For the DLSE to suppose now that the waivability of statutory rights was not addressed in that case is without foundation.

Not only is the DLSE bound by the *Baker* decision, but it is also bound by post-*Armendariz* court orders confirming that the agency has no jurisdiction of claims where an arbitration agreement exists. In the case of *Labor Commissioner, State of California v. Sonic-Carson F, Inc.*, Los Angeles Superior Court Case No. 03-C-03488, filed Sep. 10, 2003 (“*Sonic-Carson F*”), the DLSE intervened to prevent an employer from compelling arbitration of a wage claim, arguing that an arbitration agreement “did not, without more, deprive the Labor Commissioner of jurisdiction to hear the claim.” (See State Labor Commissioner’s Opposition to Defendant’s Motion to Compel Arbitration and Stay Proceedings, filed May 18, 2004, attached to Reese Declaration as Exhibit B.) The Court disagreed, and in its Order, specifically held “[t]hat jurisdiction is lacking in that the jurisdiction of the Labor Commissioner to process a wage claim is preempted by the Federal Arbitration Act once the Defendant demands arbitration if there is an enforceable agreement to arbitration governed by the Federal Arbitration Act.” (See Order, dated July 9, 2004, in *Sonic-Carson F, supra*, attached as Exhibit C to the Reese Declaration.) This Order is binding on the DLSE under principles of collateral estoppel.

“Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.” (*Lucido v. Superior Court (The People)* (1990) 51 Cal.3d 355,

341.) Where, as here, the same party seeks to re-litigate an issue necessarily determined in another action, the doctrine of collateral estoppel presents an insurmountable barrier. In this case, each of the elements fundamental to collateral estoppel is present (*See, e.g., Lucido, supra*, 51 Cal.3d at 341 [setting forth five elements]) First, the issue before the Court here is identical to the issue presented in the prior action. At issue in *Sonic-Carson F* was whether or not the DLSE retained jurisdiction to conduct an adjudicatory hearing on a wage claim where an agreement under the FAA was present; this is the same contention pressed by the DLSE in this action. Second, the issue was “actually litigated” in the case below. As noted, the Order in *Sonic-Carson F* specifically addressed the question of federal preemption of DSLE jurisdiction, and the brief submitted by the DLSE in that case maintained the agency’s right to conduct its proceedings notwithstanding an arbitration agreement (*See Reese Decl.*, Exhibits B and C.)

Third, the issue of the DLSE’s preempted jurisdiction was necessarily decided in the *Sonic-Carson F* matter. In the Order, the court specifically ruled that the Labor Commissioner lost jurisdiction as soon as a demand was made; that finding was what enabled the court in that case to declare the challenged judgment void due to lack of jurisdiction. (*See Reese Decl.*, Exhibit C, at p. 2.) Moreover, the “necessarily decided” requirement under California law means only “only that the issue not have been ‘entirely unnecessary’ to the judgment in the initial proceeding.” (*Lucido, supra*, 51 Cal.3d at 342 [citing 7 Witkin, Cal. Procedure (3d Ed. 1985) Judgment, § 268, p. 710].) Just as in This case, the question of DLSE jurisdiction in the face of preemption was a

critical issue in *Sonic-Carson F*, not an “entirely unnecessary” one.

Fourth, the decision in *Sonic-Carson F* is final and on the merits. The Order, dated July 9, 2004, was never challenged by the DLSE or by the individual employee. Moreover, the action in which the Order was issued was dismissed more than a year ago. (*See* Reese Decl., at ¶ 10, and Exhibit E [dismissal noted on court records on March 24, 2006].) Because that Order is free from attack on appeal, the requirement of finality is satisfied. (*See Morris v. McCauley’s Quality Transmission Service* (1976) 60 Cal.App.3d 964, 973.) And Fifth, the parties are the same: it is the same DLSE that had filed the action and briefed the issue in *Sonic-Carson F* as has sought intervention herein to oppose the employer’s Petition to Compel Arbitration.

The *Sonic-Carson F* case is not the only prior decision on the issue of FAA preemption of DLSE jurisdiction that binds the DLSE through collateral estoppel. In *FirstAmerica Automotive, Inc. v. Sweeney* ((2000) 79 Cal.App.4th 1207),⁴ a decision from the Sixth Appellate District of the Court of Appeal, the DLSE intervened to argue that the arbitration

⁴ The *FirstAmerica Automotive* decision was published by the Court of Appeal, but review was granted by the California Supreme Court, pending resolution of a case then pending before the U.S. Supreme Court. The California high court dismissed review of this case after the U.S. Supreme Court issued its decision in *Circuit City Stores, Inc. v. Adams* ((2001) 532 U.S. 105), which reached the same conclusion as the Sixth District in *FirstAmerica Automotive*. Notwithstanding its publication status, the *FirstAmerica Automotive* opinion is properly cited in this court under Rule 8.1115, which permits citation to and reliance upon unpublished opinions under the doctrine of collateral estoppel.

agreement and the FAA did not preempt the Labor Commissioner from holding its adjudicatory hearing on a wage claim. (See *FirstAmerica Automotive, supra*, 79 Cal.App.4th at 1210-11 [confirming intervenor status].) In rejecting the DLSE's contention that its adjudicatory procedure was not preempted, the Court held unequivocally that "California courts are uniformly in accord with *Perry [v. Thomas, supra]*, holding that where there is an arbitration agreement subject to the FAA, the federal act preempts Labor Code section 229" and its authorization to maintain wage actions notwithstanding agreements to arbitrate. (*FirstAmerica Automotive, supra*, 79 Cal.App.4th at 1214-15 [citing *Perry v. Thomas, supra*].)

