No. S174475

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SONIC-CALABASAS A. INC.,

Plaintiff and Appellant,

vs.

FRANK MORENO,

Defendant and Respondent.

After a Decision by the Court of Appeal, Second Appellate District,
Division Four, Case No. B204902
Superior Court, Los Angeles County, Case No. BS107161

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF AND APPELLANT

To the Honorable Tani Cantil-Sakauye, Chief Justice:[1]

The Chamber of Commerce of the United States (the "Chamber") respectfully moves for leave to file a brief as *amicus curiae* in this matter in support of the plaintiff and appellant. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community—including cases specifically involving the enforceability of arbitration agreements with employees or consumers—in a wide variety of state and federal courts. Recent cases in which the Chamber has participated include *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758;

[1] No party or counsel for a party in the pending appeal authored the proposed *amicus brief* in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the *amicus curiae* and its members.

Preston v. Ferrer (2008) 552 U.S. 346; *Gentry v. Superior Court* (2007) 42 Cal.4th 443; and *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.[2]

Many Chamber members have adopted agreements to arbitrate disputes with their employees. They use arbitration as a method of resolving employment disputes because it is speedy, fair, inexpensive, and less adversarial than litigation in court. These advantages would be lost, however, if employees were routinely allowed to divert disputes into costly and time-consuming administrative proceedings rather than abide by their arbitration agreements.

Respondent Frank Moreno asks this Court to determine that agreements to arbitrate claims for unpaid wages are categorically unenforceable until the Labor Commissioner has conducted an administrative hearing pursuant to Labor Code § 98 (also known as a "*Berman* hearing"). This Court previously concluded that any agreement to arbitrate an unpaid-wages claim in a standardized form contract of employment is contrary to public policy and unconscionable insofar as it would require the employee to pursue arbitration in lieu of a *Berman* hearing. The Court also concluded that its public-policy rule prohibiting so-called "*Berman* waivers" as a condition of employment is not preempted by the Federal Arbitration Act (FAA).

Appellant Sonic-Calabasas A, Inc. ("Sonic") sought certiorari from the U.S. Supreme Court. On October 31, 2011, the U.S. Supreme Court vacated this Court's prior opinion 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)." On remand, this Court

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[2] A collection of the Chamber's most recent briefs in arbitration cases is available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

directed the parties to file simultaneous supplemental briefs on the significance of the *Concepcion* decision, followed by simultaneous supplemental reply briefs. Because this full round of supplemental briefing amounts to a new round of merits briefing on how the FAA, as authoritatively construed by the U.S. Supreme Court in *Concepcion*, affects the proper disposition of this case, interested *amici* should be permitted to file briefs after the completion of all supplemental briefing. *Cf.* Cal. R. Ct. 8.520(f).

In the Chamber's view, *Concepcion* calls for this Court to revisit its earlier ruling, which—if reaffirmed—would frustrate the intent of employers and employees, undermine existing arbitration agreements (including many utilized by the Chamber's members), and erode the benefits offered by arbitration as an alternative to litigation. The Chamber respectfully requests the opportunity to file the attached brief as *amicus curiae* in support of Sonic.

CONCLUSION

The Court should grant this application and permit the Chamber to file an *amicus curiae* brief.

Dated: April 6, 2012

Respectfully submitted.

_____

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—CONTINUED

Pages(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—CONTINUED

Pages(s)

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community—including cases specifically involving the enforceability of arbitration agreements with employees or consumers—in a wide variety of state and federal courts. Recent cases in which the Chamber has participated include *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758; *Preston v. Ferrer*, 552 U.S. 346 (2008); *Gentry v. Superior Court* (2007) 42 Cal.4th 443; and *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.[3]

Many Chamber members have adopted agreements to arbitrate disputes with their employees. They use arbitration as a method of resolving employment disputes because it is speedy, fair, inexpensive, and less adversarial than litigation in court. These advantages would be lost, however, if employees were routinely allowed to divert disputes into costly

[3] A collection of the Chamber's most recent briefs in arbitration cases is available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

and time-consuming administrative proceedings rather than abide by their arbitration agreements.

