No. 19-875

In The Supreme Court of the United States

OTO, L.L.C.,

Petitioner,

v.

KEN KHO; JULIE A. SU, CALIFORNIA LABOR COMMISSIONER,

Respondent.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David A. Rosenfeld
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001
drosenfeld@unioncounsel.net

Attorneys for Respondent KEN KHO

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTIONS PRESENTED

Respondent Ken Kho ("Kho") was employed as a mechanic at One Toyota Oakland, L.L.C. ("OTO"). While on duty working on a car, a low level employee of the dealership asked him to sign two documents, one, a new wage plan, and the other, an arbitration agreement. Kho was paid on a piece rate basis so any time he spent away from working on the car to review the documents, which were in small font and prolix language, would have reduced his earnings since he paid on a flat rate system, which paid him only for completed auto repair tasks. He had no opportunity to question the documents, so he signed them and immediately went back to work.

After he was terminated the following year, he discovered he had not been paid all the wages he was due, and he filed a claim with the California Labor Commissioner under the Berman statutes, a procedure enacted in 1976. That procedure contains many benefits, both procedural and substantive, for a wage claimant. In this case, the employer chose not to appear at the Labor Commissioner hearing, and after Kho presented his evidence the Deputy Labor Commissioner entered an Order, Decision and Award ("ODA") for $158,546.21. Under the California Labor Code, the employer has a right to de novo trial in the trial court and OTO exercised that right. This case is now before the trial court for that purpose.

The courts below found the entire process of executing the arbitration agreement to contain an "'extraordinarily high' degree of procedural unconscionability." Pet. App. 14a. Furthermore, the California Supreme Court, in reviewing the arbitration agreement, found that it was also substantively unconscionable since it deprived Kho of some of the benefits of the Berman statutes. Because there were both procedural and substantive elements to the unconscionability analysis of the arbitration agreement, the California Supreme Court found that Kho could complete the Berman statutory process and directed the trial court to conduct the trial de novo.

Counsel for OTO undercut the petition when, at oral argument before the California Supreme Court, he contended that the chosen arbitrator could order a proceeding that reflected the nature of the Berman hearing (but not necessarily copy it). Had that contention been raised from the beginning, a different result might have occurred, but the California Supreme Court rejected the contention as waived since it was only raised at oral argument after five years of litigation.

The Questions presented are:

Where an employer implements an arbitration agreement that deprives an employee of substantive and procedural rights available under a state administrative procedure to collect unpaid wages, is

that agreement unconscionable so as to be voided under the terms of section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. 2?

Where an employer claims for the first time at oral argument in the California Supreme Court that its mandatory arbitration procedure provides that the arbitrator can fashion the substantive and procedural protections available to wage claimants, and that assertion is rejected by the court has having been waived, is that an independent state ground to deny the Petition?

Where the California Supreme Court reversed the trial court's decision vacating the Order, Decision or Award and remanded to the trial court to conduct a trial de novo and where the petition does not question that ruling, has the Petitioner waived the right to object to the trial de novo?

Where state law regarding unconscionability requires the court to analyze the agreement in its context, does the court disfavor arbitration agreements so as to preempt state law, where the arbitration agreement is compared to a long established state administrative procedure which provides an "affordable and accessible" procedure to wage claims?

Can California establish a wage collection process which provides an accessible and affordable forum favoring wage claimants, where the state's unconscionability doctrine restricts employers from

implementing an arbitration agreement that strips away many of the benefits of the Berman statutes?

Where the parties assumed the FAA applies to a wage dispute but the record does not establish that the wage dispute is a "transaction involving commerce" within the mean of section 2 of the FAA because they are entirely state law claims, does this Court lack jurisdiction to consider the Petition?

Where the parties assumed the FAA applies to a wage dispute but the record does not establish that the wage dispute or dispute resolution process affects commerce, does this Court lack jurisdiction since the Commerce Clause is not implicated?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

I. BRIEF IN OPPOSITION

Respondent Ken Kho respectfully submits this brief in opposition to the petition for a writ of certiorari.

II. OPINIONS BELOW

The opinion of the California Supreme Court is reported at 447 P.3d 680. The opinion of the court of appeal is not officially reported but is contained in Petitioner's Appendix and is available at 2017 Cal.App. LEXIS 723. The trial court's decision is contained in the Petitioner's Appendix at 127a-140a. The Petitioner's Appendix provides a typeset copy of the arbitration agreement which distorts the nature of that Agreement. See Pet. App. 120a-124a. The agreement is contained in the record before the trial court and was attached as an Appendix to the court of appeal decision. That court noted the agreement was in "seven-point font." Pet. App. 95a, n.3. The California Supreme Court referenced the dispute as to the font size (seven or 8.5 as asserted by OTO) and noted it was "quite small." See Pet. App. 4a, n.4. The arbitration agreement is attached as an Appendix to this Opposition.

III. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a). As we note below, however, the Court's jurisdiction is questioned.

IV. STATUTORY PROVISION INVOLVED

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. 2.

V. STATEMENT OF THE CASE

A. INTRODUCTION

Since the nineteenth century, the California Labor Commissioner has had the power to investigate and remedy disputes over the payment of wages. In 1976, the California legislature created a wage claim procedure, section 98 of the California Labor Code, called the Berman hearing to provide

procedural and substantive benefits to wage claimants. 1976 Cal. Stat. 5367. It has been expanded and modified to provide an expansive statutory process to remedy wage theft. It undoubtedly tilts the playing field in favor of the worker who claims unpaid wages, but it offers due process protections to both sides of such a dispute through the availability of a trial de novo before a superior court judge. That trial comes with certain burdens for an employer (and sometimes the employee). For example, the employer must post a bond in the amount of any money award in the Berman hearing, and a claimant who prevails in any amount after an employer filed appeal de novo is entitled to attorney's fees. Those are not the only procedural and substantive protections to wage claimants, but are among the more prominent ones.

What is at issue in this case is whether an employer may implement an arbitration agreement that strips away many of those protections and substitutes an arbitration process that imposes many burdens and hurdles which have been eliminated in the Berman statutory process.

This case involves more than just the Berman hearing process. It involves an attempt to eliminate the entire statutory scheme, which protects workers from wage theft and makes the collection of unpaid wages "accessible and affordable." See Cal. Lab. Code § 98.1 through 98.10, and 100-105. These

collectively are the "Berman statutes" or "Berman statutory process."

Under California law, unconscionability has two aspects:

> A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. Under this standard, the unconscionability doctrine "'has both a procedural and a substantive element.'" "The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided."

Pet. App. 13a-14a (internal citations omitted).

Here, each court that reviewed the circumstances under which Kho signed the arbitration agreement found that the circumstances demonstrated an "'extraordinarily high' degree of procedural unconscionability." Pet. App. 14a. The California Supreme Court found both oppression and surprise.

When considering the substantive unconscionability, the court found the arbitration agreement as a whole substantively unconscionable because there were provisions which took away substantive rights from wage claimants.

What is at issue here is whether California's system of providing an "accessible and affordable" wage claim system can be undermined by a private arbitration agreement.

B. KHO WAS FORCED TO SIGN AN ARBITRATION AGREEMENT UNDER HIGHLY OPPRESSIVE CONDITIONS

When Kho was hired, he signed documents in a hurry and without reading them; he was not provided any copies. He worked as a technician until he was summarily terminated four years later. When Kho was hired, there was no reference to any arbitration provision. Kho has limited English proficiency as a Chinese immigrant whose first language is Chinese.

After working more than three years at OTO, a "porter" approached Kho at his work station and asked him to sign some additional work-related documents on February 23, 2013. Kho was asked to sign those documents and return them immediately. One of the two documents was the arbitration

agreement at issue in this case and was in seven-point font.

Kho was not excused from his work, nor was he allowed sufficient time to thoroughly review the small font-sized documents provided to him. He was not given the opportunity to come into the Human Resources office to review the documents or seek an explanation. He was simply told that he had to sign. Kho was not provided a copy of the documents, and he was not advised in any respect that he was forfeiting his rights to a Berman hearing and the Berman statutes in agreeing to this arbitration procedure.

A year-and-a-half after signing the documents, Kho was summarily terminated, and a few months later, Kho filed a wage claim at the Labor Commissioner's office against OTO. He used a readily available form and had the assistance of the Labor Commissioner in filling out the claim form. Such assistance is available to any claimant filing claims with the Labor Commissioner's office.

Eight days after Kho filed the wage claim, the Labor Commissioner sent a Notice of Claim and Conference to OTO setting a Settlement Conference for November 10, 2014. On that date, both OTO and Kho showed up. OTO was represented by counsel, and Kho represented himself. Through the assistance of the Labor Commissioner, OTO and Kho

attempted to resolve the dispute, but they were not successful.

The Labor Commissioner assisted further efforts to resolve the dispute, which were unsuccessful, and on March 26, 2015, the Labor Commissioner sent out a Notice of Hearing, notifying OTO and Kho that a hearing would be held before a Hearing Officer on August 17, 2015, at 1 p.m. The Notice set out the issues for the Berman hearing without Kho having to do anything further.

On the Friday before the Monday hearing date, OTO filed its Petition to Compel Arbitration in Alameda County Superior Court.

Shortly after 9 a.m. on Monday, August 17, the date of the scheduled hearing, OTO faxed a letter with a copy of its court filing to the Labor Commissioner and concurrently requested that the hearing scheduled for 1 p.m. that day be taken off calendar until completion of the arbitration process.

