S174475

IN THE SUPREME COURT OF CALIFORNIA

SONIC–CALABASAS A, INC.,

Plaintiff and Appellant,

v.

FRANK MORENO,

Defendant and Respondent

SUPREME COURT
FILED

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Following an Order of the U.S. Supreme Court (Oct. 31, 1011) Docket No. 10–1450, 132 S.Ct. 496, Granting Review, Vacating the Decision of the California Supreme Court, and Remanding for Further Consideration

Following a Decision of the California Supreme Court (Feb. 24, 2011) Case No. S174475, 51 Cal.4th 659, 181 Cal.Rptr.3d 58, 247 P.3d 130

Following a Decision of the California Court of Appeal (May 29, 2009), Case No. B204902, 174 Cal.App.4th 546, 94 Cal.Rptr.3d 544

Appeal from an Order of the Superior Court of California, County of Los Angeles (Nov. 2, 2007) Case No. BS107161, HON. AURELIO N. MUNOZ, Judge

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SUPPLEMENTAL BRIEF RE: SIGNIFICANCE OF AT&T MOBILITY LLC v. CONCEPCION (Apr. 27, 2011) 563 U.S. ___, 131 S.CT. 1740

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INTRODUCTION

On October 31, 2012, the United States Supreme Court granted the Petition of Sonic–Calabasas A, Inc. for writ of certiorari in this case, vacating the decision of the California Supreme Court from February 24, 2011, and remanding the matter back to the California Supreme Court for further consideration in light of the U.S. Supreme Court decision in AT&T Mobility LLC v. Concepcion. (*See* Order, dated Oct. 31, 2011, Docket No. 10–1450, 132 S.Ct. 496 ["On petition for writ of certiorari to the Supreme Court of California. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of California for further consideration in light of AT&T Mobility LLC v. Concepcion, 563 U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)"]. As a result of the grant of the Writ of Certiorari vacating this Court's decision, this Court has asked the parties to brief the significance of the AT&T Mobility LLC decision in this matter.

In this Court's vacated decision, a narrow 4-to-3 majority of this Court applied State public policy to require that all wage claims proceed to the California Labor Commissioner's administrative adjudication process pursuant to California Labor Code § 98 et seq. (referred to by this Court as the "Berman process"), prior to being submitted to binding arbitration under the Federal Arbitration Act ("FAA"), notwithstanding the unequivocal agreement to binding arbitration between the parties that would prohibit such "original jurisdiction" with the Labor Commissioner. But two months later, in AT&T Mobility LLC, the U.S. Supreme Court reinforced the supremacy of the Federal Arbitration Act to preempt state court attempts to use public policy and/or principles of unconscionability to restrict enforcement of arbitration agreements

according to their terms. Because placing original jurisdiction of wage claims in the Labor Commissioner was just such an attempt to restrict enforcement of an arbitration agreement, the U.S. Supreme Court granted the writ of certiorari, instructing this Court to reconsider its decision in light of AT&T Mobility. Now given the chance to revisit the question on remand, Petitioner respectfully urges the Court to reverse its previous decision, adopt the reasoning of the U.S. Supreme Court and the three California Supreme Court Justices behind the dissenting opinion below, and find that an employee who has signed an otherwise binding arbitration provision must submit his/her wage claims to binding arbitration pursuant to the Federal Arbitration Act without first having his/her claims adjudicated by the California Labor Commissioner despite any California public policy giving original jurisdiction to the Labor Commissioner, and the attending desirable "advantages" listed by this Court.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Appellant Sonic–Calabasas A, Inc. (hereinafter "Sonic") is an automobile dealership located in Calabasas, California. In connection with his employment with Sonic, Respondent Frank Moreno (hereinafter "Moreno") entered into a written agreement to submit all disputes between Respondent and Petitioner to binding arbitration under the Federal Arbitration Act. Subject to exceptions not relevant here, the terms of the written agreement expressly precluded Respondent from "resort to any court or other governmental dispute resolution forum. . . ." (*See* Sonic–Calabasas A, Inc. v. Moreno (2011) 51 Cal.4th 659, 669–670 [quoting from agreement], (hereinafter "Moreno").)

Notwithstanding the written arbitration agreement, Respondent filed a claim through the California Labor Commissioner, seeking unpaid vacation wages. Petitioner responded by filing a Petition to Compel Arbitration in California Superior Court, seeking to compel Respondent to proceed in binding arbitration pursuant to his pre-dispute arbitration agreement.

The trial court denied the Petition to Compel Arbitration as premature, holding that the employee must be permitted to proceed first to the Labor Commissioner for nonbinding adjudication of his claim before the matter could proceed to arbitration. The trial court did not rule expressly on the question of federal preemption, but it did hold that the arbitration agreement would be enforceable after the non-binding administrative adjudication.

