No. 13-856

IN THE
Supreme Court of the United States

SONIC-CALABASAS A, INC.,
Petitioner,
v.
FRANK MORENO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF OF THE EMPLOYERS GROUP, CALIFORNIA EMPLOYMENT LAW COUNCIL, AND THE RETAIL LITIGATION CENTER, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE EMPLOYERS GROUP, CALIFORNIA EMPLOYMENT LAW COUNCIL, AND THE RETAIL LITIGATION CENTER, INC., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The Employers Group, the California Employment Law Council, and the Retail Litigation Center, Inc., respectfully submit this brief as amici curiae in support of Petitioner.[1]

IDENTITY AND INTEREST OF THE AMICI CURIAE

Amici are groups that represent the interests of employers, seeking to foster the development of reasonable, equitable, and progressive rules of employment.

Amicus Employers Group is the nation's oldest and largest human resources management organization for employers. It is California-based and represents nearly 3,800 employers of all sizes and in every industry, which collectively employ nearly 3 million employees.

Amicus California Employment Law Council

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[1] Pursuant to Rule 37.6, counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Petitioner and Respondent have filed with the Clerk of the Court letters granting blanket consent to the filing of amici briefs, and counsel of record for both parties received notice at least 10 days prior to the due date for the amici curiae brief.

("CELC") is a voluntary, non-profit organization. Its membership includes approximately 70 private sector employers in the State of California who collectively employ hundreds of thousands of Californians.

Amicus Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales.

Amici all have a vital interest in seeking clarification and guidance from the Court regarding issues that impact employment law—including the important issue of when employment disputes may be resolved in arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has squarely held 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 Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq*. *Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008). The decision below pays lip service to that rule, but holds that lack of access to a state administrative process for resolving wage-and-hour disputes should be considered in determining whether an arbitration agreement is unconscionable. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109,

1124 (2013) ("*Sonic II*"). But a state may not do indirectly what it cannot do directly. Just as California may not categorically invalidate arbitration agreements for failure to offer access to the state administrative process, it may not invalidate arbitration agreements on a case-by-case basis for failure to offer access to those same procedures.

This is not the first time California has attempted to impose state procedural barriers to arbitration agreements. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding preempted a California rule that certain arbitration agreements containing class action waivers were unconscionable); *Preston*, 552 U.S. at 349 (holding preempted a California rule requiring exhaustion of administrative remedies before arbitration of claims); *Perry v. Thomas*, 482 U.S. 483 (1987) (holding preempted a California statute that allowed actions for the collection of wages "without regard to the existence of any private agreement to arbitrate"); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding preempted a California rule that purported to make certain state-law claims non-arbitrable).

Indeed, this Court has recognized that "[a]lthough 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." *Concepcion*, 131 S. Ct. at 1747 (citing 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, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*,

52 Buffalo L. Rev. 185, 186-87 (2004)).

California continued this pattern of hostility to arbitration agreements during the last seven years as petitioner sought to enforce the parties' signed arbitration agreement. The first time this case reached the California Supreme Court, that court held that state law gave employees an "unwaivable" right to engage in a pre-arbitration administrative proceeding known as a "Berman hearing." *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011) ("*Sonic I*"). Citing the state's strong policy interests in ensuring access to these administrative proceedings, the court held arbitration agreements were unconscionable to the extent they required employees to waive their access to Berman hearings, but purported to defer to the aims of the FAA by noting that arbitration could still occur after the Berman process had finished. *Id*. at 669.

This Court vacated the judgment in *Sonic I* and remanded for reconsideration in light of *Concepcion*, 131 S. Ct. 1740. *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011). On remand, the court split 5-2 in once again refusing to immediately enforce the arbitration agreement. Writing for the majority, Justice Liu's opinion concedes it could not apply a categorical rule that Berman waivers are unconscionable. *Sonic II*, 57 Cal. 4th at 1124. Yet the court stressed at length the benefits of a Berman hearing, and held that for arbitration agreements containing a Berman waiver the *lack* of access to a Berman hearing should be considered as a factor potentially rendering the agreement unconscionable. *Id*. at 1146, 1148-49.

This sleight of hand is transparent and improper. The FAA supersedes state laws lodging primary jurisdiction in an administrative forum. That rule means that consideration of those administrative procedures may not be taken into account when assessing the validity of arbitration agreements—access to the state administrative process cannot invalidate arbitration agreements on a categorical basis or invalidate them on a case-by-case basis. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). Just as the *Sonic I* rule holding Berman waivers categorically unconscionable is preempted under this Court's precedents, "[i]t is equally, if not more, clear that . . . the FAA preempts the" case-by-case unconscionability analysis of *Sonic II*. *Sonic II*, 57 Cal. 4th at 1184 (Chin, J., concurring and dissenting). The California Supreme Court's decision should be summarily reversed.