As evidenced by the U.S. Supreme Court's order vacating the Court's prior opinion and remanding the case for further consideration in light of *Concepcion*, this case presents important issues regarding the preemptive scope of the FAA. In the Chamber's view, *Concepcion* calls for this Court to revisit its earlier ruling, which—if reaffirmed—would frustrate the intent of employers and employees, undermine existing arbitration agreements (including many utilized by the Chamber's members), and erode the benefits offered by arbitration as an alternative to litigation. The Chamber accordingly submits that it has a strong interest in the proper resolution of this case.

SUMMARY OF ARGUMENT

The U.S. Supreme Court remanded this case "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)." *See* 132 S.Ct. 496 (2011). As appellant Sonic-Calabasas A, Inc. ("Sonic") has explained, the Court should change course from its prior opinion and instead should hold that, under *Concepcion*'s interpretation of the FAA, the parties' arbitration agreement must be enforced without delay and, importantly, without imposition of any preconditions—including administrative exhaustion of the *Berman* hearing process.

Respondent Moreno maintains that "the rule that had been adopted [by this Court in its prior opinion] is unaffected by *Concepcion*" and subsequent cases applying it. Moreno Initial Supp. Br. 2. But *Concepcion* makes clear that states may not erect obstacles to arbitration that frustrate the purposes and objectives of the FAA. Moreno's contention that agreements to arbitrate unpaid-wages claims cannot be enforced unless

parties first undergo the *Berman* hearing procedure is directly at odds with *Concepcion* and the FAA.

As construed by this Court's prior opinion, the public policy of this state categorically invalidates agreements to arbitrate unpaid-wages claims until the Labor Commissioner has conducted a *Berman* hearing pursuant to Labor Code § 98. *See Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 676-84 ("*Sonic-Calabasas I*"), *vacated and remanded*, 132 S.Ct. 496. On the basis of this public-policy rule, the Court also determined that the waiver of a *Berman* hearing is substantively unconscionable. *See id.* at 687.

But *Concepcion* makes clear that the public policy rule declaring *Berman* hearings unwaivable—as well as the substantive-unconscionability holding derived from that rule—is preempted by the FAA. After *Concepcion*, there is no room for doubt: The FAA unquestionably "preempt[s] a state-law rule requiring exhaustion of administrative remedies before arbitration." 131 S.Ct. at 1749 (citing *Preston*, 552 U.S. at 357-58). That is because such a rule would frustrate the federal policy favoring arbitration by "requiring a dispute to be heard by an agency first" and thus defeat one of the "prime objective[s] of an agreement to arbitrate"—*i.e.*, "to achieve streamlined proceedings and expeditious results." *Id.* (internal quotation marks omitted). *Concepcion*'s clear explication of its "holding" (*id.*) in *Preston*—that the FAA preempted another California statute requiring initial resort to the Labor Commissioner before arbitration could begin—is dispositive of this case. If (as this Court previously held) unpaid-wages claims must be resolved in the first instance by the Labor Commissioner rather than an arbitrator, that rule of California public policy is preempted by the FAA, as definitively construed in *Concepcion*.

In a related vein, *Concepcion* makes clear that the public policy justifications for refusing to enforce arbitration agreements that waive

Berman hearings are no longer tenable under the FAA. In *Concepcion*, the U.S. Supreme Court declared that a state "cannot require a procedure that is inconsistent with the FAA" even if doing so were deemed "desirable" under state public policy. 131 S.Ct. at 1753. Nor may a state "interfere[] with fundamental attributes of arbitration" or "superimpose on arbitration" procedures that are inconsistent with "arbitration as envisioned by the FAA." *Id.* at 1748, 1752-53. That is so regardless of whether the state-law ground for declining to enforce the arbitration agreement applies to all dispute-resolution contracts—*i.e.*, in both the litigation and arbitration contexts. *Id.* at 1746-47. Stated another way, even if California public policy does not authorize waivers of *Berman* hearings prior to litigation or arbitration, the FAA would preempt that state-law rule in the context of arbitration—just as it precludes a state from imposing other procedures applicable to litigation (*e.g.*, full discovery, class procedures, or juries) as a condition of enforcing arbitration agreements.