Petitioner appealed, and the California Second District Court of Appeal reversed the decision of the Superior Court, holding that the arbitration agreement waived Respondent's right to proceed before the Labor Commissioner and specifically held that the arbitration agreement was enforceable despite requiring Respondent to arbitrate his wage claims without first having the California Labor Commissioner adjudicate his claims.

Respondent Moreno requested and was granted review of the Court of Appeal decision by the California Supreme Court, which reversed the decision below with instructions to reinstate the order of the Superior Court. (*See* Moreno, *supra,* 51 Cal.4th 659.) Sonic then filed a Petition for writ of certiorari asking the United States Supreme Court to review the decision, vacate the California Supreme Court's decision and remand the case to the California Supreme Court for further consideration. The U.S.

Supreme Court issued the writ, remanding the case back to the California Supreme Court for proceedings not inconsistent with its decision in AT&T Mobility, *supra.*

II. THE VACATED DECISION OF THE CALIFORNIA SUPREME COURT.

At the outset it should be noted that all courts to have addressed the issues,[1] including the California Supreme Court, agree that the parties herein have an enforceable binding arbitration agreement requiring arbitration of all disputes pursuant to the Federal Arbitration Act ("FAA"), including Moreno's claims for alleged unpaid vacation (*i.e.,* wage claims). However, the California Supreme Court, in a 4-to-3 decision reversing the Court of Appeal, held that despite the otherwise enforceable arbitration agreement requiring original jurisdiction of wage claims in binding arbitration, original jurisdiction over wage claims must be given to the Labor Commissioner and its adjudicatory procedures. It did so relying on state public policy and principles of unconscionability based on that same public policy. The California Supreme Court ruled that only after the Labor Commissioner's adjudication process was complete (albeit non-binding adjudication), Sonic could require that Moreno's claim for unpaid vacation wages proceed *de novo* through binding arbitration pursuant to the parties' written arbitration agreement.

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[1] The decision of the California Supreme Court is reported at 51 Cal.4th 659, 181 Cal.Rptr.3d 58, and 247 P.3d 130. The decision of the California Court of Appeal, Second District, Division 4, was reported at 174 Cal.App.4th 546, 94 Cal.Rptr.3d 544. The order of the California Superior Court, County of Los Angeles, denying Petitioner's petition to compel arbitration was not reported but is found in the Clerk's Transcript on Appeal, CT at 375-376.

The California Supreme Court found as a matter of law that the arbitration agreement at issue did not by its terms allow original jurisdiction with the Labor Commissioner (or this two-step adjudication process consisting of first the Labor Commissioner and then a *de novo* hearing in arbitration). Notwithstanding, the California Supreme Court ruled that California public policy required original jurisdiction with the Labor Commissioner, thereby rewriting the terms of the parties' arbitration agreement to allow for original jurisdiction with the Labor Commissioner.

This Court held that the preliminary administrative adjudication by the Labor Commissioner was not preempted by the FAA. In reaching this conclusion, the California Supreme Court first determined that the right to proceed through the Labor Commissioner's administrative adjudication procedures pursuant to Labor Code section 98 *et seq.* (referred to as the "Berman" process) provided certain procedural and substantive "advantages" to level the playing field for employees (wage claimants) such as an informal hearing lacking discovery and formal rules of evidence, a de novo appeal process, representation by the Labor Commissioner in the de novo process, and a one-way fee shifting provision. Because of these more desirable advantages given to wage claimants, the California Supreme Court held that the Berman process was an unwaivable right. As such, goes the argument, state public policy requires that parties who wish to arbitrate claims for unpaid wages must first exhaust the California Labor Commissioner's administrative remedies (*i.e.,* adjudication through a settlement conference, an administrative evidentiary hearing and an award with the right to appeal de novo in arbitration with other related advantages) before going to arbitration under the Federal Arbitration Act. This Court found that any contrary decision would violate state public

policy and as a result of said public policy violation would be unconscionable.

In order to avoid the preempted effect of the FAA, this Court held that public policy was a valid basis for refusing to honor the parties' arbitration agreement according to its terms under the FAA. The California Supreme Court found that requiring arbitration without first going through the administrative adjudication process was against public policy and hence unconscionable. There was no other basis for refusing to enforce the arbitration agreement according to its terms other than the fact that the arbitration agreement required arbitration of wage claims without first exhausting the State's administrative adjudication through the Labor Commissioner on wage claims.

