No. 13-856

IN THE

Supreme Court of the United States

SONIC–CALABASAS A, INC.,

Petitioner,

v.

FRANK MORENO,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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When the California Supreme Court was forced to revisit the issue of Federal Arbitration Act (FAA) preemption of mandatory state-agency jurisdiction over wage claims following remand from this Court in light of *AT&T Mobility LLC v. Concepcion*, 653 U.S. ___, 131 S.Ct. 1740 (2011), the state court unequivocally rejected its previous holding that arbitration agreements could not impede access to the Labor Commissioner's administrative jurisdiction even where the FAA applied. *Sonic–Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109, 1139 (2013) ("*Sonic II*"). California thus came into line with this Court's previous holding in *Preston v. Ferrer*, 552 U.S. 346,

359 (2008), that the FAA prevents states from applying public policy considerations to insist on access to governmental adjudication forums, notwithstanding an arbitration agreement. By so doing, the California Supreme Court confirmed that any actions taken by the Labor Commissioner regarding Respondent's wage claim were done without jurisdiction and are of no consequence.

But at the same time, the court below concluded that while the FAA preempts states from elevating administrative jurisdiction over the enforcement of arbitration agreements, trial courts must consider the lack of access to such state-created procedures, holding that their unavailability could make the arbitration system "unreasonably one-sided" and therefore unconscionable and unenforceable. *Sonic II*, 57 Cal.4th at 1152. In other words, while the FAA may prevent California from guaranteeing access to the Labor Commissioner for wage claim resolution, the FAA cannot stop California from applying these same public policy considerations to find the arbitration agreement unenforceable under the unconscionability doctrine. While the court below stopped short of re-creating a blanket rule requiring access to the specific Labor Commissioner procedures in arbitration, it expressly made the absence of these procedural tools "one factor in an unconscionability analysis." *Id.*

This effort to allow the left hand to do what is proscribed for the right is nothing more than the California Supreme Court clinging to its misplaced distrust of arbitration. This Court confirmed only last term in *American Express Co. v. Italian Colors Restaurant*, __ U.S. ___, 133 S.Ct. 2304 (2013) ("*Italian Colors*") that the "effective vindication" theory could

not justify departing from the parties' written arbitration agreement to graft in procedures specifically intended to address the affordability of the forum. *Italian Colors*, 133 S.Ct. at 2310–11. And earlier this term, this Court rejected another California rule that conditioned arbitration enforcement on an "effective vindication" standard crafted to elevate the state-law policy favoring prosecution of low-value claims above the FAA and the consistent federal policy favoring enforcement of arbitration agreements according to the terms thereof as agreed by the parties. *See Carmax Auto Superstores California, LLC v. Fowler*, No. 13–439, 134 S.Ct. 1277 (Feb. 24, 2014) (petition for certiorari granted, judgment vacated, and case remanded for further consideration in light of *Italian Colors*, vacating judgment based on *Gentry v. Superior Court (Circuit City Stores)*, 42 Cal.4th 443 (2007)).

Despite the fact that this latest end-run by California Courts around FAA preemption is so contrary to this Court's consistent holdings that the keystone of federal public policy favoring arbitration is the enforcement of arbitration agreements pursuant to the terms thereof—***or perhaps precisely because of this disconnect***—Respondent argues loudly that this Court should not even hear the parties' dispute. But the holding below makes it clear that the case is not moot, as the preemption of the Berman Process means that the Labor Commissioner had no jurisdiction to take any action on Respondent's wage claim, let alone issue an Award.

Nor is the claim premature for want of an express "final judgment" under 28 U.S.C. 1257(a). This Court has been clear that where the state court has ruled on a federal issue, its judgment may be sufficiently final to permit Supreme Court review even where further

lower-court involvement is contemplated. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Here, the California Supreme Court has ruled on the federal issue, directing the lower court to consider whether the absence of procedural advantages consequent to the preempted jurisdiction of the state administrative agency makes the arbitration so "unreasonably one-sided" as to make enforcement unconscionable. The contemplated proceedings below will not change the state court's interpretation of the federal preemption rule, only carry it out. Because reversal of this state decision on the federal issue will obviate any further litigation in this action, and because "refusal immediately to review the state court decision might seriously erode federal policy, this Court can and should entertain and decide the federal issue which itself has been finally determined by the state courts for the purposes of the state litigation," even though Petitioner may prevail on the merits on nonfederal grounds. *Cox*, 420 U.S. at 482–83.

Ultimately, this appears precisely the type of case this Court had in mind when it set forth the fourth *Cox* factor: a final state-court decision on a federal issue, coupled with a remand for fact-finding that will not change the federal rule applied. In rejecting the "effective vindication" doctrine, this Court held that judicial litigation over the relative efficiency of alternatives to arbitration pursuant to the terms of the parties' agreement was a "preliminary litigating hurdle" that "would undoubtedly destroy the prospect of speedy resolution that arbitration . . . was meant to secure." *Italian Colors*, 133 S.Ct. at 2312. The rule adopted below would require such pre-arbitration litigation based on the same public policy grounds of "effective vindication" and "accessible and affordable mechanism" for protection of "claims that might

otherwise slip through the legal system" that have been expressly rejected by this Court. *Id.*, *quoting AT&T Mobility*, 131 S.Ct. at 1753.