The Labor Commissioner rejected that last minute request since OTO had failed to obtain a court order ordering arbitration or staying the proceeding. The Labor Commissioner also advised OTO that it could raise the issue of the arbitration agreement at any trial de novo if it appealed.

The Labor Commissioner then held the scheduled hearing. OTO appeared solely for the purpose of

serving Kho with a copy of its filed Petition. The Labor Commissioner informed OTO that there was no order requiring the Labor Commissioner to stay its proceedings before the Hearing Officer. OTO's counsel left and did not participate.

After hearing evidence, the Hearing Officer issued an ODA that was served on Kho and OTO on August 31, 2015. The Hearing Officer determined that the employer did not properly compensate Kho for all hours worked and awarded him unpaid wages, liquidated damages, interest, and statutory waiting time penalties.

As permitted by the Berman statutes, OTO filed a de novo appeal of the Labor Commissioner's ODA on September 15, and on the next day filed a motion to vacate the ODA.

After various hearings, the trial court denied OTO's petition. The trial court found that the arbitration agreement was both procedurally and substantively unconscionable. On the other hand, the trial court vacated the ODA and remanded the matter to the Labor Commissioner's office for another hearing, finding that OTO had been deprived of a fair hearing because even though it showed up at the hearing and left, the hearing should have been postponed.

With respect to OTO's arbitration agreement, the Court of Appeal found "that the degree of procedural unconscionability was extraordinarily high." Pet. App. 109a and 14a. The court, however, concluded that the Agreement was not substantively unconscionable. *Ibid.*

The California Supreme Court found both procedural and substantive unconscionability and reversed. It also reversed the trial court on its decision vacating the ODA and directed that the trial de novo proceed. Pet. App. 39a. The decision reversing the trial court on the issue of vacating the ODA is not before this Court. [1]

C. THE CALIFORNIA SUPREME COURT FOUND A HIGH DEGREE OF PROCEDURAL UNCONSCIONABILITY, WHICH IS NOT CHALLENGED BY PETITIONER

The California Supreme Court explained first the application of procedural unconscionability:

> A procedural unconscionability analysis "begins with an inquiry into whether the contract is one of adhesion." (*Armendariz*

[1] OTO has not challenged that ruling and the wage claim is before the superior court for a *de novo* trial. Because the petition does not challenge that part of the California Supreme Court's decision, the challenge to the ODA in favor of Kho is waived.

> *v. Found. Health Psychcare Servs.* (2000)] 24 Cal.4th [83], at p. 113 [6 P.3d 669].) An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power "on a take-it-or-leave-it basis." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1245 [367 P.3d 6] (*Baltazar*); see *Armendariz*, at p. 113.) Arbitration contracts imposed as a condition of employment are typically adhesive (see *Armendariz*, at pp. 114–115), and the agreement here is no exception. The pertinent question, then is whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required. (See *Baltazar*, at pp. 1245–1246.) """*Oppression* occurs where a contract involves lack of negotiation and meaningful choice, *surprise* where the allegedly unconscionable provision is hidden within a prolix printed form."" (*Pinnacle*, *supra*, 55 Cal.4th at p. 247, italics added; see *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 983 [422 P.3d 1004].) This record reveals both oppression and surprise.

Pet. App. 15a (internal citations omitted).

The California Supreme Court found both oppression and surprise. Pet. App. 16a-20a.

As to oppression the California Supreme Court noted the "circumstances here demonstrate significant oppression." The manner in which Kho was required to sign the document "conveyed an expectation that Kho sign them immediately, without examination or consultation with counsel." Pet. App. 16a.

As to surprise, the court stated:

> The agreement is a paragon of prolixity, only slightly more than a page long but written in an extremely small font. The single dense paragraph covering arbitration requires 51 lines. As the Court of Appeal noted, the text is "visually impenetrable" and "challenge[s] the limits of legibility."
>
> The substance of the agreement is similarly opaque. The sentences are complex, filled with statutory references and legal jargon. The second sentence alone is 12 lines long. * * * A layperson trying to navigate this block text, printed in tiny font, would not have an easy journey.
>
> * * * We agree with the Court of Appeal that the agreement appears to have been drafted with an aim to thwart, rather than promote, understanding.

Pet. App. 17a-19a. The dissent concurred. Pet. App. 55a.

D. THE CALIFORNIA SUPREME COURT FOUND SUBSTANTIVE UNCONSCIONABILITY

The California Supreme Court explained as to substantive unconscionability:

> "[T]he unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party.'" ([*Sonic-Calabasas A, Inc.* v. *Moreno*, 311 P.3d 184, 202 (Cal. 2013) ("*Sonic II*")].) Unconscionable terms "'impair the integrity of the bargaining process or otherwise contravene the public interest or public policy'" or attempt to impermissibly alter fundamental legal duties. (*Ibid.*) They may include fine-print terms, unreasonably or unexpectedly harsh terms regarding price or other central aspects of the transaction, and terms that undermine the nondrafting party's reasonable expectations. (*Ibid.*; see [*Sanchez* v. *Valencia Holding Co., LLC*, 353 P.3d 741, 748 (Cal. 2015)].)