More recently, the Monterey County Superior Court, in *Victory Dealership Gruop v. Russo* ordered a wage claim to arbitration notwithstanding the identical arguments raised in this action. (See Reese Decl., at ¶¶ 12-14.) In *Russo*, the DLSE intervened in an expedited fashion in an apparent attempt to obtain a favorable ruling on this issue before this matter could be heard. The attempt—which, just like this case, involved the Labor Commissioner acting openly and directly as Intervenor—failed, with the Court issuing an order that unequivocally held that the Labor Commissioner has no jurisdiction to hold its administrative adjudication where an arbitration agreement exists and a demand for arbitration is made. (See Order, at Reese Decl., Exhibit G.) Notably, this order was reviewed in advance by the Labor Commissioner, who contributed the very language confirming the preemption of Labor Commissioner jurisdiction! (See Reese Decl., at ¶ 14 and Exhibit H.) Intervenor's current attempt now for yet another bite at this apple should be emphatically rejected. (See also Reese Decl., at ¶¶ 7-8 [describing the *Taravella* case

in which the Labor Commissioner's attorney unsuccessfully made the same arguments in 2006, albeit indirectly, via the *in pro per* Respondent]; see *Alvarez v. The May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223 [privity satisfied where the interests of the party in the earlier case are sufficiently similar to the interests of the DLSE in this case so as to deem one the "virtual representative" of the other].)

CONCLUSION

Respondent agreed to arbitrate all disputes arising out of his employment at the Acura 101 West dealership. Ignoring his agreement, he filed a claim with the DLSE. Accordingly, Respondent must be ordered to arbitrate any and all claims arising out of or related to his employment, including but not limited to the claims set forth in his complaint to the DLSE.

Respectfully submitted,

Dated: 8/14/2007 /s/ David J. Reese.
David J. Reese
FINE BOGGS & PERKINS LLP
Attorneys for Petitioner
Sonic-Calabasas A, Inc.

APPENDIX H

West's Annotated California Codes Labor Code
Division 1. Department of Industrial Relations
Chapter 4. Division of Labor Standards Enforcement

West's Ann.Cal.Labor Code § 98

Effective: January 1, 2007

Currentness

§ 98. Employee complaints; investigations and hearings; pleadings; evidence

(a) The Labor Commissioner shall have the authority to investigate employee complaints. The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation properly before the division or the Labor Commissioner, including orders of the Industrial Welfare Commission, and shall determine all matters arising under his or her jurisdiction. It shall be within the jurisdiction of the Labor Commissioner to accept and determine claims from holders of payroll checks or payroll drafts returned unpaid because of insufficient funds, if, after a diligent search, the holder is unable to return the dishonored check or draft to the payee and recover the sums paid out. Within 30 days of the filing of the complaint, the Labor Commissioner shall notify the parties as to whether a hearing will be held, whether action will be taken in accordance with Section 98.3, or whether no further action will be taken on the complaint. If the determination is made by the Labor Commissioner to hold a hearing, the hearing shall be held within 90 days of the date of that determination. However, the Labor Commissioner may postpone or grant additional time before setting a hearing if the Labor Commissioner finds that it would lead to an equitable and just resolution of the dispute.

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It is the intent of the Legislature that hearings held pursuant to this section be conducted in an informal setting preserving the right of the parties.

(b) When a hearing is set, a copy of the complaint, which shall include the amount of compensation requested, together with a notice of time and place of the hearing, shall be served on all parties, personally or by certified mail, or in the manner specified in Section 415.20 of the Code of Civil Procedure.

(c) Within 10 days after service of the notice and the complaint, a defendant may file an answer with the Labor Commissioner in any form as the Labor Commissioner may prescribe, setting forth the particulars in which the complaint is inaccurate or incomplete and the facts upon which the defendant intends to rely.

(d) No pleading other than the complaint and answer of the defendant or defendants shall be required. Both shall be in writing and shall conform to the form and the rules of practice and procedure adopted by the Labor Commissioner.

(e) Evidence on matters not pleaded in the answer shall be allowed only on terms and conditions the Labor Commissioner shall impose. In all these cases, the claimant shall be entitled to a continuance for purposes of review of the new evidence.

(f) If the defendant fails to appear or answer within the time allowed under this chapter, no default shall be taken against him or her, but the Labor Commissioner shall hear the evidence offered and shall issue an order, decision, or award in accordance with the evidence. A defendant failing to appear or answer, or subsequently contending to be aggrieved in any manner by want of notice of the pendency of the

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proceedings, may apply to the Labor Commissioner for relief in accordance with Section 473 of the Code of Civil Procedure. The Labor Commissioner may afford this relief. No right to relief, including the claim that the findings or award of the Labor Commissioner or judgment entered thereon are void upon their face, shall accrue to the defendant in any court unless prior application is made to the Labor Commissioner in accordance with this chapter.

(g) All hearings conducted pursuant to this chapter are governed by the division and by the rules of practice and procedure adopted by the Labor Commissioner.

(h)(1) Whenever a claim is filed under this chapter against a person operating or doing business under a fictitious business name, as defined in Section 17900 of the Business and Professions Code, which relates to the person's business, the division shall inquire at the time of the hearing whether the name of the person is the legal name under which the business or person has been licensed, registered, incorporated, or otherwise authorized to do business.

