No. 06-1463

IN THE

Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts the California Labor Commissioner's jurisdiction under the California Talent Agencies Act ("TAA") to conduct an administrative hearing and determine whether an individual has violated the TAA, which determination is subject to *de novo* review by a court or arbitrator.

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PRELIMINARY STATEMENT

This case arises from a controversy between Judge Alex E. Ferrer ("Ferrer"), who sought employment for the first time in the television industry, and Arnold M. Preston ("Preston"), who attempted to procure employment for Ferrer in that industry. Holding himself out as a talent agent, Preston set up a meeting between Ferrer and several television network executives and producers. Hours before the meeting, Preston insisted that Ferrer sign a contract (the "Contract") entitling Preston to a sizeable commission stemming from any employment that Ferrer obtained as a result of the meeting. Although Ferrer did not obtain employment as a result of the meeting, Ferrer later became employed in the television industry working with two of the producers that he met at the meeting.

In the Contract, Preston refers to himself as a "manager." Under the California Talent Agencies Act, CAL. LAB. CODE § 1700, *et. seq*. ("TAA" or "Act"), however, anyone who procures or attempts to procure employment for an artist in the television, stage, or motion picture industry is a "talent agency," and must be licensed by the California Labor Commissioner ("Commissioner"). Although Preston attempted to procure employment for Ferrer, Preston was not a licensed talent agent, and the Contract that Preston presented to Ferrer had not been approved by the Commissioner as also required by the TAA. Subsequently, even though (i) Preston never actually procured employment for Ferrer; (ii) Preston was not a licensed talent agent under the TAA; and (iii) Preston's Contract did not comply with the TAA,

Preston nevertheless insisted that Ferrer pay him a commission for the television employment that Ferrer later obtained.

Under the TAA, the Commissioner has jurisdiction to hold an administrative hearing and determine whether Preston violated the TAA by, among other things, operating as an unlicensed talent agent. CAL. LAB. CODE § 1700.44. If the Commissioner finds that Preston violated the TAA, she may then determine that the Contract is void, and may take additional action as set forth in the Act. Following the Commissioner's determination, either party may, as a matter of right, obtain a *de novo* hearing in the California Superior Court. Alternatively, following the Commissioner's determination, either party may move in the Superior Court to have the matter resolved *de novo* by an arbitrator if the parties have a valid arbitration agreement. Under California law, the Superior Court must grant a motion to compel arbitration if a valid arbitration clause exists. Thus, compliance with the TAA *does not preclude arbitration* of a dispute if the parties have agreed to arbitrate. Rather, at most, the TAA merely postpones arbitration pending completion of the Commissioner's initial inquiry.

The Contract between Preston and Ferrer that Preston drafted has an arbitration clause. JA 17-18. Accordingly, if the clause is valid and applicable, the parties may proceed to arbitration if either of them is dissatisfied with the Commissioner's determination. If so, an arbitrator, rather than a court, will resolve the controversy *de novo*.

Long recognized as "the center of the entertainment industry," *Sinatra v. National Enquirer*, 854 F.2d 1191, 1202 (9th Cir. 1988), California has a strong interest in regulating relations between artists and those who procure, or attempt to procure, employment for them. Drawing on nearly a century of regulatory experience, California enacted and maintains the TAA to prevent a broad variety of abusive practices and ensure the smooth functioning of an industry vital to its economy. Employing the expert office of the Commissioner to closely supervise, monitor, and adjust relations between agents and artists, the TAA aims to (i) avoid and deter illegal activities harmful to the industry, (ii) promote the expeditious resolution of controversies, (iii) vindicate the Commissioner's comprehensive authority, and (iv) keep the Commissioner apprised of relevant controversies. Given that the TAA expressly permits an arbitrator to resolve a controversy *de novo* following the Commissioner's review, it cannot be said that the TAA either effectively precludes arbitration or otherwise obstructs the Federal Arbitration Act ("FAA"). On the contrary, by requiring the Commissioner's expert resolution without constraining the outcome of any subsequent arbitration proceeding, the TAA actually promotes efficient, informed arbitration.