Pet. App. 20a.

Because there was "substantial procedural unconscionability here, even a relatively low degree of substantive unconscionability may suffice to render the agreement unenforceable." Pet. App. 21a.

The court then examined a few of the aspects of the arbitration agreement which took away substantive rights of wage claimants. First, a wage claimant like Kho would find it difficult to initiate the process, and, certainly, his employer would offer no assistance. In contrast, the Berman statutory process is easily initiated with readily available forms and Deputy Labor Commissioners are available to assist wage claimants. The court also found it difficult for a wage claimant to navigate the arbitral system as opposed to the Berman process. The Deputy Labor Commissioner controls the process, initiates the hearings, formulates the Notices, issues subpoenas, provides interpreters and sets the dates. In the Berman process, the wage claimant is assisted through the entire process. This is not so in the arbitral system created by OTO.

By contrast, in the OTO arbitration agreement, "the complaint must be framed in a legal pleading, and the claimant must respond to discovery demands and dispositive motions. * * * [T]he arbitration here must be conducted by a retired superior court judge, with procedures similar to a formal civil trial." Pet. App. 23a. The contrast with the Berman process is profound.

Another point the California Supreme Court made is that collection of amounts found owed is much simpler under the Berman statutes. For example, the Labor Commissioner may enforce the judgment, or the claimant can collect on a mandatory posted bond. By contrast, in arbitration, a successful claimant must petition a court to confirm the award and then enforce that judgment. Pet. App. 24a. Collection of unpaid wages is one of the most serious barriers to combating wage theft, and the Berman statutes are designed to remedy the difficulties faced by wage claimants in their attempts to collect from unscrupulous employers.

The point is that there are more than 30 benefits built into the Berman statutes for wage claimants. Some of these benefits also assist the employer to ensure prompt and fair resolution of claims. Overall, the process is slanted in favor of the wage claimant, and, in contrast, the OTO arbitration agreement tilts the process substantially against the wage claimant.

Finally, the court noted that for wage claimants, it had made it clear in *Sonic II* that:

> while the waiver of Berman procedures does not in itself render an arbitration agreement unconscionable, the agreement must provide in *exchange* an accessible and affordable forum for resolving wage disputes. * * * But the arbitral scheme

> must offer employees an effective means to pursue claims for unpaid wages, and not impose unfair costs or risks on them or erect other barriers to the vindication of their statutory rights.

Pet. App. 26a-27a (internal citations omitted; emphasis in original).

Thus, the arbitration agreement imposed on Kho by OTO was substantively unconscionable not because it required arbitration, but because it deprived wage claimants of rights they have under state law.

VI. REASONS WHY THE PETITION SHOULD BE DENIED

A. BECAUSE OTO ASSERTED AT THE CALIFORNIA SUPREME COURT ORAL ARGUMENT THAT THE ARBITRATOR COULD FASHION A PROCEDURE WHICH CONTAINED MANY OF THE BERMAN HEARING PROTECTIONS, THE CASE DOES NOT WARRANT REVIEW

At oral argument, for the first time after five years of litigation, counsel for OTO told the California Supreme Court that an arbitrator had the power under the arbitration agreement to fashion a procedure which protected wage claimants. See Pet.

App. 23a, n.14.[2] The California Supreme Court rejected that argument as having been waived since it was not advanced until oral argument. That is an independent state ground to deny the petition. It is a particularly powerful reason since Petitioner and amici complain about the adverse impact on all employers but there is apparently an obvious solution common to these agreements: the arbitrator can fashion a procedure which is "accessible and affordable" which can eliminate the unconscionability question.

This means this arbitration agreement as clarified does not present the question framed by the petition. Had the Petitioner made the argument when it first was faced with the claim that the protective features of the Berman statutory process affording employees an affordable and accessible forum were unavailable in arbitration, Petitioner could have presented evidence on that or tested it further by making it clear to the Labor Commissioner and Kho.[3] The Labor Commissioner could have declined to oppose arbitration or dismissed the claim if she had been assured the arbitration process was "accessible and affordable." But the very belated raising of this reading of the

---

[2] Oral Argument at 28:09-35:26, *OTO*, 447 P.3d 680, https://jcc.granicus.com/player/clip/1152?meta_id=37522.

[3] It is unclear whether counsel was referring to just the hearing or the entire set of rights available in the Berman statutes.

arbitration agreement renders the Question Presented by the petition unreachable by this Court since the employer now argues that the arbitration agreement meets the "accessible and affordable" standard not on its face, but by application by the arbitrator.[4] The insistence for five years that the arbitration agreement meant one thing and the dramatic change in position at oral argument before the California Supreme Court makes this case unsuitable to test this issue.[5]

---

[4] The California Supreme Court also rejected the argument because the arbitration agreement appeared to read to the contrary. But the oral argument before the California Supreme Court makes no record of how an agreement has been interpreted, and certainly deprived the Labor Commissioner of the opportunity to consider the argument and dismiss the claim as she has the power to do under section 98 of the California Labor Code.