ARGUMENT

The California Supreme Court's "interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012).

I. THE DECISION BELOW IS DIRECTLY CONTRARY TO THIS COURT'S PRECEDENTS.

The California Supreme Court held in *Sonic I* that "the main purpose of the Berman waiver" (i.e., the arbitration agreement at issue here) "appears to be for employers to gain an advantage in the dispute

resolution process by eliminating the statutory advantages accorded to employees [in a Berman hearing] designed to make that process fairer and more efficient." *Sonic I*, 51 Cal. 4th at 686. The court explained that the Berman process "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." *Id.* at 681. The court noted that it would be permissible for the parties to agree to engage in arbitration after the completion of the Berman process, but an arbitration agreement containing a waiver of the Berman process would for that reason alone be "markedly one-sided" and unconscionable. *Id. at* 675, 686.

When this Court vacated *Sonic I*, the California Supreme Court correctly recognized that it could not adhere to its prior rule. *Sonic II*, 57 Cal. 4th at 1124. Unable to guarantee the asserted benefits of a Berman hearing by refusing to compel arbitration altogether, the court instead held that arbitration agreements may be declared void based on the lack of access to Berman hearings on a case-by case basis. As the court explained, "[i]n applying the doctrine [of unconscionability] to the arbitration agreement here, the trial court may consider as one factor [respondent]'s surrender of the Berman protections in their entirety." *Id.* at 1148. This factor would be weighed in the unconscionability analysis—although in this case the lack of access to the Berman process was the *only* factor that respondent argued rendered the contract unconscionable. *See* Resp.'s Response to Pet. to Compel Arbitration, *Sonic-Calabasas A, Inc.*

v. Moreno, No. BS107161, 2007 WL 5234179 (Cal. Sup. Ct. May 15, 2007); *see also Sonic II*, 57 Cal. 4th at 1142.

The decision below thus mandates that, before enforcing an arbitration agreement, trial courts in California must compare the procedures available in arbitration with those that would be available in an administrative Berman hearing. *Id. Sonic II* does not hold that the procedures must be identical. *Id.* at 1147 ("There are potentially many ways to structure arbitration, without replicating the Berman protections . . . ."). But *Sonic II* does require that trial courts sit in judgment regarding the relative benefits of arbitration versus administrative Berman hearings.

Not only did the California Supreme Court require consideration of the Berman procedures in analyzing unconscionability, but it put a finger on the scale by stressing the benefits of the state administrative process: "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." *Sonic II*, 57 Cal. 4th at 1125. As the court gamely conceded, "[t]here is no reason why an arbitral forum cannot provide these benefits," and arbitration agreements could be upheld when they did. *Id.*; *see also id.* at 1149 ("Our rule contemplates that arbitration, no less than an administrative hearing, can be designed to achieve speedy, informal, and affordable resolution of wage claims.").

Whether an arbitral forum "can" provide the as-

serted benefits of an administrative Berman hearing, however, is beside the point. The relevant question is whether the FAA permits a state to take into account the lack of Berman procedures in refusing to enforce arbitration agreements. As explained below, it does not.

A. *Perry, Preston*, And *Concepcion* Control The Analysis.

In *Perry*, this Court was faced with a California Court of Appeal decision refusing to enforce an arbitration agreement based on California Labor Code Section 229, which provided that actions for the collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate." 482 U.S. at 484. The Court rejected the assertion that "the State's interest in protecting wage earners outweighs the federal interest in uniform dispute resolution," *id.* at 486, explaining that the federal policy embodied in the FAA—enforcing private arbitration agreements—is "in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes." *Id*. at 490-91.

This Court again held that the FAA preempted a section of the California Labor Code in *Preston,* 552 U.S. at 357-59. The provision at issue there vested the California Labor Commissioner with original jurisdiction over certain claims brought by talent agents. Cal. Labor Code §§ 1700 *et seq*. Justice Ginsburg, writing for eight Justices, explained that the "'mere involvement of an administrative agency in the enforcement of a statute' . . . does not limit private parties' obligation to comply with their arbi-

tration agreements." *Preston*, 552 U.S. at 358 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991)). The Court thus concluded that, "[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." *Preston*, 552 U.S. at 359.