ARGUMENT

The U.S. Supreme Court has stated repeatedly that the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms." *Concepcion*, 131 S.Ct. at 1748. Section 2 of the FAA thus embodies an "'emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet Health Care Ctr., Inc. v. Brown* (2012) 132 S.Ct. 1201, 1203 (per curiam) (quoting *KPMG LLP v. Cocchi* (2011) 565 U.S. ___, 132 S.Ct. 23, 25).[4] As the U.S. Supreme Court put it in

[4] *Marmet* was a *unanimous* summary reversal of a state-court decision on FAA preemption grounds that explicitly relied upon *Concepcion*, which was decided by a five-four majority. *Marmet* thus ends any doubt that the U.S. Supreme Court's "five-to-four decision[s]" in FAA-preemption cases "appl[y] to actions brought in state court." *Cf. Sonic-Calabasas I*, 51 Cal.4th at 688 n.12.

Concepcion, "our cases place it beyond dispute that the FAA was designed to promote arbitration." 131 S.Ct. at 1749. The FAA provides that arbitration agreements are valid and enforceable "'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Marmet*, 132 S.Ct. at 1203 (quoting 9 U.S.C. § 2; emphasis added). Its text "includes no exception for [particular types of state-law] claims," but rather "requires courts to enforce the bargain of the parties to arbitrate." *Id.* (quotation marks omitted). Accordingly, unless the FAA's "savings clause" for generally applicable state-law contract defenses—*i.e.*, those defenses that do *not* "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue"—applies, state courts *must* enforce arbitration agreements according to their terms. *Concepcion*, 131 S.Ct. at 1746.

In view of these principles of federal law—most recently elucidated in *Concepcion* and its progeny—California cannot impose prior access to a *Berman* hearing as a condition of enforcing an arbitration agreement. As discussed in detail below, that rule is preempted by the FAA.

This Court previously held that, as a matter of California public policy, until there has been a *Berman* 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-Calabasas I*, 51 Cal.4th at 695 (quotation marks omitted). And this Court went on to hold that, because of this public policy, the arbitration agreement was substantively unconscionable as well. According to the prior opinion, these *per se* state-law rules are not preempted by the FAA: "[We] do[] 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." *Id.* at 693. But the U.S. Supreme Court's

subsequent interpretation of the FAA in *Concepcion* now compels the opposite conclusion.[5]

A. The FAA forbids states from imposing an administrative-exhaustion requirement as a precondition to the arbitration of particular claims.

In holding that agreements to arbitrate unpaid-wages clams are unenforceable until after the conclusion of the *Berman* hearing process, this Court previously distinguished the U.S. Supreme Court's decision in *Preston v. Ferrer*, which had held preempted a California statute that "postpone[d] arbitration until after the Labor Commissioner" had resolved claims brought under the Talent Agency Act. *See Preston*, 552 U.S. at 356. According to the majority, *Preston* did not forbid a state from requiring "[e]xhaustion of . . . administrative remedies [that] delay the commencement both of arbitration and litigation." *Sonic-Calabasas I*, 51 Cal.4th at 693. *Concepcion* now makes clear that this Court's prior opinion was mistaken.

1. Concepcion *confirms that a state cannot require exhaustion of administrative remedies as a condition of enforcing an arbitration agreement.*

Moreno contends that *Concepcion* does not require the setting aside of this Court's prior decision requiring a *Berman* hearing as a precondition

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[5] Because—for the reasons we discuss in this brief—the FAA preempts this State's public-policy rule declaring *Berman* hearings unwaivable in the context of arbitration agreements, the related the substantive-unconscionability holding must fall as well. *See Marmet*, 132 S.Ct. at 1204 (vacating state court's "alternative" unconscionability holding because it possibly was "influenced by [that court's] invalid, categorical rule" of public policy prohibiting predispute agreements to arbitrate certain types of claims against nursing homes); *Concepcion*, 131 S.Ct. at 1747 (holding that the FAA's preemptive effect extends to any "rule appl[ying] the general principle of unconscionability *or* public-policy disapproval of" certain types of agreements in a fashion that disfavors arbitration or obstructs the purposes of the FAA) (emphasis added).

to an agreed-upon arbitration. In Moreno's view, that rule leaves the "arbitration process completely intact" and thus is consistent with the FAA: "*once the Berman process is concluded*, arbitration may proceed." Moreno Initial Supp. Br. 28 (emphasis added).