In this case, the lower court determined only that (i) under the TAA, the Commissioner may proceed with her inquiry before the parties litigate or arbitrate their dispute; and (ii) the FAA does not preempt the Commissioner's jurisdiction to make an initial determination. Pet. App. 6a-7a (determining that "[t]he administrative procedures before the

Commissioner must be resolved before resort may be had to another tribunal," and that it makes no difference whether a party "commenced an arbitration seeking damages" or "the action was initiated in superior court"); 10a-11a (concluding that there is no preemption of administrative procedures). Indeed, these were the only issues that the lower court in this case *could* decide, given that the Commissioner had not completed her review at the time, and the question whether to arbitrate or litigate following the Commissioner's determination had not yet arisen, much less been resolved. Thus, contrary to the assertions of Preston and his *amici*, no court in this case determined that that the Superior Court would conduct a *de novo* hearing, and this case does not involve a lower court's invalidation of an arbitration clause. Rather, this case involves merely the postponement of arbitration to permit the Commissioner to perform her administrative, regulatory function. Critically, this is precisely what Preston bargained for in the very Contract that he drafted.

The Contract specifically provides that "[t]his agreement shall be governed by the laws of the state of California." JA 17. It further provides that "[i]f there is any conflict between this agreement and any present or future law, the latter shall prevail." JA 18. In *Volt Information Science, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), the Court addressed virtually identical contractual terms and a similar California rule postponing arbitration. In *Volt*, the parties agreed that their contract would be governed by California law. The Court determined that the parties thereby agreed to be bound by a California

procedural rule that permitted a stay of arbitration pending the outcome of related litigation. The Court held that the FAA did not preempt the procedural rule that postponed arbitration, and the same reasoning applies here. As noted, the TAA does not prevent arbitration; at most, it simply postpones it. By selecting California law to govern his Contract, Preston agreed to be bound by the TAA procedure. Because the FAA aims to *enforce* contractual agreements concerning arbitration, Preston's preemption argument necessarily fails since recognizing the Commissioner's initial jurisdiction requires nothing more than enforcing the Contract itself.

Preston's preemption argument also fails because, even if he had not bargained for application of the TAA procedure at issue here, there is no conflict between the relevant federal and state laws. First, the TAA is a comprehensive exercise of California's police power designed to regulate an industry that, historically, was fraught with abuse. Accordingly, the presumption against preemption applies. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Second, no conflict exists because Ferrer does not argue, and the TAA does not provide, that arbitration may never take place. On the contrary, if the parties' arbitration clause is valid and applicable, arbitration will take place after the Commissioner completes her inquiry if a party dissatisfied with the Commissioner's determination pursues his absolute right to seek a *de novo* hearing. A state rule that merely postpones arbitration to permit an administrative hearing to take place does not conflict with the FAA.

Third, the Labor Commissioner's review is informal, expeditious, and subject to complete *de novo* review. As a result, it does not tie the hands of the arbitrator, who is left, as between the parties, to fashion the ultimate remedy. At the same time, as between the parties and the State, the TAA procedure permits the Commissioner to exercise her administrative, regulatory authority to conduct an investigation, make an initial determination whether the TAA has been violated, and take appropriate administrative action – an authority that private parties are powerless to negate by contract. The TAA procedure here is analogous to other kinds of agency authority and action that the Court has held does not conflict with the FAA. *See, e.g., EEOC v. WaffleHouse, Inc.*, 534 U.S. 279, 288 (2002). For these reasons, the Court should affirm the decision below.

STATEMENT

A. Factual Background

Ferrer is a former Florida Superior Court Judge who currently arbitrates legal disputes on the nationally syndicated television program *Judge Alex*. Preston is an attorney who has never been a licensed talent agent.

In early 2002, an acquaintance gave Preston's name to Ferrer, and Ferrer contacted Preston to inquire about seeking employment in the television industry. After some discussions, Ferrer sent materials to Preston and Preston circulated these materials to persons in the television business, attempting to procure employment for Ferrer. Preston subse-

quently contacted Ferrer and informed him that executives at a television network were interested in meeting him in California. Ferrer, who was on vacation, modified his travel plans and arranged to fly to Los Angeles for the meeting.

Just before Ferrer left for Los Angeles, Preston faxed the Contract to Ferrer's hotel and informed Ferrer that there would be no meeting unless Ferrer signed it. As originally drafted, the Contract would have entitled Preston to receive a commission for any employment that Ferrer obtained in the entertainment industry, regardless of whether Preston procured the employment for Ferrer. Ferrer objected, and the parties negotiated certain hand-written changes to the agreement limiting Preston's commission to a percentage of income that Ferrer obtained from employment resulting from the specific meeting that Preston had arranged. JA 11-12. Ferrer executed the Contract on March 7, 2002. The Contract expressly provides that "[t]his agreement shall be governed by the laws of the state of California," JA 17, and that "[i]f there is any conflict between this agreement and any present or future law, the latter shall prevail," JA 18.