The rules announced in *Preston* and *Perry* control this case. The California statute at issue here vests the California Labor Commissioner with original jurisdiction over certain wage-and-hour claims brought by employees. *See* Cal. Labor Code § 98. But just as the FAA preempts California's rule that employees bringing wage claims must have access to a judicial forum (as *Perry* holds), the FAA preempts California's rule that employees bringing wage claims must have access to an administrative forum. Further, state law giving jurisdiction to the Commissioner of Labor can no more limit private parties' obligations to comply with their arbitration agreements here than it could in *Preston*.

The California Supreme Court claimed to be following this Court's cases by making the lack of prearbitration access to Berman hearings only one factor in assessing whether an arbitration agreement is unconscionable, rather than the sole factor.[2] But

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[2] The court purported to reconcile its rule with some of this Court's precedents, including *Concepcion* and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). *Sonic II*, 57 Cal. 4th at 1142-58, 1165-71. But despite recognizing the importance of *Preston* and acknowledging that "[i]n *Sonic I*, we distinguished *Preston* on grounds that, after *Concepcion*, are no longer dispositive of the preemption issue before

these precedents demonstrate that "the FAA supersedes state laws" giving jurisdiction to any tribunal other than an arbitral one, whether it be judicial or administrative. *Preston*, 552 U.S. at 359; *see also Perry*, 482 U.S. at 489-91. Those laws are not partially superseded, or superseded only to the extent they are applied categorically. Those laws are preempted whenever they "stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748; *id.* at 1753. State laws giving preference to an alternative administrative forum are equally an obstacle to enforcement of arbitration agreements whether the state laws are used as the sole or partial basis for invalidating an arbitration agreement.

This Court's decision in *Concepcion* provides a useful illustration. In *Concepcion*, this Court held that the FAA preempts California's rule that certain class action waivers in arbitration agreements are unconscionable. *Concepcion*, 131 S. Ct. at 1753. California could not now declare that it will "follow" *Concepcion* by using the presence of a class action waiver as just one factor—not the sole factor—in the unconscionability analysis. *Concepcion*'s preemption analysis does not only apply to categorical determinations that class action waivers are unconscionable, but it also preempts consideration of waivers as a ground for invalidating arbitration agreements on a case-by-case basis. The same is true here.[3]

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us," *Sonic II*, 57 Cal. 4th at 1140, the court made no attempt to distinguish *Preston* in justifying the new rule it announced.

[3] Indeed, it is even more true here. The factors considered by the California courts in *Concepcion* were not themselves unlaw-

Another aspect of *Concepcion* confirms and illustrates this analysis. The Court considered the relationship between the FAA's savings clause, which allows application of such "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and state rules of unconscionability. The Court held that, despite the FAA's savings clause, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Concepcion*, 131 S. Ct. at 1747 (citation omitted).

That is precisely what *Sonic II* does: it permits a court to find an agreement to arbitrate unconscionable because such an agreement displaces administrative Berman hearings that the California Supreme Court considers superior to arbitration. As Justice Chin explained, "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.'" *Sonic II*, 57 Cal. 4th at 1190 (Chin, J., concurring and dissenting) (emphasis in original). Just as the state cannot

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ful. Here, by contrast, *Sonic II* instructs all California courts to consider in the unconscionability analysis an administrative process that is preempted by federal law.

require by statute that parties engage in an alternative to arbitration, it cannot penalize through the unconscionability doctrine the parties' failure to engage voluntarily in that alternative process. In other words, "[w]hat the State may not do directly it may not do indirectly." *Bailey v. Alabama*, 219 U.S. 219, 244 (1911); *see also Concepcion*, 131 S. Ct. at 1747.

This Court in *Concepcion* provided several examples of specific types of procedural rules that a state could not declare unconscionable consistent with the FAA: "An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery." 131 S. Ct. at 1747. "Other examples are easy to imagine. The 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' to help avoid preemption)." *Id.*

These are the same concerns that drove the decision of the court below. *Sonic II* spends no fewer than three pages describing the benefits of Berman hearings: "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." *Sonic II*, 57 Cal. 4th at 1146; *see also id.* at 1129-30, 1160-62.

The court suggested the lack of these features were appropriate considerations supporting a finding that an arbitration agreement was unconscionable. *Id.* Yet, these features are indistinguishable from the examples given by this Court in *Concepcion* of "the judicial hostility towards arbitration that prompted the FAA," and which has "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747 (citation and internal quotation marks omitted); *see also Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) ("Our cases hold that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'") (citing *Concepcion*, 131 S. Ct. at 1740).