In a recent situation in California had the courts ever considered whether an arbitration agreement must give way and give original jurisdiction of an otherwise-arbitrable claim under the FAA to a state administrative adjudicatory process first. That issue was addressed in Preston v. Ferrer ((2008) 552 U.S. 346, 359.)[2] In that case, the United States Supreme Court held that California's "unwaivable right" that original jurisdiction be given to the California Labor Commissioner for certain claims under the Talent Agencies Act was preempted by the Federal Arbitration Act—*i.e.,* that States cannot require exhaustion of

[2] The United States Supreme Court and the California courts have previously confirmed that that Labor Commissioner process cannot overcome the preemptive effect of the FAA. (Perry v. Thomas (1987) 482 U.S. 483, 498 [California statute purporting to preserve judicial jurisdiction notwithstanding arbitration preempted]); Baker v. Aubrey (1989) 216 Cal.App.3d 1259 (administrative agency, Department of Labor Standards Enforcement, dismissed a wage claim filed by an employee subject to an arbitration agreement despite Labor Code sec. 229.)

administrative adjudication as a condition of arbitration. In an eight-to-one decision, the U.S. Supreme Court held very clearly that state obstructions to arbitration enforcement will not be tolerated, whether judicial or administrative in nature:

> Does the FAA override not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency? ***We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.***

(Preston v. Ferrer, *supra,* 522 U.S. at 349–50 [*emphasis added*].)

Preston was unequivocal. The FAA does not allow for jurisdiction to be given to any state administrative agency (specifically, the Labor Commissioner). However, the California Supreme Court in the present case held that Preston was distinguishable for two different reasons, and again held that California public policy (unwaivable rights) can be used as the basis for requiring that claims be submitted first to the State's administrative adjudication process and then later to binding arbitration.

Just two months after this Court's decision in the present case, the U.S. Supreme Court issued its decision in AT&T Mobility LLC v. Concepcion. ((Apr. 27, 2011) Docket No. 09–893, 563 U.S. ___, 131 S.Ct. 1740.) In AT&T Mobility, the U.S. Supreme Court completely eviscerated each and every legal premise relied upon by the majority of this Court in its ruling in the present case.

First, the U.S. Supreme Court held that state public policy cannot require state administrative adjudicatory procedures inconsistent

with the Federal Arbitration Act even if those procedures may be otherwise desirable under state public policy.

Second, AT&T Mobility confirmed the rule in cited in Preston (*i.e.,* that States cannot require exhaustion of administrative remedies as a condition of arbitration) in the context of legal challenges based on state public policy and dismissed any basis for this Court's drawing a distinction between Preston and the present case. Both bases for the California Supreme Court's purported distinctions and subsequent rejection of federal preemption arguments, as laid out in Preston, *supra,* 552 U.S. 346, have now been rejected by the U.S. Supreme Court.

As a result of the U.S. Supreme Court's clarification of the role of state public policy in the context of the FAA and because the U.S. Supreme Court confirmed that any exhaustion of administrative adjudication prior to arbitration is preempted by the FAA, this Court should reverse its ruling and enter an order compelling immediate arbitration of Moreno's claims for unpaid wages, along with an Order staying the case in its entirety pending the outcome of the arbitration.

LEGAL DISCUSSION

I. THE SOLE BASIS FOR THE CALIFORNIA SUPREME COURT OPINION WAS ITS CONCLUSION THAT CALIFORNIA PUBLIC POLICY FAVORED ADMINISTRATIVE JURISDICTION OVER WAGE CLAIMS MORE THAN ENFORCEMENT OF ARBITRATION AGREEMENTS ACCORDING TO THEIR TERMS.

Fundamental to an understanding of why the California Supreme Court's ruling must be reversed in light of AT&T Mobility, is the recognition that the sole basis for the California Supreme Court's finding that the arbitration agreement at issue here was against public policy,

resulting in a tandem over-lapping finding of unconscionability, was that by requiring original jurisdiction of all claims before an arbitrator, the arbitration agreement required that an employee proceed to arbitration in the first instance instead of having the opportunity to pursue the Labor Commissioner's administrative adjudication process prior to proceeding to binding arbitration on wage claims. Also important to a proper understanding is acknowledging the fact that the arbitration agreement in the present case did not have any so-called "Berman Waiver." Instead, the arbitration agreement broadly required that any and all claims between the parties be submitted to binding arbitration in the first instance and there was simply no exception spelled out for wage claims.

As a result, the decision of the California Supreme Court went far beyond the arbitration agreement between the parties in this case. The decision would require that any arbitration agreement which required binding arbitration of all wage claims to first proceed through the California Labor Commissioner's administrative adjudication process, notwithstanding the Federal Arbitration Act. Indeed, the California Supreme Court effectively carved out an exception to arbitration under the FAA by making every arbitration proceeding involving wage claims subject to a mandatory preliminary investigation and adjudication of the claims by the California Labor Commissioner. At the very least, the reasoning in the vacated opinion at least allows every wage claimant the unilateral right to choose whether to proceed preliminarily through the Labor Commissioner, regardless of whether the parties have contracted for arbitration of their disputes.

Relying heavily on Discover Bank v. Superior Court ((2005) 36 Cal.4th 148) and Gentry v. Superior Court ((2007) 42 Cal.4th 443), the

California Supreme Court based its decision in this matter on three underlying legal conclusions:

(1) The Federal Arbitration Act does not preempt California courts from applying state public policy to require certain substantive or procedural requirements viewed as desirable by the California courts to rewrite an arbitration agreement to allow wage claimants to pursue the Labor Commissioner's adjudication process ("Berman" process) before submitting the claims to binding arbitration;

(2) Requiring a wage claimant to proceed to binding arbitration in the first instance without allowing wage claims to choose first to pursue the Berman process in violation of California's public policy is *per se* unconscionable; and

(3) Requiring the Berman process as a prerequisite to arbitration is not inconsistent with the Federal Arbitration Act.