(2) The division may amend an order, decision, or award to conform to the legal name of the business or the person who is the defendant to a wage claim, if it can be shown that proper service was made on the defendant or his or her agent, unless a judgment had been entered on the order, decision, or award pursuant to subdivision (d) of Section 98.2. The Labor Commissioner may apply to the clerk of the superior court to amend a judgment that has been issued pursuant to a final order, decision, or award to conform to the legal name of the defendant, if it can be shown that proper service was made on the defendant or his or her agent.

APPENDIX I

West's Annotated California Codes
Labor Code

Division 1. Department of Industrial Relations
Chapter 4. Division of Labor Standards Enforcement

West's Ann.Cal.Labor Code § 98.2
Effective: January 1, 2011
Currentness

§ 98.2 Review; costs and attorney's fees; stay of execution; satisfaction of judgment

(a) Within 10 days after service of notice of an order, decision, or award the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo. The court shall charge the first paper filing fee under Section 70611 of the Government Code to the party seeking review. The fee shall be distributed as provided in Section 68085.3 of the Government Code. A copy of the appeal request shall be served upon the Labor Commissioner by the appellant. For purposes of computing the 10-day period after service, Section 1013 of the Code of Civil Procedure is applicable.

(b) As a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award. The employer shall provide written notification to the other parties and the Labor Commissioner of the posting of the undertaking. The undertaking shall be on the condition that, if any judgment is entered in favor of the employee, the employer shall pay the amount owed pursuant to the

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judgment, and if the appeal is withdrawn or dismissed without entry of judgment, the employer shall pay the amount owed pursuant to the order, decision, or award of the Labor Commissioner unless the parties have executed a settlement agreement for payment of some other amount, in which case the employer shall pay the amount that the employer is obligated to pay under the terms of the settlement agreement. If the employer fails to pay the amount owed within 10 days of entry of the judgment, dismissal, or withdrawal of the appeal, or the execution of a settlement agreement, a portion of the undertaking equal to the amount owed, or the entire undertaking if the amount owed exceeds the undertaking, is forfeited to the employee.

(c) If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.

(d) If no notice of appeal of the order, decision, or award is filed within the period set forth in subdivision (a), the order, decision, or award shall, in the absence of fraud, be deemed the final order.

(e) The Labor Commissioner shall file, within 10 days of the order becoming final pursuant to subdivision (d), a certified copy of the final order with the clerk of the superior court of the appropriate county unless a settlement has been reached by the parties and approved by the Labor Commissioner. Judgment shall be entered immediately by the court clerk in conformity therewith. The judgment so entered has the same force and effect as, and is subject

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to all of the provisions of law relating to, a judgment in a civil action, and may be enforced in the same manner as any other judgment of the court in which it is entered. Enforcement of the judgment shall receive court priority.

(f)(1) In order to ensure that judgments are satisfied, the Labor Commissioner may serve upon the judgment debtor, personally or by first-class mail at the last known address of the judgment debtor listed with the division, a form similar to, and requiring the reporting of the same information as, the form approved or adopted by the Judicial Council for purposes of subdivision (a) of Section 116.830 of the Code of Civil Procedure to assist in identifying the nature and location of any assets of the judgment debtor.

(2) The judgment debtor shall complete the form and cause it to be delivered to the division at the address listed on the form within 35 days after the form has been served on the judgment debtor, unless the judgment has been satisfied. In case of willful failure by the judgment debtor to comply with this subdivision, the division or the judgment creditor may request the court to apply the sanctions provided in Section 708.170 of the Code of Civil Procedure.

(g) Notwithstanding subdivision (e), the Labor Commissioner may stay execution of any judgment entered upon an order, decision, or award that has become final upon good cause appearing therefor and may impose the terms and conditions of the stay of execution. A certified copy of the stay of execution shall be filed with the clerk entering the judgment.

(h) When a judgment is satisfied in fact, other than by execution, the Labor Commissioner may, upon the

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motion of either party or on its own motion, order entry of satisfaction of judgment. The clerk of the court shall enter a satisfaction of judgment upon the filing of a certified copy of the order.

(i) The Labor Commissioner shall make every reasonable effort to ensure that judgments are satisfied, including taking all appropriate legal action and requiring the employer to deposit a bond as provided in Section 240.

(j) The judgment creditor, or the Labor Commissioner as assignee of the judgment creditor, is entitled to court costs and reasonable attorney's fees for enforcing the judgment that is rendered pursuant to this section.

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APPENDIX J

West's Annotated California Codes
Labor Code

Division 1. Department of Industrial Relations
Chapter 4. Division of Labor Standards Enforcement

West's Ann.Cal.Labor Code § 98.4
Currentness

**§ 98.4. Representation by commissioner of
financially disabled persons in de novo
proceedings**

The Labor Commissioner may, upon the request of a claimant financially unable to afford counsel, represent such claimant in the de novo proceedings provided for in Section 98.2. In the event that such claimant is attempting to uphold the amount awarded by the Labor Commissioner and is not objecting to any part of the Labor Commissioner's final order, the Labor Commissioner shall represent the claimant.