[5] OTO did not suggest there was a delegation clause that would have been applicable. Cf. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019).

B. THE COURT CORRECTLY COMPARED THE AGREEMENT TO THE CONTEXT IN WHICH IT WAS OBTAINED AND ENFORCED BECAUSE THE UNCONSCIONABILITY DOCTRINE, AS APPLIED IN CALIFORNIA AND OTHER JURISDICTIONS, REQUIRES A CONTEXTUAL ANALYSIS

While this Court should not grant the petition as it relies upon an assertion rejected by the California Supreme Court as waived, OTO's additional arguments are also without merit. OTO asks this Court to grant a hearing asserting the California Supreme Court disfavored arbitration by comparing it to a state established administrative system. In Petitioner's view, the California Supreme Court's analysis automatically disfavors arbitration by requiring the parties to use that administrative procedure. Pet. 14-16. Every unconscionability evaluation requires a look at the context. Whether the agreement is a commercial agreement, insurance contract, consumer agreement, or employment agreement, the context matters. OTO has offered no conflicting case remotely similar which creates a need to hear this case.

OTO's argument is that in determining unconscionability, a court should ignore any specially created remedial process. In effect, the position is that this Court should allow any entity to enforce an

arbitration agreement which eliminates procedural or substantive rules and which favors one party over another. This challenges California's long history of protective labor legislation.

When determining substantive unconscionability of any contract, California courts have long looked at the entire contract and the legal and factual context. "Whether the price of a bargain is 'unreasonably and unexpectedly harsh' depends on more than just a single printed number, so we examine not only the price term itself but other provisions and circumstances affecting a transaction's benefits and burdens." *De La Torre* v. *CashCall, Inc.*, 422 P.3d 1004, 1009 (Cal. 2018); *Grand Prospect Partners, L.P.* v. *Ross Dress for Less, Inc.*, 182 Cal.Rptr. 3d 235, 240 (2015) (whether a provision is unconscionable or imposes an unreasonable penalty depends heavily on the facts proven in a particular case). Moreover, this broad application of unconscionability to contracts is well-established in many jurisdictions. See *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965) (In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case."); *Collins* v. *Click Camera & Video*, 621 N.E. 2d 1294,

1299 (Ohio Ct. App. 1993). *Williams*, *supra*, is perhaps the leading case on the application of the unconscionability doctrine, and the California Supreme Court applied its precepts.

The FAA authorizes the application of the unconscionability defense, and Petitioner does not contest that. Petitioner has not argued that the California Supreme Court applied the unconscionability doctrine in a different manner to arbitration agreements than is generally applied to all contracts. Petitioner has not established that the California Supreme Court strayed in any respect from a traditional unconscionability analysis under California law and it has not cited one case where the California Supreme Court's analysis on this issue is inconsistent with unconscionability analysis in any other jurisdiction. In effect, this Court is being asked to establish a blanket rule that any state-created administrative proceeding, or court remedy which grants procedural and substantive protections to one side of a dispute, can be nullified by an arbitration agreement. For these reasons, OTO's arguments do not provide a basis to grant review.

C. THIS CASE DOES NOT PRESENT ANY CIRCUMSTANCE REQUIRING THE COURT TO GRANT A HEARING BECAUSE THE ISSUE PRESENTED IS NOT EXCEPTIONALLY IMPORTANT

As Petitioner concedes, the Opinion of the California Supreme Court creates no conflict with any other court except its assertion that the decision conflicts with selected decisions of this Court, and that California needs to be reprimanded because of its alleged hostility to arbitration. Nor does the lone dissent of Justice Chin (who agreed that there was procedural unconscionability) make the case worthy of granting the petition. Petitioner concedes that this Court denied certiorari in *Sonic II,* just as it has done in other cases where Petitioner asserts California has shown hostility to arbitration. *E.g.*, *Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014), *cert den*., 574 U.S. 1121 (2015) (holding that among other things, the National Labor Relations Act does not preempt arbitration waivers anticipating this Court's decision in *Epic Sys. Corp.* v. *Lewis*, 138 S.Ct. 1612 (2018)). Moreover, Petitioner has not acknowledged the cases where the California courts have rejected similar challenges to arbitration agreements. *Sanchez* v. *Valenica Holding Co*., *supra*. Petitioner also has not acknowledged that California's arbitration statute has been in existence since 1961 and enforced liberally since then. Petitioner points to no other

state which has a similar system of wage claim adjudication as the Berman statutes that could raise the same issue. It points to no conflict with any appellate court decision. All of this, however, matters little because this particular case evidences support for the fundamental attributes of arbitration as contemplated by the FAA.