After the California Supreme Court issued its ruling in the present case, the United States Supreme Court issued its ruling in AT&T Mobility, wherein it addressed and expressly overruled the California Supreme Court's prior decision in Discover Bank. (*Supra.* 36 Cal.4th at 148.) AT&T Mobility expressly rejected California's Discover Bank Rule, *i.e.,* that state courts may use public policy as the basis for requiring certain conditions on arbitration under the FAA if the state law might be frustrated by not applying those conditions.

At issue in AT&T Mobility was whether an arbitration agreement that did not allow for class action arbitration was unconscionable and against public policy. The Ninth Circuit Court of Appeal applied California's Discover Bank Rule and denied non-class arbitration because

AT&T had not shown that non-class arbitration adequately substituted for the deterrent effects of class actions. But the United States Supreme Court overruled the Ninth Circuit and held that state public policy could not be applied to modify the parties' arbitration agreement. (AT&T Mobility, *supra,* 131 S.Ct. at 1745.)

In restricting a State's rights, based on state-law principles, to reject and/or modify arbitration agreements governed by the FAA, the United States Supreme Court completely eviscerated the legal premises relied upon by the California Supreme Court in the present case. Indeed, Justice Chin's dissent in the February 24, 2011 decision by this Court, could have served as a blueprint for the AT&T Mobility opinion, establishing as it did the same reasoning and the same arguments used by the United States Supreme Court to overrule and reverse this Court's decision in Discover Bank and its progeny such as Gentry. (*Supra,* 42 Cal.4th at 443 [applying the Discover Bank rule to the employment setting].)

As set forth below, given the clarity and strength of the decision by the United States Supreme Court in eliminating state-law public policy as a basis for rejecting and/or modifying arbitration agreements governed by the FAA, this Court should follow the original dissenting opinion by Justice Chin (joined by Justice Baxter and Justice Corrigan) and instruct the Los Angeles County Superior Court to enter an Order compelling Moreno's claims to binding arbitration notwithstanding the requirements of California Labor Code section 98 *et seq.* and the so-called desirable advantages of the Berman Process.

II. THE UNITED STATES SUPREME COURT HAS MADE CLEAR THAT THE FAA PREEMPTS A STATE'S RIGHT TO USE STATE-LAW PUBLIC POLICY AS A BASIS FOR REFUSING TO ENFORCE THE PARTIES' ARBITRATION AGREEMENT ACCORDING TO ITS TERMS.

In its February 2011 decision, this Court held that the FAA does not preempt California courts from applying state public policy to require certain substantive or procedural requirements viewed as desirable by the California courts to rewrite an arbitration agreement to allow wage claimants to pursue the Labor Commissioner's adjudication process ("Berman" process) before submitting the claims to binding arbitration.

This Court started its analysis by finding that certain statutory "advantages" were available in the Berman process: (1) a settlement conference and an informal hearing with no formal discovery and no formal rules of evidence; (2) a de novo review process if the employee wage claimant did not like the outcome of the adjudicatory hearing before the Labor Commissioner; (3) legal representation by the Labor Commissioner's legal counsel at the de novo review process; (4) a one-way bond/undertaking requirement by the employer if the employer wanted to have the Labor Commissioner's ruling reviewed de novo; and (5) a one-way attorney fee-shifting rule if the employee was successful at the de novo review. (Moreno, *supra,* 51 Cal.4th at 674.) This Court found that these claimant-desirable advantages could not be waived by an arbitration agreement under the FAA:

> We must decide whether the absence of these statutory protections will significantly impair Moreno's ability to vindicate his wage rights in arbitration. According to Gentry . . . ,'Armendariz makes clear that for public policy reasons we will not enforce provisions contained within arbitration agreements that pose

> significant obstacles to the vindication of employees' statutory rights.'

(Moreno, *supra,* 51 Cal.4th at 677, *quoting* Gentry, *supra,* 42 Cal.4th at 463, fn. 7.)

This Court went on to detail how the Berman process is intended to give employees with wage claims an advantage over normal arbitration under the FAA:

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

(Moreno, *supra,* 51 Cal.4th at 679.)

> Berman hearings and post-hearing protections provide important advantages to employees not present if the employee went directly to arbitration, or that

> permitting a Berman hearing waiver as a condition of employment would substantially undermine the legislative purpose behind the Berman hearing statutes.

(Moreno, *supra,* 51 Cal.4th at 684.)

The Court then went on to find placing original jurisdiction in arbitration to be against public policy because that would require an employee to forego the substantive and procedural advantages provided to an employee by the California legislature in Labor Code section 98 *et seq.* (the "Berman" process).