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APPENDIX K

West's Annotated California Codes
Labor Code

Division 2. Employment Regulation and Supervision

Part 1. Compensation

Chapter 1. Payment of Wages

Article 1. General Occupations

West's Ann.Cal.Labor Code § 229

Currentness

**§ 229. Actions to enforce payment of wages;
effect of arbitration agreements**

Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

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APPENDIX L

STATE OF CALIFORNIA

Division of Labor Standards Enforcement

Department of Industrial Relations

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
NORTH CENTRAL DISTRICT

Case No. ES 016866

TOM HOLMES, INC.,
dba HOLMES BODY SHOP,
Petitioner,

vs.

SANDY ROLLICE,
Respondent.

LABOR COMMISSIONER, Chief of the Division of Labor
Standards Enforcement, Labor and Workforce
Development Agency, State of California,
Intervenor.

OPPOSITION OF INTERVENOR
LABOR COMMISSIONER TO PETITION TO
COMPEL ARBITRATION; DECLARATION OF
SANDY ROLLICE

Date: December 20, 2013

Time: 9:00 a.m.

Dept.: D

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I.

INTRODUCTION

Petitioner TOM HOLMES, INC. dba HOLMES BODY SHOP'S (hereinafter, "Petitioner") is a body shop. Petitioner requires all of its employees, such as Respondent SANDY ROLLICE, (hereinafter, "Respondent"), to sign arbitration agreements as a condition of obtaining and keeping employment. (See Exhibit A to Decl. of Edna Garcia Earley, attached hereto). Petitioner's arbitration agreement covers "all disputes that may arise out of the employment context," prohibits resort to "any court or other government dispute resolution forum" except for certain specified exceptions. The Labor Commissioner's Berman process is not listed among those exceptions. In its place, the arbitration agreement provides for an arbitration hearing before a retired California superior court judge, under the rules of evidence, with all rules of civil pleading, including the right to bring a demurrer, a motion for summary judgment, and a motion for judgment on the pleadings. The arbitration agreement is silent on attorney fees and costs.

Intervenor Labor Commissioner, (hereinafter, "Labor Commissioner"), hereby opposes Petitioner's Petition to Compel Arbitration on the grounds that it is substantively unconscionable under the recent California Supreme Court case of *Sonic-Calabasas A, Inc. v. Moreno*, (2013) 57 Cal.4th 1109, 163 Cal.Rptr.3d 269, ("*Sonic II*"), because it results in waiver of the Berman process *without* affording Respondent an accessible and affordable arbitral forum for resolution of her wage dispute. The agreement is also procedurally unconscionable under the conditions it was presented to Respondent.

II.

STATEMENT OF FACTS

In approximately September, 2007, Respondent read a job advertisement online for the position of Office Manager with Petitioner. (See ¶2 Decl. of Sandy Rollice, attached hereto). Respondent responded to the advertisement by submitting her resume online. (See ¶2, Decl. of Sandy Rollice, attached hereto). She was contacted by Tony Grant by email on October 8, 2007. (See ¶3, Decl. of Sandy Rollice, attached hereto). Mr. Grant informed Respondent she was one of the applicants being considered for the Office Manager position and would be contacted for an interview. (See ¶3, Decl. of Sandy Rollice, attached hereto). Within a week of receiving the email from Mr. Grant, Respondent went in for an interview at Petitioner's body shop in Pasadena and met with Mr. Grant who interviewed her and asked her to return for a second interview at the Pasadena location to meet with the Pasadena body shop Office Manager. (See ¶4, Decl. of Sandy Rollice, attached hereto). During this second interview at the Pasadena location, Respondent was asked to complete an online application. (See ¶5, Decl. of Sandy Rollice, attached hereto). The online application took 45 minutes to 1 hour for Respondent to complete. (See ¶5, Decl. of Sandy Rollice, attached hereto). At the conclusion of the online application, Respondent was asked to submit her signature electronically, which she did. (See ¶5, Decl. of Sandy Rollice, attached hereto). Respondent recalls there being many forms for her to fill out during this online application. (See ¶5, Decl. of Sandy Rollice, attached hereto). She does not, however, specifically recall reading an arbitration agreement, but thinks it is possible it was included in the many forms she was

asked to fill out as part of the online application process. (See ¶5, Decl. of Sandy Rollice, attached hereto). At no time after completing the online application, did Respondent receive a copy of the forms she had filled out and signed electronically. (See ¶5, Decl. of Sandy Rollice, attached hereto).

Soon thereafter, Respondent was called in for another interview, this time with the Vice-President of Operations, Steve Morris. (See ¶6, Decl. of Sandy Rollice, attached hereto). This interview was short and consisted of answering typical management questions. (See ¶6, Decl. of Sandy Rollice, attached hereto). Respondent does not recall signing any forms during this interview. (See ¶6, Decl. of Sandy Rollice, attached hereto).

A couple of days after meeting with Mr. Morris, Respondent received a call from Mr. Grant offering her the job. (See ¶7, Decl. of Sandy Rollice, attached hereto). During this call, Mr. Grant also set up a phone appointment for Respondent to speak with Human Resources. (See ¶7, Decl. of Sandy Rollice, attached hereto). When Respondent called Human Resources, she was informed she was required to take and pass a physical and drug test. (See ¶8, Decl. of Sandy Rollice, attached hereto). Shortly after taking the physical and drug test, Respondent received a phone call from Karen Schockneck informing her that she had passed both the physical and drug test and asked Respondent to attend a New Hire Orientation. (See ¶8, Decl. of Sandy Rollice, attached hereto). Respondent attended the New Hire Orientation on October 16, 2007 which consisted of viewing a video on different types of harassment in the workplace as well as reviewing and signing new hire paper work. (See ¶9, Decl. of Sandy Rollice, attached hereto). While

Respondent recalls signing a great deal of paper work during this New Hire Orientation, she does not recall specifically signing an arbitration agreement. (See ¶9, Decl. of Sandy Rollice, attached hereto).