In fact, it is primarily auto dealers represented by the same counsel who have gone to such lengths to construct and defend arbitration agreements that conflict with the claim process established by the Berman statutes. See *Sonic-Calabasas A, Inc.* v. *Moreno*, 247 P.3d 130 (Cal. 2011) ("*Sonic I*"), and *Sonic II*, *supra*, and *Davis* v. *TWC Dealer Grp., Inc.*, 254 Cal.Rptr.3d 443 (2019) (same counsel). The auto dealers who have filed an amicus offer no explanation as to why they must avoid the Berman statutes. Some employers recognize that the Berman statutes afford an opportunity to resolve wage claims in an "accessible and affordable" manner and have excluded such claims from arbitration agreements. *E.g.*, *Rebolledo* v. *Tilly's, Inc.*, 175 Cal.Rptr.3d 612, 626 (2014). Where the issue of the Berman statutes and arbitration arises, the cases are often decided on other grounds. *E.g.*, *Performance Team Freight Sys., Inc.* v. *Aleman*, 194 Cal.Rptr.3d 530, 542 (2015) (no showing of procedural unconscionability, no showing contract is one of employment.) Neither Petitioner nor amici offer any authority that this is a widespread problem worthy of a hearing, other than

to argue that many employers are using arbitration agreements. It only becomes a problem where employers overreach in their attempts to avoid the Berman statutes as OTO does here.

The California courts apply the unconscionability doctrine using the same context analysis to the unconscionability doctrine and this is the lesson here. This undercuts any argument by OTO that this Court needs to hear this case because the auto dealer industry has overreached. And when counsel for OTO realized how far OTO overreached in this case, he retreated and claimed belatedly the agreement would satisfy the concerns of the California Supreme Court in *Sonic II*.

In summary, the argument of Petitioner is that no state administrative procedure which creates procedural and substantive benefits may be measured against an arbitration agreement no matter how severely it disadvantages the worker with an unpaid wage claim against the employer.

OTO properly points out that in other areas of the law, such as discrimination cases, more formality is required and allowed. The California Supreme Court has required some of the formalities of civil litigation but by no means all such procedures in the context of discrimination lawsuits. *Armendariz*, *supra*. That highlights why the exception from the requirement of formality for wage claims provided for in the Berman

statutes should not be questioned by granting the petition. Petitioner's claim that this may require different arbitration procedures just underscores the validity of the Berman statutes and the right of the courts to police any effort to void those rights.

Finally, Petitioner, citing *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013), claims that the California Supreme Court has erected a pre-arbitration barrier that will create a "'preliminary litigating hurdle.'" Pet. 17. The California Supreme Court addressed that issue head-on. Pet. App. 33a-34a. The unconscionability defense, which has long been recognized as a contractual defense, will always require some pre-arbitration litigation hurdle, but the burden of establishing such a barrier is squarely on the party asserting it. But this creates no conflict with *Italian Colors*, *supra*. The Petitioner asks this Court to ignore section 2 of the FAA, which authorizes such defenses and prescribes an expedited procedure to resolve such disputes in federal court, which is replicated in California courts. Cf. 9 U.S.C. 4 and Cal. Civ. Proc. Code § 1281-1281.96.

D. THE COURT'S DECISION DOES NOT PRESENT A CIRCUMSTANCE DISFAVORING ARBITRATION, RATHER IT FAVORS THE FUNDAMENTAL ATTRIBUTES OF ARBITRATION

This Court has made clear that arbitration serves a different purpose than civil litigation. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357-358 (2008) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

This Court in *AT&T Mobility, LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011), addressed this concept and suggested that "judicially monitored discovery or adherence to the Federal Rules of Evidence" would interfere with arbitration similar to mandated class actions.

The California Supreme Court adhered to this principle in *McGill* v. *Citibank, N.A.*, 393 P.3d 85, 95-96 (Cal. 2017). See also *Sonic II*, 311 P.3d at 201. OTO's agreement attempts to force precisely that which state laws could not impose by legislation without facing preemption by the FAA.

Finding the OTO arbitration agreement unconscionable does not disfavor arbitration, rather it promotes arbitration because the decision would

require an arbitration procedure that has all the "fundamental attributes of arbitration, * * * lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *McGill*, 393 P.3d at 96 (quoting *Concepcion*, 563 U.S. at 344]. See also *Sonic II*, 311 P.3d at 201-204. Here, the OTO agreement voids the Berman hearing, which more closely adheres to the principles of arbitration as envisioned by the FAA, rather than civil litigation.

California has an undeniably strong interest in preventing wage theft by preserving the informality of the Berman statutes, which "offer a 'speedy, informal, and affordable method of resolving wage claims.'" *Sonic II*, 311 P.3d at 203 (quoting *Cuadra* v. *Millan*, 952 P.2d 704, 706 (Cal. 1998)).