Yet the U.S. Supreme Court in *Concepcion* provided a crystal-clear—and squarely contrary—description of its "holding" in *Preston*: The FAA "***preempt[s] a state-law rule requiring exhaustion of administrative remedies before arbitration***." 131 S.Ct. at 1749 (citing *Preston*) (emphasis added). That language means what it says: The *per se* public-policy rule announced in the prior opinion—which "generally prohibit[s] a *Berman* waiver as a condition of employment," *Sonic-Calabasas I*, 51 Cal.4th at 684 n.10—is preempted by the FAA. Tellingly, Moreno does not confront *Concepcion*'s statement of *Preston*'s holding; instead, he simply pretends that the statement does not exist. But this Court cannot accept respondent's invitation to ignore *Concepcion*. "When th[e U.S. Supreme] Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Marmet*, 132 S.Ct. at 1202.

2. Concepcion *makes clear that a state cannot engraft special hearing procedures onto arbitration.*

Moreno's principal argument also fails on its own terms. He contends that the rule against waiving *Berman* hearings arguably would permit enforcement of an arbitration provision *if* it conferred on claimants "special protections" and procedures equivalent to those available in a *Berman* hearing. Moreno Initial Supp. Br. 20 (citing *Sonic-Calabasas I*, 51 Cal.4th at 681 n.4). As we explain, mandating that the *Berman* hearing procedures be available—either as a precursor to arbitration or as part of the arbitral process—is contrary to *Concepcion*'s holding and the central rationales underlying it.

The FAA preempts states from requiring, as a condition of enforcing an agreement to arbitrate, that the parties structure their arbitration to parallel a state-law hearing procedure. Under the FAA, contracting parties "are generally free to structure their arbitration agreements as *they* see fit" and may "specify by contract the rules under which that arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trustees* (1989) 489 U.S. 468, 479 (emphasis added). The FAA accordingly allows the parties to, *inter alia*, designate "the issues subject to arbitration" and "arbitrate according to specific rules." *Concepcion*, 131 S.Ct. at 1748-49; *see also Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. ___, 130 S.Ct. 1758, 1763. The rule that Moreno advocates cannot be reconciled with the "overarching purpose of the FAA," which "is to ensure the enforcement of arbitration agreements according to *their* terms"—not terms that state law might deem desirable to superimpose onto arbitration. *Concepcion*, 131 S.Ct. at 1748 (internal quotation marks omitted; emphasis added).

In *Concepcion*, the U.S. Supreme Court addressed whether the FAA preempted this Court's *Discover Bank* rule. *See Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. The plaintiffs in *Concepcion* argued that because their arbitration agreement precluded them from pursuing class-wide relief, it was unconscionable under California law. 131 S.Ct. at 1745. The lower courts agreed, but the U.S. Supreme Court reversed, holding that this State's refusal to enforce agreements to arbitrate on an individual basis was preempted by the FAA, because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration." *Id.* at 1748. Starting with the purpose of the FAA, the Court explained that "[t]he point of affording parties *discretion in designing arbitration*" is "to allow for efficient, streamlined procedures tailored to the type of dispute" at issue. *Id.* at 1749 (emphasis added); *see also Gentry*, 42 Cal.4th at 474 (Baxter, J., dissenting) (explaining that the FAA "demands deference to the

fundamentally contractual nature [of private arbitration], and to the attendant requirement that [contractual] arbitration shall proceed *as the parties themselves have agreed*) (emphasis in original; internal quotation marks omitted).

Concepcion held that the FAA's purpose of enforcing agreements to arbitrate in accordance with the parties' terms would be frustrated if arbitral class-action waivers were not fully enforceable. As the U.S. Supreme Court put it, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S.Ct. at 1748. Because class-wide resolution of claims "requires procedural formality," mandating class 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." *Id.* at 1751 (emphasis omitted); *see also Gentry*, 42 Cal.4th at 478 (Baxter, J., dissenting) (observing that the "qualities of informality, simplicity, and expedition . . . [are] largely negated by the complexities of a class proceeding).