Distinguishing United States Supreme Court decisions on federal preemption of state rules restricting arbitration, this Court concluded that arbitration pursuant to the FAA is not inconsistent with the Berman process because this Court was not denying arbitration altogether but instead the Berman process would merely result in a delay (until after the Berman process is completed and the claims go to arbitration) and that such a delay by itself does not frustrate the purposes of the FAA.

In simple terms, the California Supreme Court held that based on California's public policy (and the resulting unconscionability[3] caused by the requirement of binding arbitration in lieu of the Berman process), that all wages claims must have the option to proceed first through the Berman process and once the Berman adjudication process is completed, may proceed as a *de novo* appeal through the binding arbitration process outlined in the arbitration agreement—in essence, a two-step adjudication, first before the Labor Commissioner and then *de novo* in binding

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[3] As noted by this Court, the issue of unconscionability was not even raised by the parties until this Court asked for it to be raised by Supplemental Letter Brief on Review, and as a result Moreno has waived the issue of unconscionability.

arbitration. After the matter proceeds to a hearing before the California Labor Commissioner (which could take months, if not years), if either party is dissatisfied with the result, it may appeal the matter for *de novo* review in an arbitration proceeding under the parties' agreement—but only after exhausting California's administrative remedies.[4]

After the California Supreme Court issued its ruling in February 2011, the United States Supreme Court issued its ruling in AT&T Mobility and ruled that California may invalidate arbitration agreements only by "generally applicable contract defenses, such as fraud, duress, or unconscionability, ***but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.***" (AT&T Mobility, *supra,* 131 S.Ct. at 1746 (*emphasis added*).) The United States Supreme Court went on to examine the so-called Discover Bank Rule (application of public policy to override FAA arbitration agreements) according to this Court's argument that the Rule was a rule applicable to all contracts generally and did not single out arbitration agreements because public policy would apply to all contracts equally. (Id. 131 S.Ct. at 1746–47.) The United States Supreme Court examined that issue in the context of unconscionability and as a matter of public policy prohibiting waivers of class litigation and flatly rejected it. (Id.) The Court went on to explain that the preemptive effect of the FAA

[4] Aside from requiring binding arbitration in the first instance, instead of proceeding first to the Labor Commissioner's administrative adjudication of wage claims, the California Supreme Court did not find the arbitration agreement unconscionable or otherwise unenforceable in any other respect—the only provision that it found unconscionable and against public policy was the fact that the parties had to submit wage claims immediately to binding arbitration instead of going first through the State's administrative adjudication procedures for wage claims.

applies equally when arbitration is prohibited outright and when arbitration is permitted but rules are applied in a fashion that disfavor arbitration as a means of dispute resolution: "For example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract.'" (Id., 131 S.Ct. at 1747.) 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." (Id.) Indeed, just because the state law public policy is more desirable to a plaintiff, or that arbitration is arguably exculpatory, is no valid basis for ignoring the preemptive effect of the FAA and requiring special rules outside the parties' agreement to arbitrate. (Id.)

The plaintiffs in AT&T Mobility argued unsuccessfully that special state rules should not be preempted if they can "sensibly be reconciled" with the FAA. (Id., 131 S.Ct. at 1749.) This is exactly the approach applied by the California Supreme Court in the present case, holding public policy (and unconscionability principles based on public policy grounds) to require special procedures in arbitration should be permitted because those procedures are not necessarily inconsistent with the FAA. (*See* Moreno, *supra,* 51 Cal.4th at 676 ["the two statutory schemes are compatible and that having the Berman hearing precede arbitration is workable"].)

But the U.S. Supreme Court made it clear that the saving clause does not permit state interference with arbitration where, as here, the arbitration procedures are not honored as drafted. In rejecting the same legal premise relied upon this Court, in AT&T Mobility, the U.S. Supreme Court stated,

> Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. . . . As we have said, a federal statutes saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be inconsistent with the provisions of the act.

(AT&T Mobility, *supra,* 131 S.Ct. at 1748.)

> [O]ur cases place it beyond dispute that the FAA was designed to promote arbitration. They are repeatedly described the Act as "embodying a national policy favoring arbitration . . . and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."

(AT&T Mobility, *supra,* 131 S.Ct. at 1749.)

In striking down any attempt by the State of California to apply public policy and/or principles of unconscionability to change the terms of an arbitration agreement or to reject arbitration altogether, the United States Supreme Court ruled that, ". . . States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (AT&T Mobility, *supra,* 131 S.Ct. at 1753.) Thus, the court overruled the Discover Bank Rule—and those cases based inexorably on that decision, including Gentry v. Superior Court, *supra,*.