B. The Decision Below Improperly Limits The Scope Of This Court's Cases.

The decision below attempts to reconcile this Court's preemption prerequisites by asserting that "*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.'" *Sonic II*, 57 Cal. 4th at 1166 (distinguishing *Concepcion*, 131 S. Ct. at 1748, and *Italian Colors*, 133 S. Ct. at 2312). Based on this premise, the California Supreme Court concluded that it can condition enforcement of arbitration agreements on their inclusion of any terms that do not interfere with "fundamental attributes of arbitration." *Sonic II*, 57 Cal. 4th at 1124-25, 1168-69.

In particular, the California Supreme Court held

that it is limited only by "*Concepcion's* precept that 'efficient, streamlined procedures' is a fundamental attribute of arbitration with which state law may not interfere." *Id.* at 1140. Because efficiency is a fundamental purpose of arbitration, the court reasoned that a state is only precluded from imposing requirements that make arbitration less efficient, such as the class action requirements at issue in *Concepcion* and *Italian Colors*. *Id.* at 1151 ("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.").

But this Court has never held that efficiency is the only fundamental attribute of arbitration, and it has never held that states could interfere with arbitration agreements so long as their interference was done in the name of enhanced efficiency. In fact, while efficiency is a benefit of arbitration, it is not the primary focus of the FAA. In *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985), this Court explained: "The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims." *Id.* at 219.

By attempting to limit *Concepcion* and other cases to a narrow rule preempting only state laws that make arbitration less efficient, the decision below commits the same error of analysis that this Court has corrected in numerous cases. *Id.* Rather than a limited concern with efficiency, the "'principal pur-

pose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 131 S. Ct. at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). To give effect to that purpose, "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753.

The decision below attempts to use the unconscionability doctrine to invalidate arbitration agreements that do not contain certain procedures akin to a state administrative alternative to arbitration. This holding frustrates the FAA's fundamental purpose of ensuring that private arbitration agreements are enforced according to their terms.[4]

II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

Petitioner Sonic-Calabasas, Inc., requests that the Court grant certiorari in this case, arguing that the California Supreme Court's application of the unconscionability standard is preempted by the FAA. (Pet. at 31, quoting *Sonic II*, 57 Cal. 4th at 1159.) Petitioner is surely correct, and amici would not oppose certiorari. But this Court has already spent considerable time correcting the California

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[4] To the extent that the California Supreme Court requires the inclusion of the characteristics of a Berman Hearing in an arbitration agreement to avoid unconscionability because the court believes such procedures would allow for a more effective vindication of wage and hours rights, those requirements are preempted by the FAA. *See Italian Colors*, 133 S. Ct. at 2312; *see also* Pet. at 15-17, 26-29.

Supreme Court's outdated view of arbitration agreements. *See, e.g.*, *Preston*, 552 U.S. 483 (reversing California opinion that refused to enforce the terms of an arbitration agreement); *Perry*, 482 U.S. 483 (same); *Southland*, 465 U.S. 1 (same). Amici thus respectfully suggest that this Court summarily reverse under Supreme Court Rule 16.1. Jurisdiction is proper, and this is an appropriate case for summary disposition.

A. This Court Has Jurisdiction To Review And Reverse The Decision Below.

After it held that federal law did not preempt consideration of state procedural alternatives to arbitration in determining whether to enforce an arbitration agreement, the California Supreme Court remanded the case to the trial court to decide whether the arbitration agreement at issue in this case is unconscionable. *See Sonic II*, 57 Cal. 4th at 1125. This decision is reviewable under 28 U.S.C. § 1257(a), even though further proceedings remain.

Section 1257(a) provides that this Court has jurisdiction to hear "[f]inal judgments or decrees" rendered by the highest court of a State on federal issues. *Id.* Judgments of a state high court are sufficiently final under Section 1257(a) where the court determines a federal issue, even if non-federal issues are remanded to a lower court, pursuant to the framework set out in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (decision final under Section 1257(a) even though the state supreme court remanded for a full trial on the merits); *see also, e.g.*, *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (deci-

sion final even though entire case was left to be litigated in state courts); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 246-47 (1974) (decision final when state court determined state law was constitutional and remanded for application of that law).