This case does not present circumstances where the Berman statutes interfere with the "fundamental attributes of arbitration" as envisioned by the FAA as OTO's arbitration agreement does not possess those attributes. As a result, the petition does not present an issue warranting a grant of review by this Court.

E. THE PETITION DOES NOT ESTABLISH THAT THE FAA APPLIES OR THAT THE DISPUTE AFFECTS COMMERCE AS TO ASSURE THIS COURT'S JURISDICTION

1. The FAA Does Not Apply

Although we have shown above why there is no conflict with the FAA, it arguably does not apply in the circumstances of this case. By its own terms, the FAA applies only to arbitration provisions that appear in a "contract evidencing a transaction involving commerce" (9 U.S.C. 2), where commerce is defined as "commerce among the several States or with foreign nations." 9 U.S.C. 1.

There is no contract in the record other than the arbitration agreement. Thus, there is no contract evidencing a transaction, and the FAA is not applicable.[6]

Assuming, however, that the employment relationship is deemed a contract, the disputed transaction must affect commerce for the FAA to

---

[6] The "at will" nature of the employment is recited in paragraph 1 of the "Employee Acknowledgement and Agreement." It restates that there is no agreement except the illusory one of the at will termination of the employment relationship by either party. The pay plan Kho acknowledged expressly disclaims that it "DOES NOT constitute an employment contract." CT 116 ("CT" refers to the Clerk's Transcript on Appeal).

apply. Under the FAA, "the transaction (that the contract 'evidences') must turn out, *in fact*, to have involved interstate commerce." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 277 (1995). See also *Garrison* v. *Palmas del Mar Homeowners Ass'n, Inc.*, 538 F. Supp. 2d 468, 473 (D.P.R. 2008) ("[T]he FAA * * * only applies when the parties allege and prove that the transaction at issue involved interstate commerce.") (citing *Medina Betancourt* v. *La Cruz Azul de P.R.*, 155 D.P.R. 735, 742–743 (2001)); *Shearson Hayden Stone, Inc.* v. *Liang*, 493 F.Supp. 104, 106 (N.D. Ill. 1980), *aff'd*., 653 F.2d 310 (7th Cir. 1981) ("Interstate commerce is a necessary basis for application of the [FAA]").

Courts have found that the FAA does not apply to employment contracts. In *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198, 200-201 (1956), this Court found that the FAA did not apply to an employment contract between Polygraphic Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of the company's lithograph plant in Vermont. See also *Slaughter* v. *Stewart Enters., Inc.*, No. C-07-01157MHP, 2007 U.S. Dist. LEXIS 56732, at *10 (N.D. Cal. Aug. 3, 2007) (an "employment contract [did] not involve interstate commerce as required by the [FAA]" where an employee "was employed at a single location," "[h]is employment did not require interstate travel," and "his activities while employed with defendants as well as the

events at issue in the underlying suit were confined to California."); *Ambulance Billings Sys., Inc.* v. *Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex. App. 2003) (holding FAA not applicable where services performed were confined to Texas); and *H. L. Libby Corp.* v. *Skelly & Loy, Inc.*, 910 F.Supp. 195, 198 (M.D. Pa. 1995).

The party claiming FAA preemption has the burden of proof to show the contract involves interstate commerce. [7] *Lane* v. *Francis Capital Mgmt. LLC*, 168 Cal.Rptr. 3d 800, 809 (2014). Here, OTO has not established that the FAA governs.

There is no evidence that the transaction between the parties, meaning the failure to pay wages, involves interstate commerce.[8] Disputes that arise between OTO and any of its employees based solely on state law are local disputes governed only by state law.[9]

---

[7] This is consistent with the general principle that the party asserting preemption has the burden of establishing preemption.

[8] The Petition alleges that Kho's employment affects interstate commerce but does not allege the transaction subject to the arbitration agreement affects commerce.

[9] *Epic Sys. Corp.* v. *Lewis*, *supra*, involved a claim brought under the federal Fair Labor Standards Act, 29 U.S.C. 201 *et seq*. The jurisdiction question here is easily distinguishable as Kho did not bring federal claims.

The character of OTO's business does not alter this conclusion. The relevant question here is whether the transaction between the parties has an effect on interstate commerce. The fact that one of the parties to the transaction is independently involved in interstate commerce for other purposes does not bring every contract that party enters into, no matter how trivial or local, within the reach of the FAA. See *Bernhardt*, 350 U.S. at 200–201. See also *Bruner* v. *Timberlane Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) ("The facts that the nursing home buys supplies from out-of-state vendors * * * are insufficient to impress interstate commerce regulation upon the admission contract for residential care between the Oklahoma nursing home and the Oklahoma resident patient."); *Saneii* v. *Robards*, 289 F.Supp.2d 855, 858–859 (W.D. Ky. 2003) (The sale of residential real estate to an out-of-state purchaser had "no substantial or direct connection to interstate commerce," since any movements across state lines were "not part of the transaction itself" but merely "incidental to the real estate transaction."); *City of Cut Bank* v. *Tom Patrick Constr., Inc.*, 963 P.2d 1283, 1287 (Mont. 1998)

The FAA does not apply in this case, and the issue presented by the petition cannot be reached by the Court.