On March 8, 2002, Ferrer attended the meeting that Preston had arranged. Preston, however, did not attend. Although the network expressed interest in Ferrer, the parties did not ultimately reach agreement on the terms of any employment for Ferrer. At the time of the meeting, Ferrer was unaware that Preston was acting unlawfully as an unlicensed talent agent.

Over a year later, Ferrer was contacted by two of the producers who had attended the meeting on March 8, 2002 about possible employment in the television industry. Ferrer and the two producers ultimately reached an agreement with Twentieth Television to produce the *Judge Alex* show. Preston thereafter claimed to be entitled to a commission as a result of Ferrer's engagement with Twentieth Television.

B. The California Talent Agencies Act

The TAA is a remedial statute, enacted to "protect artists seeking professional employment from the abuses of talent agencies." *Styne v. Stevens*, 26 Cal. 4th 42, 50 (2001). Specifically, it regulates the activities of talent agents to prevent inexperienced actors, actresses, and other artists from falling prey to exploitation by those who seek to capitalize on their inexperience. *Id.* at 58. Given California's status as an entertainment center, California has a strong interest in promoting the smooth functioning of the entertainment industry, including the regulation of relations between agents and artists vital to that industry.

The TAA has a long history and is comprehensive in scope.[1] It applies to a "talent agency," defined in

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[1] As one commentator has observed, "[f]or almost a hundred years, Southern California has been known as a bastion of artistic talent and as an avid protector of artists' rights." Gary E. Devlin, Note, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry*, 28 PEPP. L. REV. 381

relevant part as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists." CAL. LAB. CODE § 1700.4. The TAA defines an "artist" as a person who renders "professional services in . . . television and other entertainment enterprises." *Id.* Essentially anyone who procures, or attempts to procure, employment for an artist in the television, stage, or motion picture business is a talent agent within the meaning of the TAA and is subject to its provisions.[2]

The function of a talent agent under the TAA is distinct from that of a "manager." In the entertainment industry, a manager commonly performs a variety of services for an artist, such as career counseling and publicity consulting. As the TAA makes plain, however, any individual who procures, or attempts to procure, *employment* for an artist in the television, stage, or motion picture industry falls within the definition of a "talent agency" under the Act irrespective of what he calls himself. In other words, the label a person uses to describe what he does for an artist is not controlling; anyone who procures, or attempts to procure, employment for an art-

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(2001). The current version of the TAA traces its origins to California's 1913 Private Employment Agencies Law. *Id.* at 387.

[2] The statutory definition of "talent agency" makes plain that it includes within its scope an individual who procures, or attempts to procure, employment for an artist. For simplicity, this brief refers to an individual who qualifies as a "talent agency" as a "talent agent."

ist in the television, stage, or motion picture business acts as a "talent agency" and is subject to the TAA's requirements. In this case, Preston attempted to procure employment for Ferrer in the television business – indeed, that is *all* that Preston did for Ferrer. Accordingly, Preston acted as a talent agent within the meaning of the TAA, notwithstanding that he labeled himself a "manager" in the Contract.

The TAA directs that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." CAL. LAB. CODE § 1700.5. To obtain a license, an individual must submit an application, accompanied by two sets of fingerprints and certifications from residents of the location where the agent will operate attesting to the agent's "reputation for fair dealing" and "good moral character." *Id.* § 1700.6. The individual must also post a surety bond with the Commissioner in the amount of $50,000, *id.* § 1700.15, the proceeds of which are available to cover any damages occasioned by the agent's "misstatement, misrepresentation, fraud, deceit, or any unlawful acts or omissions of the licensed talent agency," *id.* § 1700.16. A talent agency may not change location without the Commissioner's consent. *Id.* § 1700.13.