To be sure, parties "may and sometimes do agree" to class treatment of claims in arbitration. *Concepcion*, 131 S.Ct. at 1752. But "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Id.* Because classwide arbitration "is not arbitration as envisioned by the FAA [and] lacks its benefits"—*e.g.*, simplicity, informality, and expedition—it "may not be required by state law." *Id.* at 1753. The Supreme Court accordingly explained that "class arbitration, to the extent it is manufactured by [a state-law rule] rather than consensual, is inconsistent with the FAA." *Id.* at 1751.

The U.S. Supreme Court's reasoning in *Concepcion* is directly on point here. Sonic and Moreno *hypothetically* could have agreed to arbitrate unpaid-wages claims under rules of arbitration that mirrored the procedures

available in a *Berman* hearing. But that is not what Sonic and Moreno *actually* did.[6] Just as it would violate the FAA for a state to "superimpose on arbitration" a host of judicial procedures that "[p]arties *could* agree" to incorporate—such as "class procedures," the "Federal Rules of Civil Procedure," "a discovery process rivaling that in litigation," "the Federal Rules of Evidence," or "an ultimate disposition by a jury" (*Concepcion*, 131 S.Ct. at 1752, 1747)—so too would it violate the FAA to engraft a *Berman* hearing onto the front end of the arbitral process. That requirement would, at minimum, result in four to six months of delay, *Sonic-Calabasas I*, 51 Cal.4th at 681 n.5, as well as introduce other significant procedural complications, *id.* at 672-73. To impose such additional procedural devices and delays on arbitration is "inconsistent with the FAA"—and thus is something that the state "cannot require . . . , even if it is desirable for unrelated reasons," *Concepcion*, 131 S.Ct. at 1753.

3. Concepcion *forecloses reliance on state public policy as a basis for imposing procedures that interfere with arbitration's fundamental attributes.*

Despite *Concepcion*, Moreno asserts that that states are free to "implement[] . . . state policy" and that such policies can "trump[]" the FAA's policy of ensuring that arbitration agreements are enforced according to their terms. Moreno Initial Supp. Br. 31. But Moreno has FAA preemption (and the Supremacy Clause of the U.S. Constitution) backwards. As we have just noted, *Concepcion* holds exactly the *opposite*: "[E]ven if it is desirable for unrelated reasons"—*e.g.*, reasons of public policy—"States cannot require a procedure that is inconsistent with the

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[6] Their agreement provided that "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" be submitted to arbitration. *See Sonic-Calabasas I*, 51 Cal.4th at 670 (internal quotation marks omitted).

FAA." 131 S.Ct. at 1753; *see also id.* at 1753 (Thomas, J., concurring) ("If [the FAA] means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration."). The U.S. Supreme Court reaffirmed that holding in *Marmet*, summarily and unanimously reversing the West Virginia Supreme Court's decision that the FAA did *not* preempt that state's public-policy rule invalidating predispute agreement to arbitrate personal-injury and wrongful-death claims against nursing homes. The *Marmet* Court forcefully declared that "[t]he West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court." 132 S.Ct. at 1203.

Justice Chin's dissenting opinion in *Sonic-Calabasas I* anticipated the holdings in *Concepcion* and *Marmet*. As he explained, the U.S. Supreme Court has rejected the position 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." 51 Cal.4th at 709 (alterations in original; internal quotation marks omitted) (Chin, J., dissenting). Thus, even if a "predispute waiver of [employee's] right to request a *Berman* hearing violates state public policy," that is "irrelevant" as a matter of law for preemption purposes because "the FAA does not permit either the Legislature or . . . th[e] court to refuse to enforce an arbitration agreement based" on public-policy considerations that reflect a state's judgments about the procedures deemed to be preferable for hearing a particular kind of claim. *Id.* at 711.