Respondent worked for Petitioner as an Office Manager from October 16, 2007 until she was laid off in 2011. (See ¶11, Decl. of Sandy Rollice, attached hereto). Respondent's final pay was \$19.00 per hour. (See ¶11, Decl. of Sandy Rollice, attached hereto).

III.

PROCEDURAL FACTS

On April 6, 2012, Respondent filed a claim with the Labor Commissioner for missed meal and rest period premiums. On August 29, 2013, a hearing notice was sent out by the Labor Commissioner scheduling a Labor Code §98(a) hearing (also known as a "Berman hearing") for October 10, 2013. On September 17, 2013, Petitioner filed an ex parte application for an order shortening time for a hearing on its petition to compel arbitration and for a stay of DLSE proceedings. This court granted the ex parte application and set a hearing date on the petition to compel arbitration for October 4, 2013. On September 19, 2013, the Labor Commissioner agreed to take its October 10, 2013 berman hearing off calendar and Petitioner agreed to take the hearing on its motion to compel arbitration set for October 4, 2013 off calendar pending issuance of the Supreme Court's decision in *Sonic II*. On October 17, 2013, the California Supreme Court issued its decision in *Sonic II*). The parties stipulated and the court signed an order on November 19, 2013 permitting the Labor Commissioner to intervene in this matter.

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IV.

ARGUMENT

A.

THE INSTANT ARBITRATION AGREEMENT
IS SUBSTANTIVELY AND PROCEDURALLY
UNCONSCIONABLE

Unconscionability, as contemplated in judicial review of a contractual arbitration clause, has two components; procedural unconscionability and substantive unconscionability. *Discover Bank v. Superior Court* (2005) 36 Ca1.4th 148, 160. The instant arbitration agreement is substantively unconscionable under *Sonic II* because it fails to provide Respondent with an accessible and affordable forum for resolution of her wage dispute against Petitioner. It is procedurally unconscionable because Respondent was given the agreement on a take it or leave it basis and lacked any bargaining power or meaningful choice.

1.

Under *Sonic II*, the Arbitration Agreement, Which Compels Surrender of the Berman Protections, Fails to Provide An Accessible and Affordable Arbitral Forum for Resolution of Respondent's Wage Dispute and is therefore Substantively Unconscionable

The arbitration agreement at issue fails to provide Respondent with an accessible and affordable forum to resolve her wage dispute against Petitioner and is therefore substantively unconscionable under *Sonic II*. In order to understand what statutory rights Respondent is required to give up if required to arbitrate her wage dispute against Petitioner, making the agreement substantively unconscionable, a brief

discussion of the Berman Process and the California Supreme Court's decisions in *Sonic-Calabasas A, Inc. v Moreno* (2011) 51 Ca1.4th 659, ("*Sonic I*") (as discussed in *Sonic II*) and *Sonic II* are necessary.

a. Berman Process

As stated above, Respondent filed a wage claim against Petitioner for missed meal and rest period premiums pursuant to the "Berman" process (named after its legislative sponsor Howard Berman and added to the Labor Code by legislation enacted in 1976, Stats. 1976, ch. 1190, §§4-11, pp.5368-5371). The Berman process is a non-binding administrative procedure afforded by the Labor Commissioner. California's labor statutes provide basic compensation rights and protections to California's workers and guarantee, among things, the right to prompt and full payment of all earned wages. (Labor Code §§200-243) These statutes also establish a comprehensive and vital remedial scheme designed to insure the effective enforcement of the substantive compensation rights conferred on California's workers. (Labor Code §§98-98.4). The scheme consists of a two-step process which, in the first step, vests the Labor Commissioner with jurisdiction to conduct an expeditious, non-binding, preliminary adjudication of employee claims for unpaid wages, and, in the second step, allows either party, if dissatisfied with the administrative decision, to appeal and thereby obtain a complete trial de novo in which the final and binding adjudication is made by the court. This remedial scheme confers special rights and protections, and is designed to effectuate the full and prompt payment of wages and to afford workers an inexpensive, expeditious, and informal process for resolving their claims.

Labor Code sections 98 to 98.4 set forth the legal framework for the administrative adjudication of wage claims by the State Labor Commissioner under this process. Employees are entitled to have their individual wage claims adjudicated in an administrative hearing procedure, which is informal in nature and neither imposes nor permits the imposition of costs on the parties. The Berman hearing itself is an accessible, informal, and affordable mechanism to resolve claims. Deputies for the Labor Commissioner investigate and process the claims and if they are not settled cause them to be promptly set for hearing. Assistance from the Labor Commissioner's office in resolving claims includes not only the Labor Commissioner's expertise but also access to a translator, when needed. Wage claimants can and generally do represent themselves without the assistance of counsel at these hearings. The Order, Decision, or Award ("ODA") of the Labor Commissioner issued after the hearing may be entered as a judgment if it is not appealed by either party. (Labor Code §98.2(e)) The ODA, of course, is not binding; if either party appeals, the Labor Commissioner is divested of jurisdiction and the matter is transferred to the appropriate court for trial de novo. (Labor Code §98.2(a)). If the employer appeals from an adverse ODA, it must post an undertaking for the full amount of the Commissioner's award. (Labor Code §98.2 (b).) Moreover, if the employer's appeal is unsuccessful, the employer must pay the reasonable attorney's fees incurred by the employee in re-litigating the claim; the employee, as the non-appellant, is not subject to fees, and in fact is protected with absolute immunity from fees of any kind, even if the appeal is successful. (Labor Code §98.2(c).) Additionally, an employee unable to afford counsel is entitled to be represented

in the de novo proceedings by an attorney for the Labor Commissioner. (Labor Code §98.4.) And, finally, the Berman process ensures the Labor Commissioner will use her best efforts to collect a Berman hearing award. (Labor Code §98.2 (i)).