Before issuing a license, the Commissioner may conduct an investigation "as to the character and responsibility of the applicant." CAL. LAB. CODE § 1700.7. The Commissioner may deny an application, *id.* § 1700.8, and must do so under certain circumstances, *id.* § 1700.9. The Commissioner may also revoke a license for, among other things, the

agent's failure to comply with the TAA's requirements. *Id.* § 1700.21. In addition, the Commissioner may collect fines for violation of the TAA. *Id.* § 1700.18. Licenses are issued on an annual basis and must be renewed each year. *Id.* § 1700.10. Licenses are not transferable without the Commissioner's consent. *Id.* § 1700.20.

Every talent agency is required to submit its contracts, or forms of contracts, to the Commissioner for prior approval. CAL. LAB. CODE § 1700.23. The Commissioner may withhold approval if, among other things, the terms are "unfair, unjust and oppressive to the artist." *Id.* Emphasizing the supervisory role of the Commissioner, the TAA further provides that "[e]very such form of contract . . . shall contain an agreement by the talent agency to refer any controversy between the artist and the talent agency relating to the terms of the contract to the Labor Commissioner for adjustment." *Id.*

Every talent agency is required to file with the Commissioner and post in conspicuous view all fees that it charges, CAL. LAB. CODE § 1700.24, and certain fees and charges are expressly prohibited, *id.* § 1700.40. Fees and charges are not effective until after they are filed with the Commissioner and posted as required by the Act. *Id.* § 1700.24. The TAA likewise contains regulations concerning conflicts of interest, and proscribes certain referral fees. *Id.* § 1700.40. Talent agencies are also required to maintain various records and must hold funds col-

lected on behalf of artists in trust. *Id.* §§ 1700.25, 1700.26.[3] The Commissioner has the right to inspect the agency's books and records, and to receive copies upon request. *Id.* § 1700.27. Restrictions apply to an agency's advertisements, *id.* § 1700.32, and health and safety limitations also apply, *id.* §§ 1700.33, 1700.34, 1700.35, 1700.36.

It is undisputed that Preston complied with none of these requirements. Although he clearly and repeatedly sought to procure employment for Ferrer in the television industry, he neither obtained a license to do so, nor submitted his Contract to the Commissioner for approval. He also failed to file and disclose his fees and charges prior to presenting them to Ferrer, instead waiting until just before the meeting on March 8, 2002 to rush Ferrer into signing the Contract.

C. The Commissioner's Investigation And Review Under The TAA

Section 1700.44 of the TAA provides that "[i]n cases of controversy under this chapter, the parties involved shall refer the matters in dispute to the La-

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[3] It is customary in the industry for a talent agent to collect funds directly from an artist's employer, deduct the agent's commission, and then remit the balance to the artist. Thus, the TAA has specific trust fund and accounting requirements to prevent abuse. In contrast, a "manager" is not supposed to procure employment for artists and does not typically fulfill the collection and disbursement function normally performed by an agent. There is thus correspondingly less need to regulate a manager's activities.

bor Commissioner, who shall hear and determine the same." CAL. LAB. CODE § 1700.44. Although this provision plainly vests the Commissioner with initial jurisdiction to determine whether a violation of the TAA has occurred, the Commissioner's determination is expressly subject to *de novo* resolution in the California Superior Court. *Id.* Specifically, any party that disagrees with the Commissioner's resolution of a controversy may file a notice of appeal with the Superior Court within ten days of the Commissioner's determination. *Id.*; *Sinnamon v. McKay*, 142 Cal. App. 3d 847, 850 (1983).

Once the matter vests in the Superior Court, either party may move to compel arbitration if the parties have agreed to arbitrate their dispute. CAL. CIV. PROC. CODE § 1281.2.[4] Following an appeal of the Commissioner's determination to the Superior Court, the court is required to grant a motion compelling arbitration if the parties have executed a valid and applicable arbitration agreement. *Id.*; *see Rosenthal v. Great Western Fin. Secs. Corp.*, 14 Cal. 4th 394, 413 (1996). Significantly, section 1281 of the California Code of Civil Procedure, applicable to proceedings in the Superior Court and incorporated into the

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[4] Section 1281.2 provides in pertinent part that "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists." CAL. CIV. PROC. CODE § 1281.2.