This Court's decision in *Southland* applies the *Cox* framework to a California Supreme Court decision that determined certain claims are not arbitrable and remanded for a consideration of the appellees' request for classwide arbitration as to the remaining claims. *Southland*, 465 U.S. 1. This Court held jurisdiction was proper under Section 1257, notwithstanding the state court's remand, explaining that "judgments of state courts that finally decide a federal issue are immediately appealable when 'the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . .' In these circumstances, we have resolved the federal issue 'if a refusal immediately to review the state-court decision might seriously erode federal policy.'" 465 U.S. at 6 (citing *Cox Broadcasting*, 420 U.S. at 483).

This framework applies here. The decision below is a final decision on a federal issue not subject to further review in the state courts. *See Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962) ("The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California.").

Petitioner might prevail in the lower state court on nonfederal grounds, such as by showing that the parties' course of dealing or unique aspects of the arbitration agreement defeat the claim of unconscionability. This would render review by this Court unnecessary.

Reversal by this Court would preclude further litigation on this issue; if this Court were to grant review and hold that federal law preempts consideration of access to Berman hearings in assessing unconscionability, the state court would have no choice but to compel arbitration. *See Sonic II*, 57 Cal. 4th at 1142 (respondent asserted no other basis for unconscionability); *see also id.* at 1175-76 (Chin, J., concurring and dissenting) (same); Resp.'s Response to Pet. to Compel Arbitration, *supra* (asserting no other basis for unconscionability).

Finally, failure to review this issue would significantly erode federal policy. The FAA "declare[s] a national policy favoring arbitration." *Southland*, 465 U.S. at 10; 9 U.S.C. § 2. State courts play a critical role in enforcing this policy; "[i]t is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 133 S. Ct. at 501. *Sonic II* erodes that policy by requiring trial courts to make "case-by-case pre-arbitration judicial unconscionability determination[s], 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." (Pet. at 6.) In this context, for this Court "to delay review of a state judicial decision denying enforcement of the contract to arbitrate un-

til the state court litigation has run its course would defeat the core purpose of a contract to arbitrate." *Southland*, 465 U.S. at 7-8.

B. Summary Reversal Is Appropriate.

Summary reversal is appropriate where "the lower court result is so clearly erroneous . . . that full briefing and argument" is unnecessary. Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12, at 345 (10th ed. 2013); *see also, e.g.*, *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal proper where the lower decision was "flatly contrary to this Court's controlling precedent").

While summary reversal is only warranted in rare cases, this is one of them. The California Supreme Court's decision in *Sonic II* squarely conflicts with this Court's precedent and federal policy favoring the enforcement of arbitration agreements. This Court has summarily reversed three arbitration cases in the last three years for similar reasons. *KPMG*, 132 S. Ct. at 23 (summarily reversing a Florida court's refusal to compel arbitration); *Nitro-Lift*, 133 S. Ct. at 503 (summarily reversing the Oklahoma Supreme Court's refusal to compel arbitration); *Marmet*, 132 S. Ct. at 1202 (summarily reversing the Supreme Court of Appeals of West Virginia's refusal to compel arbitration).

Marmet is instructive. There, the Court considered a petition for certiorari to review a West Virginia decision that found claims alleging personal injury or wrongful death against nursing homes not arbitrable based on a state statute. 132 S. Ct. 1201. This Court summarily reversed, chastising the West Virginia court for applying *Concepcion* and related

precedent in a manner "more limited than mandated by this Court's previous cases." *Id*. at 1202. In the same manner, *Sonic II* acknowledges *Concepcion* and related precedents from this Court, but reads these cases narrowly as only focused on ensuring "efficient, streamlined procedures." 57 Cal. 4th at 1140. That is an unfair and limited reading of *Concepcion*. *See supra* Section I.

This Court has declared and reaffirmed that the FAA "requires courts to enforce the bargain of the parties to arbitrate." *Marmet*, 132 S. Ct. at 1203 (citing *Dean Witter*, 470 U.S. at 217). This Court has also made clear the FAA preempts state laws requiring an administrative process as an alternative to arbitration. *Preston*, 552 U.S. at 349-50. The decision below flouts those rules, using the existence of a state administrative process as a reason to hold an arbitration agreement unconscionable. Similar to *Marmet*, *Nitro-Lift*, and *KPMG*, the California Supreme Court "misread[] and disregard[ed] the precedents of this Court interpreting the FAA" and "did not follow controlling federal law" requiring arbitration agreements to be enforced according to their terms. *Marmet*, 132 S. Ct. at 1202*; see also KPMG*, 132 S. Ct. at 26; *Nitro-Lift*, 133 S. Ct. at 503. This Court should grant the petition and summarily reverse *Sonic II*.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Petitioner, amici respectfully requests that this Court summarily reverse the decision below.

Respectfully submitted,

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