If the employee is prevented from resorting to the administrative process, the remedies afforded by that process cease to exist. There is no insulation from an award of attorney's fees and costs, there is no one-way attorney's fees provision aimed solely at discouraging employers who file unmeritorious appeals, there is no bond to insure collection, and there is no experienced, cost-free attorney available to provide critical legal representation. In other words, the employee who is shut out of the administrative remedy afforded by the Labor Commissioner enters the litigation arena stripped of the tools that will enable the employee to effectively vindicate his or her rights to his or her wage dispute.

b. *Sonic I*

The dispute over the enforceability of an arbitration agreement almost identical to the instant agreement began with the California Supreme Court's decision in *Sonic I*. In *Sonic I*, the California Supreme Court addressed the issue of whether almost identical arbitration agreement which compelled a Berman waiver, violated public policy. The *Sonic I* court concluded that the protections afforded by a Berman hearing, as discussed above, may not be waived. *Sonic II*, 163 Cal.Rptr.3d at p. 279. In reaching this conclusion, the court found the Berman waiver unconscionable and contrary to public policy. *Id.* The court, however, did not invalidate the arbitration agreement. *Sonic II*, 163 Cal.Rptr.3d at p. 282. Instead, it held that an arbitration agreement may

be enforced so long as arbitration is preceded by the option of a Berman hearing at the employee's request. *Id.* If the employee chooses to have a Berman hearing, then the post-Berman hearing protections for employees would apply in arbitration:

“A Party to a Berman hearing seeking a de novo appeal via arbitration pursuant to a prior agreement rather than through a judicial proceeding would initially file an appeal in superior court pursuant to section 98.2, subdivision (a), together with a petition to compel arbitration. The superior court would determine whether the appeal is timely and whether it comports with all the statutory requirements, such as the undertaking requirement in subdivision (b). If so, and if the petition to compel arbitration is unopposed, or found to be meritorious, the trial court will grant the petition. The Labor Commissioner, pursuant to section 98.4 may then represent an eligible wage claimant in the arbitration proceeding. The one-way fee-shifting provisions of section 98.2, subdivision (C) will be enforced initially by the arbitrator, with such judicial review as may be appropriate.”

Id. at p. 283.

Based on these findings, the *Sonic I* court adopted a categorical rule holding that any provision of an arbitration agreement that requires an employee to waive pre-arbitration access to the Berman hearing procedure is contrary to public policy and unconscionable.

Sonic filed a petition for certiorari, which the United States Supreme Court granted, vacating the *Sonic I* judgment and remanding the case to the California

Supreme Court for reconsideration in light of *AT&T Mobility, LLC v. Concepcion* (2011) 563 U.S., 131 S.Ct. 1740 (“Concepcion”). *Concepcion* held that the state rule at issue, requiring the availability of class-wide arbitration, interfered with certain specified “fundamental attributes of arbitration,” including informal bilateral proceedings, with speedy efficient, and low cost resolution of the dispute.

c. *Sonic II*

In *Sonic II*, the California Supreme Court, in the context of revisiting the issue following a remand from the United States Supreme Court, held that its prior categorical rule prohibiting all Berman waivers was, in fact, preempted by the Federal Arbitration Act (FAA). *Sonic II*, 163 Cal.Rptr.3d at p. 274. However, the court proceeded to hold that under the California doctrine of “unconscionability,” workers could continue to challenge Berman waivers as unconscionable on a case by case basis. *Sonic II*, 163 Cal.Rptr.3d at p. 291-292. Such unconscionability challenges, the court held, are not preempted by the FAA. *Sonic II*, 163 Cal.Rptr.3d at p. 279. Furthermore, the court made it clear that an adhesive arbitration agreement that compels surrender of Berman protections as a condition of employment *must provide an accessible and affordable arbitral forum for the resolution of wage disputes* — i.e., .a forum in which the employee will not be unfairly disadvantaged by the inability to invoice the benefits of the Berman process. *Sonic II*, 163 Cal.Rptr.3d at p. 295. Thus, under *Sonic II*, courts must now consider an individualized unconscionability defense to enforcement of an arbitration agreement that precludes access to the Berman process, when based on a claim that the agreement fails to provide

an arbitral forum in which the employee can fully and effectively vindicate the right to payment of wages.