Courts applying *Concepcion* have concluded that similar rules of California public policy are preempted by the FAA. For example, in *Kilgore v. KeyBank, National Association* (9th Cir. 2012) ___ F.3d ___, 2012 WL 718344, the U.S. Court of Appeals for the Ninth Circuit held that the FAA preempts the California rule against enforcing agreements to

arbitrate claims for "public injunctive relief" under the Consumers Legal Remedies Act and the Unfair Competition Law. The Ninth Circuit acknowledged that it might be the case "that enforcing arbitration agreements even when the plaintiff is requesting public injunctive relief will reduce the effectiveness of . . . the UCL" or "state legislatures will find their purposes frustrated" by FAA preemption. *Id.*, 2012 WL 718344, at *10. But "[t]hese concerns . . . cannot justify departing from the appropriate preemption analysis as set forth by the Supreme Court in *Concepcion*," which "rejected" the proposition that "state public policy rationales [can] contravene the parties' choice to arbitrate." *Id.* Under *Concepcion*, "policy arguments justifying [a state-law inarbitrability] rule, however worthy they may be, can no longer invalidate an otherwise enforceable arbitration agreement." *Id.*; *see also id.* at *11 (observing that *Marmet* "reaffirm[ed] the FAA's preemption of state public policy justifications"); *see also*, *e.g.*, *Robinson v. Title Lenders, Inc.* (Mo. 2012) __ S.W.3d ___, 2012 WL 724669, at *8 ("[P]ost-*Concepcion*, courts may *not* apply state public policy concerns to invalidate an arbitration agreement even if the public policy at issue aims to prevent undesirable results to consumers.").

The FAA precludes state-law public-policy considerations as to the desirability of particular procedures—whether it is class treatment of claims (*Concepcion*), a judicial forum (*Marmet*), or exhaustion of an administrative hearing procedure (*Preston*)—from being invoked to deny enforcement of an arbitration agreement. As the U.S. Court of Appeals for the Fourth Circuit recently explained, "[p]arties may, of course, consent to particular procedures in arbitration, but it is inconsistent with the FAA for one party to demand ex post particular procedural requirements from state law." *Wachovia Sec., LLC v. Brand* (4th Cir. 2012) ___ F.3d ___, 2012 WL 507022, at *5 (citing *Concepcion*). Just as the states may not "find[] unconscionable or unenforceable as against public policy . . . arbitration

agreements that fail to provide for" certain judicial procedures, *Concepcion*, 131 S.Ct. at 1747, they cannot "requir[e] exhaustion of administrative remedies before arbitration," *id.* at 1749. Moreover, what the FAA prohibits states from doing *directly* (*i.e.*, by requiring parties to arbitrate in accordance with procedures that they have consensually not agreed to), it equally prohibits them from trying to accomplish *indirectly*, by refusing to enforce arbitration agreements unless state-law procedural requirements are satisfied.[7]

4. Concepcion *rejects the view that the FAA preempts only state-law rules that explicitly target arbitration agreements*.

Finally, *Concepcion* makes clear that the prior decision's basis for distinguishing the U.S. Supreme Court's FAA precedents—that the *Berman* "antiwaiver policy applies equally to litigation and arbitration"—is no longer tenable. *Sonic-Calabasas I*, 51 Cal.4th at 694 n.14. *Concepcion* held that a public-policy rule is not saved from preemption simply because a state court declares that it applies to both arbitration and litigation. *See* 131 S.Ct. at 1746-47. The *Discover Bank* rule held to be preempted there was in principle "applicable to *all* dispute-resolution contracts, since California prohibit[ed] waivers of class litigation as well." *Id.* at 1746 (emphasis added). But even a facially neutral rule is preempted if it "interferes with

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[7] *See, e.g.*, *Coneff v. AT&T Corp.* (9th Cir. 2012) ___ F.3d ___, 2012 WL 887598, at *4 ("Pointedly, by invalidating arbitration agreements for lacking class-action provisions, a court would be doing precisely what the FAA and *Concepcion* prohibit—leveraging 'the uniqueness of an agreement to arbitrate' to achieve a result that the state legislature cannot.") (quoting *Concepcion*, 131 S.Ct. at 1744); *Cruz v. Cingular Wireless, LLC* (11th Cir. 2011) 648 F.3d 1205, 1213 ("It would be anomalous indeed if the FAA—which promotes arbitration, *see Concepcion*, 131 S.Ct. at 1749—were offended by imposing upon arbitration nonconsensual procedures that interfere with arbitration's fundamental attributes, but not offended by the nonconsensual elimination of arbitration altogether.").

fundamental attributes of arbitration" or is otherwise premised on a state's "'preference for procedures that are incompatible with arbitration.'" *Id.* at 1748 (quoting *Carter v. SSC Odin Operating Co.* (Ill. 2010) 927 N.E.2d 1207, 1220).