The clear message from this Court is that the FAA values enforcement of the parties' arbitration agreement according to the terms thereof higher than state-law concerns for efficiency and affordability. Under *Italian Colors*, if the arbitration agreement provides the right to pursue the claim, then the arbitration agreement should be enforced. Accordingly, this Court should step in now to reverse the decision below on this key issue of federal law to stop the consistent erosion of federal policy favoring the enforcement of arbitration agreements as written.

I. The Court Has Jurisdiction To Review And Reverse The Decision Below.

A. Review Of The California Supreme Court Decision Is Available Under Section 1257(a) Even Where The Lower Court Remanded The Cause For Further Judicial Litigation.

Respondent argues that because the *Sonic II* matter was remanded for further factual development, the decision is not "final" within the meaning of 28 U.S.C. § 1257(a), thereby restricting this Court's ability to correct California's failure to apply FAA preemption. But the court below issued a final decision conditioning enforcement of the arbitration agreement on public policy goals that run counter to this Court's holdings on the preemptive effect of the FAA over conflicting rules. As such, the decision is ripe for review under 28 U.S.C. § 1257(a), even though further proceedings may be contemplated.

While Section 1257(a) permits review of "[f]inal judgments or decrees" from state courts, this Court has repeatedly recognized circumstances where review prior to completion of additional lower-court proceedings is appropriate and within the scope of Section 1257(a). *Cox*, 420 U.S. at 477–85 (describing "at least four categories of such cases"). This case presents a textbook example of the fourth *Cox* factor: where the federal issue has been finally decided in the state courts even with further proceedings pending wherein the party seeking review may prevail on nonfederal grounds), but where (a) the federal issue, if reversed by this Court, would preclude any need for further litigation; and (b) refusal to immediately review the state determination on the federal issue "might seriously erode federal policy. . . ." *Cox*, 420 U.S. at 482–83.

Respondent's suggestion that the federal issue has not been finally decided by the state court is wrong and fails to grasp the significance of the holding of *Sonic II*, which described the new standard as "simply requir[ing] 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." *Sonic II*, 57 Cal.4th at 1150 (*emphases added*). This mandate dictates to the trial court that California public policy requires an arbitration proceeding that offers a "speedy, informal, and affordable method of resolving wage claims." *Sonic II*, 57 Cal.4th at 1147, *citing Cuadra v. Millan*, 17 Cal.4th 855, 858 (1998). Because the California Supreme Court has ruled on the federal issue in this case—finding unaffected by the FAA a state rule conditioning arbitration on state-imposed standards for accessibility, informality, and affordability not found in the agreement—the lower court on

remand is not free to reach a different conclusion. In other words, the issue remaining for the trial court is not whether preemption applies (the federal issue), but whether the arbitration agreement includes the higher standards California now requires.

If this Court reverses the federal preemption decision reached below, then there will be no need for any further litigation, as the unconscionability challenge is Respondent's only remaining defense to the enforceability of the arbitration agreement as drafted.[1] And because the California position on preemption will continue to "seriously erode federal policy" on the preemptive effect of the FAA, the fourth *Cox* category is plainly applicable here. *Cox*, 420 U.S. at 482–83.

As this Court held in *Italian Colors*, the federal policy favoring enforcement of arbitration agreements as written is substantial, trumping other considerations such as informality and cost-effectiveness. Indeed, the evidence there indicated that it would cost far more to prove the violation than any potential damages award, yet the Court still concluded 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*, 133 S.Ct. at 2311 (*emphasis in original*). California's insistence upon including elements of informality and affordability flies in the face of *Italian Colors* and, if permitted to stand, would

[1] Of course, Respondent's failure to pursue unconscionability arguments at the trial and intermediate appellate level should foreclose this defense, as well. *See Sonic II*, 57 Cal.4th at 1175–76 (CHIN, J., dissenting) (recognizing Respondent's failure to argue below that the arbitration provision was "unreasonably one-sided in favor of the employer").

plainly erode the standard set by this Court. *See e.g., AT&T Mobility*, 131 S.Ct. at 1743 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons").

This would certainly not be the first time this Court heard and decided a case involving the preemptive power of the FAA while further state-court proceedings were contemplated. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court reviewed a decision of the California Supreme Court even though the lower court had remanded the matter back for further trial court proceedings. Asserting jurisdiction under Section 1257(a) and the *Cox* decision, this Court concluded that

> the failure to accord immediate review of the decision of the California Supreme Court might 'seriously erode federal policy.' Plainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration. The [FAA] permits 'parties to arbitrable dispute to move out of court and into arbitration as quickly and easily as possible. *Southland*, 465 U.S. at 6–7, *quoting from Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22–23 (1983).

This Court has consistently protected the preemptive effect of the FAA over inconsistent state laws and should continue to do so now.