This unconscionability inquiry, the court ruled, “requires a court to examine the totality of the agreement’s substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided.” *Sonic II*, 163 Cal.Rptr.3d at p. 292. Evaluation of the substantive terms of the agreement must focus on “what features of the [Berman] dispute resolution the agreement eliminates [and] also what features it contemplates.” *Id.* Specifically, in deciding whether to enforce an arbitration agreement with a Berman waiver, a court must consider “whether the arbitral scheme imposes costs and risks on a wage claimant that makes resolution of the wage dispute inaccessible and unaffordable, and thereby ‘effectively blocks every forum for the redress of disputes, including arbitration itself.’” *Id.*

Under *Sonic II*, substantive unconscionability will likely be found if the arbitration agreement fails to provide for accessible, effective, speedy, informal, affordable, and enforceable resolution of wage disputes. These are identified by the Court as hallmarks of the Berman process. *Sonic II* makes clear that courts must consider “the value of the benefits of the Berman statutes, which go well beyond the hearing itself” in analyzing unconscionability. *Sonic II*, 163 Cal.Rptr.3d at p. 295. However, the Court acknowledged that precise replication of the Berman protections is not required, as “there is no single formula” for designing an enforceable arbitration process, and “there are potentially many ways to design arbitration, consistent with its fundamental attributes,” to achieve the goal of enabling employees

to effectively pursue and vindicate their wage claims. *Sonic II*, 163 Cal.Rptr.3d at p. 294. Here, for the reasons explained below, the arbitration agreement at issue fails to provide an arbitral forum that is accessible, effective, speedy, informal, and affordable to Respondent. Accordingly, the arbitration agreement is substantively unconscionable under *Sonic II*.

d. Application of *Sonic II* to the Instant Arbitration Agreement.

Under *Sonic II*, the instant arbitration agreement, which compels complete surrender of Respondent's Berman protections, fails to provide an accessible and affordable arbitral forum for resolution of Respondent's wage claim and for that reason is substantively unconscionable. It denies Respondent basic protections designed to allow employees to effectively vindicate their statutory wage obligations. In turn, it sets up a complex process which requires costly attorney representation in order for Respondent or any other employee to collect unpaid wages due them and which effectively blocks even the arbitration forum for redress of Respondent's wage dispute. Consequently, it is substantively unconscionable.

i. The Arbitral Forum Provided by the Instant Arbitration Agreement is Not An Accessible or Affordable Mechanism.

As described above, Berman hearings provide an accessible, informal and affordable mechanism for lay persons to seek resolution of such claims. (*See Cuadra v. Millan* (1998) 17 Ca1.4th 855, 858). An aggrieved employee filing a claim under the Berman process does not need legal representation. Nor does the aggrieved employee need any type of legal background to resolve his or her wage claim. In contrast, under the arbitral

forum provided in Petitioner's arbitration agreement, in order for a lay person such as Respondent to resolve their wage claim, they need to be familiar with all rules of civil pleading in California courts, all rules of evidence, all rights to resolution of the wage dispute by means of demurrers, motions for summary judgment, judgments on the pleadings and judgments under Code of Civil Procedure Section 631.8. Consequently, resolution of Respondent's straight forward claim for missed meal and rest periods will undoubtedly require her to spend money she does not have, to hire an attorney to help her vindicate her statutory rights under the Labor Code. Moreover, many of the terms included in the agreement impose formalities of litigation which do not offer a speedy, informal or affordable method of resolving wage claims and unconscionably prevent Respondent from pursuing her claim for missed meal and rest period premiums.

- ii. The instant arbitral forum deprives Respondent and other employees of the Protective Attorney Fee Provisions Embodied in the Berman Process.

Labor Code Section 98.2, subdivision (c) provides that an employee will not be saddled with the employer's attorney fees and costs unless the employee appeals from a Berman hearing award and receives a judgment of zero on appeal. Because the instant arbitration agreement is silent as to attorney fees, there is no indication or guarantee that Labor Code Section 98.2 (c) would apply in this wage dispute. Consequently, the instant arbitration agreement would displace this protective provision embodied in the Berman process with the attorney fees provision which governs when an employee bypasses the Berman process and pursues an ordinary civil action; that

provision, Labor Code Section 218.5, specifies that attorney fees are to be awarded to the prevailing party. In effect, the instant arbitration agreement would completely nullify this remedial provision of Labor Code Section 98.2, subdivision (c) for Respondent. The instant arbitration agreement would also severely undermine and weaken the statutory objective of deterring employers from wantonly engaging in protected and debilitating litigation. (*See Lolley v. Campbell* (2002) 28 Cal.4th 367, 376).

iii. The Instant Arbitration Agreement Deprives Respondent and other employees of the Mandatory Undertaking.

The Berman statutes ensure that an employee will actually collect a judgment or award by mandating that the Labor Commissioner use her best efforts to collect a Berman hearing award and by requiring the employer to post an undertaking in the amount of the award if the employer takes an appeal. The instant arbitration agreement would deprive Respondent of this undertaking. Consequently, this remedy which is designed to insure that at the end of the day, wage earners such as Respondent will not face enforcement or collection problems, will not be available for Respondent under this arbitration agreement.

iv. The Instant Arbitration Agreement Deprives Respondent of the Right to Be Represented by a Labor Commissioner Attorney in Resolution of the Wage Dispute

Labor Code §98.4 provides that a wage claimant who is “financially unable to afford counsel” may be represented by the Labor Commissioner in the event the employer appeals and “shall” be represented by the Labor Commissioner if the employee seeks to uphold a

Berman hearing award. The instant arbitration agreement operates to deprive low and moderate income wage earners such as Respondent of the right to be represented by an attorney for the Labor Commissioner in the de novo proceedings that follow an employer's appeal from an award of the Labor Commissioner. Consequently, Respondent is denied the ability to effectively vindicate her statutory wage rights.