In the decision below, the California Supreme Court specifically relied on Gentry v. Superior Court ((2007) 42 Cal.4th 443) in holding that California could impose such procedural conditions, such as the Berman process, on arbitration. In Gentry—a decision which echoed the California Supreme Court's Discover Bank rule which was the specific target of the U.S. Supreme Court's reversal in AT&T Mobility—the

California Supreme Court had held that the prohibition of class claims in arbitration was against state public policy (the "class action waiver"), and held that state public policy would trump arbitration agreements that did not permit such procedures as part of the arbitration process, despite the preemptive effect of the Federal Arbitration Act. (Gentry, *supra,* 42 Cal. 4th at 465 [*citing* Discover Bank, *supra,* 36 Cal. 4th at 171–72].) Because the very legal unpinning of this Court's decision was nullified, this Court should reverse its prior ruling.

III. BECAUSE THE ONLY BASIS FOR FINDING UNCONSCIONABILITY WAS THE PUBLIC POLICY OF HAVING THE BERMAN PROCESS AVAILABLE IN THE FIRST INSTANCE, AT&T MOBILITY REQUIRES REVERSAL OF THIS COURT'S PRIOR DECISION.

This Court previously held that because the arbitration agreement between the parties by its very terms, and as a matter of law,[5] required that original jurisdiction with the arbitrator, and thus de facto waived the claimant's ability to pursue the Berman process, the arbitration agreement was contrary to public policy. This Court held that the violation of public policy made the arbitration agreement unconscionable:

> We note that the public policy and unconscionability defenses, albeit similar in some ways, are different in important respects. A public policy defense is concerned with the relationship of the contract to society as a whole, and targets contractual provisions that undermine a clear public policy, such as an unwaivable statutory right designed to accomplish a public purpose . . . Unconscionability is concerned

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[5] "By its terms, the agreement precluded Moreno from pursuing any judicial 'or other government dispute resolution forum . . .' [W]e conclude, as a matter of law, that Moreno was barred from pursuing an administrative wage claim under section 98 *et seq.*" (Moreno, *supra,* 51 Cal.4th at 671.)

> with the relationship between the contracting parties and one-sided terms . . . such that consent in any real sense appears to be lacking. ***But there is sometimes an overlap between these two defenses to contract enforcement. Such is the case here.*** On the one hand, to permit employers to require employees to waive the right to a Berman hearing as a condition of employment would gravely undermine the public policy behind the Berman hearing statutes, as discussed above. On the other hand, because the Berman hearing statutes accomplish their public policy goal of ensuring prompt payment of wages by according employees special advantages in their effort to obtain such payment, a provision in a contract of adhesion that requires the employee to surrender such advantages as a condition of employment is oppressive and one-sided, and therefore unconscionable.

(Moreno, *supra,* 51 Cal.4th at 687, *emphasis added.*) No other suspected unconscionability was either argued or identified below, and none can be found fresh now at this stage of this litigation.

Again, the analysis used by the United States Supreme Court in AT&T Mobility makes clear that any argument of unconscionability that is based on public policy or on grounds to avoid the consequences of an arbitration agreement, carried out according to its terms, is preempted by the FAA. As such, the California Supreme Court should reverse its ruling.

IV. THE FAA REQUIRES THAT ARBITRATION BE CARRIED OUT IN ACCORDANCE WITH THE TERMS OF THE WRITTEN AGREEMENT AND ANY ADMINISTRATIVE PREREQUISITES SUCH AS THE BERMAN PROCESS ARE PREEMPTED.

In the present case, the California Supreme Court stated that it did 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."

(Moreno, *supra,* 51 Cal.4th at 693.) But this exact legal argument was expressly rejected in AT&T Mobility. In AT&T Mobility, the United States Supreme Court held that California could not condition arbitration on certain state procedures desirable to claimants. More importantly, it further explained and reinforced its prior ruling in Preston, *supra,* that states lack the power to establish original jurisdiction before administrative agencies notwithstanding arbitration agreements.

> The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. . . . The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms."

(AT&T Mobility, *supra,* 131 S.Ct. at 1748.)

> "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."

(Id., 131 S.Ct. at 1752–53.)

In decreeing these legal principles, the U.S. Supreme Court held that California's public policy requiring certain substantive and/or procedural advantages cannot be used as the basis for denying arbitration without delays. (Id., 131 S.Ct. at 1751–54.)

Here, there are a number of reasons, why this Court erred in finding that requiring the Berman process as a prerequisite to arbitration is not preempted by the FAA.

First, and foremost, as stated so clearly by the United States Supreme Court, the FAA requires that courts "honor the parties' expectations" and as the principal purpose of the FAA "ensur[e] that private arbitration agreements are enforced according to their terms." (AT&T

Mobility, *supra,* 131 S.Ct. at 1748, 1752–53.) The California Supreme Court found that the arbitration agreement between the parties prohibited the Labor Code section 98 (Berman) process, but nevertheless altered the terms of the arbitration agreement and required the parties to proceed through the administrative adjudication process (Berman process) prior to arbitration. This Court blatantly altered the terms of the parties' arbitration agreement and proceeded to enforce arbitration according to the terms set by this Court (by writing in the Berman procedures prior to arbitration), not according to the parties' signed arbitration agreement. This is a direct violation of the rule set forth in AT&T Mobility. As a result, the Berman process is preempted by the FAA. (*See, e.g.,* AT&T Mobility, *supra,* 131 S.Ct. at 1750–53 [refusing to rewrite arbitration agreement to include class-wide arbitration where no provision for same was made in agreement between the parties]; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp. (2010) 559 U.S. ___, 130 S.Ct. 1758 [same].)