TAA by reference in section 1700.45,[5] is virtually identical to section 2 of the FAA. *Compare* CAL. CIV. PROC. CODE § 1281 ("A written agreement to submit to arbitration . . . a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.") *with* 9 U.S.C. § 2 ("A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

It is evident that section 1700.44 of the TAA does not, in fact, invalidate an arbitration agreement or prevent arbitration of a controversy arising under its provisions. Rather, the TAA simply vests the Commissioner with initial administrative jurisdiction to determine if the TAA has been violated, subject to *de novo* resolution (i) in the Superior Court if the parties have not agreed to arbitrate, or (ii) by an arbitrator if they have. Thus, at most, the TAA may postpone arbitration in a particular case; it does not preclude or invalidate an otherwise enforceable arbitration agreement.

Further, under section 1700.45 of the TAA, a licensed talent agent and an artist may avoid the

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[5] Section 1700.45 provides in pertinent part that "[e]xcept as otherwise provided in this section, any arbitration shall be governed by the provisions of Title 9 (commencing with section 1280) of Part 3 of the Code of Civil Procedure." CAL. LAB. CODE § 1700.45.

Commissioner's initial review altogether and proceed directly to arbitration if they provide in their contract that they will give notice of any arbitration proceeding to the Commissioner and permit the Commissioner (or her representative) to attend. CAL. LAB. CODE § 1700.45; *Styne*, 26 Cal. 4th at 59 n.9 ("[T]he [TAA] specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner. (§ 1700.45)."). It is undisputed that Preston was not a licensed talent agent and that he failed to comply with these requirements in drafting the Contract. Accordingly, section 1700.45 of the TAA does not apply. Pet. App. 8a-9a.

Proceedings before the Commissioner are informal and expeditious. They are administrative in nature, governed by relevant parts of the California Code of Regulations. *See* CAL. CODE REGS. tit. 8, §§ 12022-12033 (2007). A party commences the proceeding by filing a petition, and formal pleading rules that govern proceedings in the California courts do not apply. *Id.* § 12022. The Commissioner typically schedules a hearing several months after the petition is filed. Discovery prior to the hearing is not ordinarily permitted. *Id.* § 12028. Although the parties may present evidence at the hearing (including witnesses), formal rules of evidence that govern proceedings in the California courts do not apply. *Id.* § 12031. If the Commissioner determines that the TAA has been violated, the Commissioner may refer the violation to the enforcement arm of the Labor Department, which may take administrative action,

including the commencement of license-revocation proceedings.

As noted, the Commissioner has broad oversight authority over contracts between talent agencies and artists. Among other things, agents must submit these contracts to the Commissioner for approval. CAL. LAB. CODE § 1700.23. Given the Commissioner's role in closely supervising relations between talent agencies and artists, the Commissioner also has broad authority to interpret their agreements and apply the provisions of the TAA. *Id.* § 1700.44. The Commissioner also has an overriding interest in policing individuals who act as talent agents without complying with the TAA's requirements. Inherent in this function is the ability to determine whether the TAA applies to the activities of a particular individual, and whether the individual has violated any of the requirements of the Act. *See Styne*, 26 Cal. 4th at 54-55 (explaining that "[w]hen the [TAA] is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his jurisdiction over the matter, including whether the contract involved the services of a talent agency" and that "[h]aving so determined, the Commissioner may declare the contract void and unenforceable as involving the services of an unlicensed person in violation of the Act") (citations omitted), *id.* at 58 (discussing Commissioner's role).

D. The Federal Arbitration Act

Enacted in 1925, the FAA was intended to overcome judicial resistance to arbitration, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443

(2006), by, among other things, overruling the "ouster doctrine" that federal courts had invoked to disregard otherwise valid arbitration agreements, H.R. REP. NO. 68-96, at 1-2 (1924); S. REP. NO. 68-536, at 2 (1924).[6]

After the Court's ruling in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (holding that, absent a pertinent state statute, federal common law, rather than state common law, governed in diversity cases), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts treated arbitration as remedial and procedural in nature, and therefore governed by the procedural law of the forum court, rather than as part of the substantive state law governing the general enforceability of the particular contract containing an arbitration clause. Adopting their own procedural rules, such as the ouster doctrine, federal courts often declined to enforce arbitration agreements as contrary to their own system of procedures and remedies. *See, e.g., Mitchell v. Dougherty*, 90 F. 639,

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[6] The ouster doctrine provided that "any agreement contained in an executory contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted." Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 332 (2007) (citation omitted); *see, e.g., Vynior's Case*, 77 Eng. Rep. 595, 595-96 (K.B. 1609); *see also* Meacham *v. Jamestown, Franklin & Clearfield R.R. Co.*, 211 N.Y. 346, 354 (1914) (Cardozo, J., concurring) ("If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes.").