In sum, it is not the waiver of the Berman process in favor of arbitration here that makes the instant arbitration agreement unconscionable. Rather, it is the waiver of these protections in the context of an arbitration agreement that does not provide Respondent with an accessible and affordable arbitral forum for resolving her wage claim for missed meal and rest period premiums against Petitioner, that supports a finding of substantial unconscionability.

2.

The Arbitration Agreement Is Also
Procedurally Unconscionable

“The procedural element of unconscionability focuses on two factors: oppression and surprise.” *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1288. “Oppression” arises from an inequality of bargaining power which results in no real negotiation and “an absence of meaningful choice.” [Citation.] *Id.* ‘Surprise’ involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.’ [Citations]. *Id.* See also, *Little v. Auto Stiegler, Inc.* (2003) 29 Ca1.4th 1064, 1071.

Here, procedural unconscionability is also present. Respondent was given the arbitration agreement she

signed as part of a New Hire packet. (See ¶9, Decl. of Sandy Rollice, attached hereto). The New Hire packet included numerous forms for Respondent to sign as a condition of employment. (See ¶9, Decl. of Sandy Rollice, attached hereto). Respondent did not review each document nor does she recall anyone explaining to her what the arbitration policy meant. (See ¶9, Decl. of Sandy Rollice, attached hereto). Being employed on a part time basis, Respondent was not in a financial position to turn down a full time job offer simply because it required her to submit to binding arbitration. (See ¶10, Decl. of Sandy Rollice, attached hereto). At the time she signed the arbitration agreement, Respondent did not understand she was giving up her legal rights to a trial by jury. (See ¶10, Decl. of Sandy Rollice, attached hereto). Absent any negotiation at all over the arbitration agreement and the fact Respondent did not even have the choice to refuse to sign the arbitration agreement, procedural unconscionability is present.

B.

CONCLUSION

Sonic II requires an adhesive arbitration agreement that compels the surrender of Berman protections as a condition of employment to provide for accessible, affordable resolution of wage disputes. The instant arbitration agreement fails in this regard and is therefore substantively unconscionable. The instant arbitration agreement is also procedurally unconscionable under the terms it arose as Respondent lacked bargaining power and a meaningful choice to reject signing the agreement. Under these facts, the petition to compel arbitration should be denied without prejudice.

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STATE OF CALIFORNIA

Division of Labor Standards Enforcement

Department of Industrial Relations

By /s/ Edna Garcia Earley

EDNA GARCIA EARLEY

Attorney for the Labor Commissioner

Dated: November 22, 2013

DECLARATION OF SANDY ROLLICE
IN SUPPORT OF OPPOSITION
TO PETITION TO COMPEL ARBITRATION

I, Sandy Rollice, declare as follows:

1. I have personal knowledge of the facts stated herein, and if called and sworn as a witness, could and would competently testify as to such facts.

2. In approximately September, 2007, I read a job advertisement online for the position of Office Manager for Holmes Body Shop. I responded to the advertisement by submitting my resume online.

3. I was contacted by Tony Grant by email on October 8, 2007. Mr. Grant informed me that I was one of the applicants being considered for the Office Manager position and that I would be contacted for an interview.

4. Within a week of receiving the email from Mr. Grant, I went in for an interview at Holmes Body Shop's body shop in Alhambra and met with Mr. Grant who interviewed me and asked me to return for a second interview at the company's Pasadena location to meet with the Pasadena body shop Office Manager.

5. During my second interview at the Pasadena location, I was asked to complete an online application. The online application took 45 minutes to 1 hour for me to complete. At the conclusion of the online application, I was asked to submit my signature electronically, which I did. I recall there being many forms for me to fill out during this online application. I do not, however, specifically recall reading an arbitration agreement, but think it is possible it was included in the many forms I was asked to fill out as part of the online application process. At no time after

completing the online application, did I receive a copy of the forms I had filled out and signed electronically.

6. Soon thereafter, I was called in for another interview, this time with the Vice-President of Operations, Steve Morris. This interview was short and consisted of answering typical management questions. I do not recall signing any forms during this interview.

7. A couple of days after meeting with Mr. Morris, I received a call from Mr. Grant offering me the job. During this call, Mr. Grant also set up a phone appointment for me to speak with Human Resources.

8. When I called Human Resources, I was informed I was required to take and pass a physical and drug test, which I took. Shortly after taking the physical and drug test, I received a phone call from Karen Schockneck from Holmes Body Shop informing me that I had passed both the physical and drug test and asked me to attend a New Hire Orientation.

9. I attended the New Hire Orientation on October 16, 2007 which consisted of viewing a video on different types of harassment in the workplace as well as reviewing and signing new hire paper work. While I recall signing a great deal of paper work during this New Hire Orientation, I do not recall specifically signing an arbitration agreement or being explained what an arbitration agreement even meant.

10. Prior to being hired by Holmes Body Shop, I had been employed on a part time basis for another company and was therefore not in a financial position to refuse the full time job offer by Holmes Body Shop based on the existence of an arbitration agreement (even if I fully understood what it was, which I did not

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at the time) as a condition of my hiring and employment with the company.

11. I worked for Holmes Body Shop as an Office Manager from October 16, 2007 until I was laid off in 2011. My final pay was \$19.00 per hour.

12. I currently am not in a financial position to hire and pay for an attorney to assist me in resolving my wage dispute against Holmes Body Shop. This is why I filed with the Labor Commissioner in the first place.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 22nd day of November, 2013 in Irwindale, California.

/s/ Sandy Rollice

SANDY ROLLICE