Second, as recognized by the California Supreme Court, requiring the Berman process delays the process, adds additional settlement conferences and an evidentiary hearing, takes away the right to discovery and formal evidentiary rules required by the parties' arbitration agreement, and also adds a *de novo* review with a bond/undertaking requirement that would not otherwise exist if original jurisdiction vested in the arbitrator. As a result, all of these very significant differences are imposed upon the parties' even though they are inconsistent with the terms of the original arbitration agreement. As such, those requirements are preempted by the FAA because requiring additional procedures and rules not contemplated by the written terms of the arbitration provision is a violation of the FAA and is preempted. AT&T Mobility, supra, 131 S.Ct. at 1748-53 (holding

that delay and additional requirements not contemplated by the written agreement are burdens on the parties and cannot be required under the FAA because they are outside the terms of the arbitration agreement).

V. THE CALIFORNIA SUPREME COURT'S STATED BASES FOR DISTINGUISHING PRESTON HAVE BEEN REJECTED BY AT&T MOBILITY.

A. A Mere Delay In Arbitration Is Sufficient To Trigger FAA Preemption, Not Even Considering the Additional Burdens of the Berman Process.

The California Supreme Court held that requiring employers to submit to the state agency's original jurisdiction is compatible with arbitration. (*See* Moreno, *supra,* 51 Cal.4th at 695.) The court did so by reasoning that there is no reason why the wage claim cannot be adjudicated through the Berman Hearing, and then if the employer did not like the award by the hearing officer, the employer could still appeal the decision to the Superior Court and request arbitration, provided that the employer complied with all the administrative protections provided to an employee in the agency's hearing (such the burden of a surety bond, 10-day appeal rule, etc.). The court specifically held that since the requirements of the Berman process are "workable," the two schemes (the Berman hearing and arbitration) are not incompatible. In order to make this ruling, this Court had to distinguish the Preston decision from the United States Supreme Court.

For example, the California Supreme Court rejected the notion that a temporary delay in arbitration was a burden on the Federal Arbitration Act. But the U.S. Supreme Court has specifically held to the contrary: merely requiring "procedures incompatible with arbitration" are already a violation of the Federal Arbitration Act; any procedure that

interferes with a "streamlined" arbitration proceeding is prohibited. (*See, e.g.,* AT&T Mobility, *supra,* 131 S.Ct. at 1748 [interference with arbitration as drafted interferes with fundamental attributes of arbitration] Preston, *supra,* 552 U.S. at 358 [agency-hearing delay hinders arbitration enforcement].)

Applying Preston, this Court held that even where general principles of public policy or unconscionability are at issue, the FAA would prohibit procedures which require that a "dispute be heard by an agency first."

> [O]ur cases place it beyond dispute that the FAA was designed to promote arbitration . . . [and it embodies] a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary . . . Thus, in Preston v. Ferrer, holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" which objective would be "frustrated" by requiring a dispute to be heard by an agency first. (552 U.S., at 357–358, 128 S.Ct. 978.) That rule, we said, would "at the least, hinder speedy resolution of the controversy." (Id., at 358, 128 S.Ct. 978.)

(AT&T Mobility, *supra,* 131 S.Ct. at 1749 [*citing* Preston v. Ferrer, *supra*]; *see also* AT&T Mobility, *supra,* 131 S.Ct. at 1748 [requiring procedures that interfere with the fundamental attributes of arbitration and thus creating a scheme inconsistent with the FAA is a violation of the FAA and is preempted].) Thus, the U.S. Supreme Court has plainly held that even the delay alone, not even taking into account all the other added burdens, would result in FAA preemption.

B. AT&T Mobility confirms that Preston Cannot Be Distinguished On The Grounds That Preston Applied To The Entire Agreement, Not Just An Arbitration Provision.

In Preston, the U.S. Supreme Court held that requiring the "prerequisite" of going to the Labor Commissioner for talent agency claims (that is, exhaustion of administrative remedies), instead of going directly to arbitration, was a violation of the Federal Arbitration Act. (Preston, *supra,* 552 U.S. at 354.) The California Supreme Court, in order to avoid the effect of this U.S. Supreme Court conclusion, attempted to distinguish this holding from Preston v. Ferrer.