B. The Federal Issue Has Not Been Rendered Moot By Extra-Jurisdictional Action By The California Labor Commissioner.

Faulty premises also underlie Respondent's assertion that review by this Court is improper under the mootness doctrine. The decision below confirmed that the jurisdiction of the Labor Commissioner was preempted by the FAA. As such, there was no authority for the Labor Commissioner to act. Under California law, actions taken without valid jurisdiction are void. *See Carlson v. Eassa*, 54 Cal.App.4th 684, 691 (1997) ("A judgment is void if the court rendering it lacked subject matter jurisdiction or jurisdiction over the parties"). "Lack of jurisdiction in this 'fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.'" *Id.* (*quoting Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 288 (1941). Because the jurisdiction of the Labor Commissioner over the claim was preempted by the FAA, the Labor Commission acted without authority, and any resulting Order is void.

Respondent also argues that his current willingness to arbitrate renders moot any further question of the enforceability of the arbitration agreement under the FAA. This contention, too, is unsupportable. Respondent maintains that because the Labor Commissioner issued an Order, Decision and Award in his favor, the procedural benefits from the Berman Process may be applied in the post-Berman arbitration proceeding. *See* Brief in Opposition, *at* p. 9, fn. 1. But the purpose behind this litigation has always been to confirm that arbitration must proceed pursuant to the

terms agreed by the parties, which do not include any involvement by the Labor Commissioner nor any related procedural advantages, such as one-way fee shifting, free representation by the Labor Commissioner, or any other advantages that might ensure to Respondent following a valid Berman hearing and ruling. It is clear, therefore, that there remains a live controversy between the parties as to the availability of Berman-related features in arbitration; the question is not moot.

II. The Decision Below Must Be Reversed As Inconsistent With The FAA And The Strong Federal Policy Favoring Enforcement Of Arbitration Agreements As Written.

The FAA and the strong federal policy favoring enforcement of arbitration agreements place paramount consideration on the enforcement of the parties' arbitration agreements by their terms. *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010) (class arbitration not available absent agreement for same between the parties, consistent with "consensual basis of arbitration"); *AT&T Mobility*, 131 S.Ct. at 1752–53 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations").

Respondent ignores this prime directive and focuses instead exclusively on arbitration as an informal, speedy alternative to judicial litigation. Underlying this position throughout this litigation has been Respondent's argument that forcing the parties to pursue the statutory Berman adjudication before the Labor Commissioner—or, following *Sonic II*, forcing

the parties to include within their arbitration procedures the same guarantees of informality and affordability as would otherwise apply following a Berman proceeding—is compatible with arbitration under the FAA. Specifically, Respondent maintains that efforts in both *AT&T Mobility* and *Italian Colors* to avoid arbitration as written "ran afoul of the FAA because, in both cases, the parties opposing enforcement of the arbitration agreements sought to replace the agreed upon procedures with class procedures that are not consistent with the 'fundamental attributes' of arbitration." *See* Brief in Opposition, at p. 32.

While it is true that state-mandated replacement of agreed-upon procedures that ***hamper*** informality or other fundamental attributes of arbitration as agreed by the parties is inconsistent with the FAA, Respondent's argument requires the Court to conclude that the inverse is must logically follow: state-mandated replacement of agreed-upon terms with alternative procedures designed to ***foster*** informality and efficiency must therefore be okay. But this is fallacious logic. Where any deviation from the parties' contracted language is inconsistent with the FAA, the state cannot justify its rule under the FAA simply by characterizing its mandated changes as arbitration-friendly.

This Court, in *Italian Colors*, went well beyond the rejection of procedures inconsistent with the informality or efficiency of the parties' agreed-upon terms. It expressly rejected an attempt by the Second Circuit Court of Appeals to craft a middle-ground solution that could send the dispute to arbitration while at the same time ensuring that claimants were guaranteed a cost-effective forum to "effectively vindicate" their

rights, despite recognizing that in the absence of such appended protections, some claims "might otherwise slip through the legal system." *Italian Colors*, 133 S.Ct. at 2312, *quoting AT&T Mobility*, 131 S.Ct. at 1753. Again, the FAA ranks enforcement of the parties' arbitration agreement according to the terms thereof higher than concerns for efficiency and affordability. *See also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (the FAA, "both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and not substitute its own views of economy and efficiency" even where the result is inefficiency).

Finally, Respondent argues that this Court has no place to police California's standard for substantive unconscionability, which it describes as a state-law issue for California to determine. But this Court has always maintained that the FAA permits only the application of unconscionability standards that apply generally to all contracts; special rules for arbitration agreements are not permitted. *See AT&T Mobility*, 131 S.Ct. at 1746 ("defenses that apply only to arbitration or that derive their meaning form the fact that an agreement to arbitrate is at issue" are not permitted under the FAA); *see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (states cannot decide that a contract is fair enough for basic terms but not fair enough for arbitration).

This Court must reject any state-court requirement which would apply a watered-down version of substantive unconscionability in cases involving arbitration. And the decision below authorized just such a rule, rejecting the long-standard "shock the

conscience" standard in favor of a softer "unreasonably one-sided" standard.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari and vacate the decision below.

Respectfully submitted,

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