As we have explained, *Concepcion* forbids a state from "superimpos[ing] on arbitration" procedures that are inconsistent with "arbitration as envisioned by the FAA." *Id.* at 1752-53. And the imposition of *Berman* hearing procedures—either by making the hearing a prerequisite to the enforcement of arbitration agreements or requiring that arbitration be structured to mirror the *Berman* process—does just that. Accordingly, it is preempted by the FAA. *See Sonic-Calabasas I*, 51 Cal.4th at 712 n.7 (Chin, J., dissenting) (citing *Carter*; explaining why "anti-*Berman*-waiver" rule is preempted by the FAA even though it "applies 'equally' to waivers that 'appear[ ] . . . independent of arbitration") (citation omitted).

* * * *

Because the FAA preempts California law as announced in the prior opinion in this case, the Court should alter course in light of *Concepcion*, and instead should adopt Justice Chin's prior analysis as further strengthened by intervening decisions of the U.S. Supreme Court. In short, this Court should conclude that "the FAA preempts the *Berman* statutes insofar as the [prior opinion] construes them, as a matter of public policy, to allow [an employee] to pursue a *Berman* hearing notwithstanding his agreement to forego that option and arbitrate his claim for vacation pay." *Sonic-Calabasas I*, 51 Cal.4th at 712 (Chin, J., dissenting)

B. Requiring a *Berman* hearing undermines the benefits that both employers and employees receive from the availability of arbitration.

Enforcing the parties' arbitration agreement according to its terms not only is required by federal law; it also makes sense because arbitration

benefits employers and employees alike. Requiring employers and employees to submit to the *Berman* hearing process as a condition for enforcing arbitration agreements would have several deleterious consequences.

To begin with, the judicial imposition of the *Berman* hearing process as a precursor to (or component of) arbitration is inherently inconsistent with many of the "fundamental attributes of arbitration" identified by the U.S. Supreme Court—*e.g.*, the facilitation of "streamlined proceedings" and "informal[] . . . arbitral proceedings" to "reduc[e] the cost and increas[e] the speed of dispute resolution." *Concepcion*, 131 S.Ct. at 1748-49. By "affording parties discretion in designing arbitration" procedures—and by requiring courts to enforce parties' arbitration agreements according to their terms—the FAA "allow[s] for efficient, streamlined procedures" to resolve disputes. *Id.* at 1749. But piling on the *Berman* hearing procedure as a prerequisite or required component would wipe out many of the benefits of arbitration.

"The time between filing a complaint with the Labor Commissioner and a *Berman* hearing date" was four to six months in 1998, and "Sonic has documented cases in which the commencement of a *Berman* hearing took a year or more." *Sonic-Calabasas I*, 51 Cal.4th at 708 (Chin, J., dissenting); *see also id.* at 681 n.5 (majority op.) (acknowledging similar delays). Thus, far from promoting streamlined proceedings and expeditious dispute resolution, requiring the *Berman* hearing process would "sacrifice[] the principal advantage[s] of arbitration" by making the overall "process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S.Ct. at 1750. In short, a state-law rule "requiring a dispute to be heard by an agency first" would "'frustrate[]'" the principal objectives of arbitration—its informality, simplicity, and expedition. *Id.* at 1749 (quoting *Preston*, 552 U.S. at 357). If the Court

were to adhere to its prior holding notwithstanding *Concepcion*, these benefits of arbitration would be lost.