Despite the fact that the California Supreme Court requirement in this case is exactly the type of "prerequisite" jurisdiction with the Labor Commissioner required before arbitration that was specifically rejected by this Court in Preston, the California Supreme Court concluded that while Preston was an attack on the entire agreement between the parties, Moreno's attack in the present case only targets the arbitration provision itself. (*See* Moreno, *supra,* 51 Cal.4th at 692 ["We agree with the Court of Appeal that Preston is distinguishable. In this case, unlike in Buckeye and in Preston, the challenge is to a portion of the arbitration agreement—the Berman waiver—as contrary to public policy and unconscionable, rather than to the contract as a whole"].) However, the AT&T Mobility decision directly addresses and rejects this premise.

In AT&T Mobility, the challenge was not as to the entire agreement, but only as to whether the arbitration provision had to include additional state-law procedures as a condition of arbitration under the FAA. (AT&T Mobility, *supra,* 131 S.Ct. at 1744–45.) Despite the fact that Preston involved a challenge to the entire agreement, the AT&T Mobility

holding confirmed that Preston applies where just the arbitration provision is at issue. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward." (AT&T Mobility, *supra,* 131 S.Ct. at 1747.)

C. AT&T Mobility confirms that Preston Cannot Be Distinguished On The Grounds That Preston Did Not Address General Contract Defenses Such As Public Policy and Unconscionability.

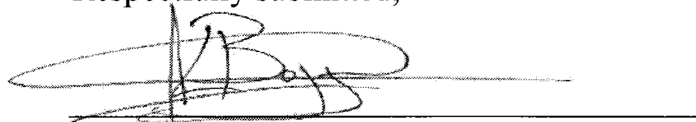
Finally, the California Supreme Court attempted to distinguish Preston on the grounds that the court therein did not address general contract defenses such as public policy and unconscionability. (See Moreno, *supra,* 51 Cal.4th at 692–94.) But the AT&T Mobility decision expressly involved general contract defenses of public policy and unconscionability, relying on its earlier reasoning in Preston. It was, therefore, of no consequence to the U.S. Supreme Court that Preston did not involve such attacks to contract enforcement. In other words, the Preston holding was extended by the U.S. Supreme Court in AT&T Mobility to cover public policy and unconscionability challenges.

CONCLUSION

The Court's decision in AT&T Mobility was the latest in a consistent string of decisions confirming the strong preemptive effect of the Federal Arbitration Act over state laws that would interfere with the enforcement of agreements to submit disputes to binding arbitration. The California Supreme Court did not have the benefit of this Court's holding in that decision when it ordered that Respondent's claim proceed first to an administrative adjudication by the California Labor Commissioner instead of to binding arbitration pursuant to the parties' written agreement. In

issuing the writ of certiorari, the U.S. Supreme Court has instructed the California Supreme Court to reconsider its previous decision on light of this further clarity in the law. With this reconsideration, Petitioner respectfully requests that the Court reverse its vacated decision, ordering the parties to arbitration pursuant to the terms of their arbitration agreement, without first having to exhaust the administrative remedies provided by Labor Code section 98 *et seq.*

Respectfully submitted,



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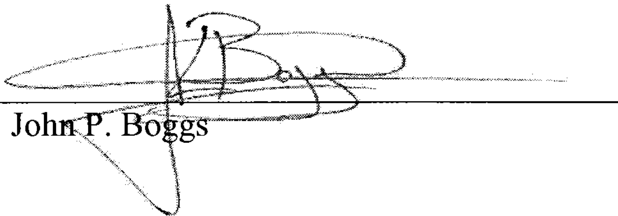
CERTIFICATION OF WORD COUNT

Pursuant to Rules of Court, Rule 8.520(c)(1), I certify that the text of this **SUPPLEMENTAL BRIEF RE: SIGNIFICANCE OF AT&T MOBILITY LLC V. CONCEPCION, 53 U.S. ___ (2011) [131 S.CT. 1740]** consists of 8,000 words as counted by the Microsoft Word 2010 software program used to generate this document, inclusive of tables, titles, and proof of service, etc.



John P. Boggs

PROOF OF SERVICE

I, John P. Boggs, hereby declare and state:

1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 330 Golden Shore, Suite 410, Long Beach, California, and I am not a party to the cause, and I am over the age of eighteen years.

2. On the date hereof, I caused to be served the following document:

SUPPLEMENTAL BRIEF RE: SIGNIFICANCE OF AT&T MOBILITY LLC v. CONCEPCION (Apr. 27, 2011) 563 U.S. ___, 131 S.CT. 1740

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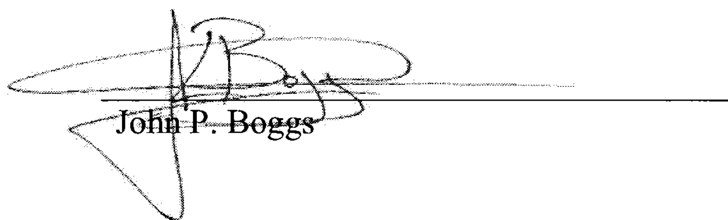
BY FIRST-CLASS MAIL. I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.

3. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

4. Executed at Long Beach, California, on Monday, March 12, 2012.



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