2. There is no activity which affects commerce

In addition to the reasons articulated above showing that that FAA does not apply to the employment transaction in this case, the adjudication of the wage dispute also does not affect commerce and therefore, this Court lacks jurisdiction for this additional reason. Under the Commerce Clause, Congress may only regulate "'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S.Ct. 2566, 2578 (2012) (quoting *United States* v. *Morrison*, 529 U.S. 598, 609 (2000)).

The fact that OTO as a car dealer is independently engaged in interstate commerce for other purposes separate from its employment relationship with Kho cannot supply the necessary connection to commerce, because the FAA is not a regulation of automotive sales or repair. In *Sebelius*, the Court made it clear that Congress may only use its authority under the Commerce Clause "to regulate 'class[es] of *activities*,' not classes of *individuals*, apart from any activity in which they are engaged." *Sebelius*, 132 S.Ct. at 2590 (citation omitted).

The only activity regulated by the FAA is the resolution of disputes between private individuals.

The FAA does not seek to regulate how the employer conducts its business or carries out its commercial activities or whether Kho was properly paid. This is the only activity regulated by the FAA, and such a law passed pursuant to the Commerce Clause cannot be constitutionally applied to the dispute resolution of this wage claim which itself does not affect commerce. See *Sebelius*, 132 S.Ct. at 2578.

In summary, the FAA does not apply on this record, and the record does not establish that the FAA applies under the Commerce Clause. These jurisdictional questions present additional compelling reasons why the case is not a vehicle to test the OTO arbitration agreement against the Berman statutes.

VII. CONCLUSION

For the reasons expressed herein, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Weinberg, Roger & Rosenfeld
A Professional Corporation

/s/ David A. Rosenfeld
By: David A. Rosenfeld

Attorneys for Respondent KEN KHO

Dated: April 29, 2020

148908\1078815

APPENDIX

COMPREHENSIVE AGREEMENT
EMPLOYMENT AT-WILL AND ARBITRATION

1. It is hereby agreed by and between KEN KHO (hereinafter "Associate") and One Toyota of Oakland (hereinafter "Company") that the employment and compensation of Associate can be terminated by the Company or the Associate at any time, with or without cause and/or with or without notice, at the option of the Company or the Associate.

2. I also acknowledge that the Company utilizes a system of alternative dispute resolution that involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable local, state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, associates, agents, and parties affiliated with its associate benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims"). Notwithstanding the prohibition herein against "class claims" in arbitration, where my aggregate claims seek a small amount of damages (*e.g.*, relief that would otherwise require or permit me to proceed in a California Small Claims action), and where the arbitrator makes a specific factual finding after an evidentiary hearing that the prohibition against "class claims" would, for my specific claims, become an exemption to the Company from responsibility for its own alleged willful injury to me and that such prohibition against "class claims" violates fundamental notions of fairness to the extent that the arbitrator determines that the prohibition against "class claims" is substantively unconscionable, I will be permitted to bring "class claims" in binding arbitration subject to all the legal requirements for maintaining "class claims." I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, or joint action. I understand and agree that after I exhaust administrative remedies through the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission, I must pursue any such claims through this binding arbitration procedure. I acknowledge that the Company's business (repairing automobiles and selling automobiles and parts coming from outside the State) and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all the Act's other mandatory and permissive rights to discovery). However in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. The arbitrator shall be vested with authority to determine any and all issues pertaining to the dispute/claims raised, any such determinations shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to, notions of "just cause") for his/her determinations other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. **Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4), even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to arbitration; thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c). The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement.**

I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY.

3. It is further agreed and understood that any agreement contrary to the foregoing must be entered into, in writing, by the President of the Company. No supervisor or representative of the Company, other than its President, has any authority to enter into any agreement for employment for any specified period of time or make any agreement contrary to the foregoing. Oral representations made before or after you are hired do not alter this Agreement.

4. This is the entire agreement between the Company and the Associate regarding dispute resolution, the length of my employment, and the reasons for termination of employment, and this agreement supersedes any and all prior agreements regarding these issues.

5. Should any term or provision, or portion thereof, be declared void or unenforceable it shall be severed and the remainder of this agreement shall be enforced.

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS.

Signed at Rohnert Park, California, this 22 day of Feb, 2013.

Associate's Signature: [signature]

Print Name: KEN KRIJ

Date: 2/22/13

2a