What is more, there is good reason to believe that, faced with the disincentive of a *Berman* hearing requirement, businesses may abandon arbitration altogether or at least sharply curtail its availability. A rational employer could decide that there is little reason to subsidize an arbitral forum—as most employment arbitration agreements do today—if it knows that it will have to incur the cost and delay of a *Berman* hearing process no matter what. As Justice Chin previously pointed out, "parties in the future will likely exclude from predispute arbitration agreements claims that would be subject to the *Berman* statutes" if such agreements cannot be enforced according to their terms. *Sonic-Calabasas I*, 51 Cal.4th at 714 n.8 (Chin, J., dissenting); *see also Concepcion*, 131 S.Ct. at 1752 n.8 ("It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate."). Put another way, the prior opinion assumed that its public-policy policy rule declaring *Berman* hearings unwaivable simply gave the employee the "choice, after a dispute arises, of going directly to arbitration or pursuing a *Berman* hearing" before arbitration. *Sonic-Calabasas I*, 51 Cal.4th at 714 n.8 (Chin, J., dissenting). But in fact, arbitration might no longer be an option at all, and that result would serve neither employers nor employees.

As already noted, employees who choose arbitration enjoy its "simplicity, informality, and expedition." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.* (1985) 473 U.S. 614, 628; *see also Sonic-Calabasas I*, 51 Cal.4th at 714 (Chin, J., dissenting) (noting that arbitration might "save[] the employee both time and money"). Arbitration lowers the costs for employees and provides them with a "less expensive alternative" form of dispute resolution. *Allied-Bruce Terminix Cos. v. Dobson* (1995)

513 U.S. 265, 280; *see also, e.g.*, *Concepcion*, 131 S.Ct. at 1749 ("[T]he informality of arbitral proceedings . . . reduc[es] the cost and increas[es] the speed of dispute resolution."); *Stolt-Nielsen*, 130 S.Ct. at 1775 (observing that "the benefits of private dispute resolution" include "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 257 ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). Indeed, the U.S. Supreme Court has noted that employees in particular benefit from arbitration because of its decreased costs, "a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores Inc. v. Adams* (2001) 532 U.S. 105, 123.

Employees also benefit from the informality of arbitration, which frees them from the "procedural" and "evident[iary]" hurdles that often stymie plaintiffs in courts. *See, e.g.*, John W. Cooley & Steven Lubet, *Arbitration Advocacy* (2d ed. 2003) ¶ 1.3.1, at 5. Likely for that reason, employees tend to fare better in arbitration than in court. Studies have shown that employees who arbitrate their claims are more likely to prevail than employees who litigate. *See, e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights* (1998) 30 COLUM. HUMAN RTS. L. REV. 29, 46. For example, one study of employment arbitration in the securities industry concluded that employees who arbitrate were 12% more likely to win their disputes than employees litigating in the Southern District of New York. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?* (Nov. 2003-Jan. 2004) 58 DISP. RESOL. J. 56, 58. And awards obtained by employees in arbitration *are typically the same or even larger* than court awards. *See id.*

Moreover, it is not just the employees with disputes who benefit from arbitration. These benefits extend even to those who never have a dispute of any kind, because arbitration "lower[s] [businesses'] dispute-resolution costs," which manifest in a "wage increase" for employees. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees* (2006) 5 J. AM. ARB. 251, 254-56; c*f. Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585, 594 (customers who accept contracts with forum-selection clauses "benefit in the form of reduced fares reflecting the savings that the [company] enjoys by limiting the fora in which it may be sued"). And the customers of that business also benefit, because "whatever lowers costs to businesses tends over time to lower prices to consumers." Ware, 5 J. AM. ARB. at 255.

In sum, adherence to the Court's prior holding imposing the *Berman* hearing process as a prerequisite to arbitration would undermine the fundamental advantages of arbitration as a streamlined and efficient method of dispute resolution. And to the extent that such an administrative-exhaustion requirement would induce businesses to forgo arbitration of unpaid-wages claims altogether—even as a means of implementing the post-*Berman* hearing *de novo* review—that holding would significantly curtail the availability of arbitration, thereby depriving employees, employers, and consumers of its many benefits.

CONCLUSION

The judgment of the Court of Appeal should be reversed and remanded with directions to compel the parties to arbitrate their disputes without the delay of a *Berman* hearing.

Dated: April 6, 2012

Respectfully submitted.

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Dated: April 6, 2012

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