645 (3d Cir. 1898) (refusing to enforce arbitration, stating that "[t]he question before us is not as to the enforcement of the contract in accordance with the law of the place where it was made, but is as to whether a court of the United States should, because of the parties' agreement in advance to abstain from invoking its jurisdiction, refuse to enforce the contract at all").

Although currently there are competing views on the purpose and proper interpretation of the FAA, the best evidence is that Congress did not enact the statute to change the then well-established treatment of arbitration as remedial and procedural in nature, and therefore governed by the procedural law of the forum court. As the committee report accompanying the draft FAA explained without criticism, "[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made." H.R. REP. NO. 68-96, at 1-2 (1924).

Nor was the FAA enacted to impose a substantive national arbitration law on the States. As Julius Cohen, the principal draftsperson of the legislation, testified,"[t]here is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement." *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 40 (1924) ("Joint Hearings").

Rather, the record illustrates that Congress enacted the FAA simply to change the procedural rules of the federal courts to include rules providing for the enforceability and implementation of arbitration clauses in the federal courts. *See*, *e.g.*, H.R. REP. NO. 68-96, at 1-2 (1924) ("Before [arbitration agreements] could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States.").

Consistent with this purpose, the FAA contains no express provision preempting state arbitration laws; likewise, it does not purport to occupy the entire field of arbitration, *Volt*, 489 U.S. at 477. Rather, it simply overrules such practices as the ouster doctrine as a procedural preference in the federal courts. Specifically, section 2 of the FAA provides in pertinent part:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . 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. Likewise, in section 4, the FAA directs federal courts to enforce arbitration agreements, but only in cases in which they otherwise have jurisdiction over the suit between the parties:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a

> written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Following section 4, the balance of the FAA supplies largely procedural rules for implementing arbitration agreements in federal court.

E. The Proceedings Below

As noted, even though (i) Preston never actually procured employment for Ferrer; (ii) Preston was not a licensed talent agent; and (iii) Preston's Contract did not comply with the TAA, Preston insists that Ferrer pay him a commission for Ferrer's employment on the *Judge Alex* show. Rather than present his dispute in the first instance to the Commissioner as the TAA requires, however, Preston filed a demand for arbitration on June 4, 2005. JA 5-7.

On July 1, 2005, Ferrer filed a motion with the arbitrator to stay the arbitration, and on July 5, 2005, Ferrer filed a petition with the Commissioner to determine the controversy in the first instance. JA 20-23. Ferrer also requested that the Commissioner stay the arbitration.

On November 8, 2005, the Commissioner denied Preston's motion to dismiss Ferrer's petition for, among other things, lack of subject matter jurisdiction, stating that "this case presents a colorable basis for exercise of the Labor Commissioner's jurisdiction

and therefore, the matter must be submitted to the Labor Commissioner for determination." JA at 32-33; *see Styne*, 26 Cal. 4th at 59 n.10 (discussing what constitutes a "colorable" claim under the TAA). The Commissioner also declined to stay the arbitration on the ground that she lacked the authority to do so (that authority being vested exclusively in the California Superior Court), and the Commissioner set a hearing date for March 6, 2006. JA 32-33.

After the arbitrator denied Ferrer's motion to stay arbitration pending the Commissioner's review, JA 24, Ferrer moved in the Superior Court to enjoin arbitration, JA 26, 29. On December 6, 2005, the arbitrator reconsidered his prior order declining to stay the arbitration and entered an order staying arbitration. JA 34-38. In doing so, the arbitrator concluded that "the results of the Labor Commissioner hearing also could inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case." JA 38. On December 7, 2005, the Superior Court likewise entered an order staying arbitration pending the Commissioner's review. Pet. App. 26a-27a.

Preston appealed the Superior Court's order to the California Court of Appeal. On February 8, 2006, the parties stipulated to a stay of the Commissioner's review pending the outcome of the appellate process. JA 39-40.

F. The Decision Below

On November 30, 2006, the Court of Appeal affirmed the trial court's order staying arbitration. Pet. App. 2a, 12a. Stating that "the question before

us is who has original jurisdiction to make the determination as to the validity of the parties' contract," Pet. App. 6a, the court began its analysis by considering section 1700.44 of the TAA and the nature of the parties' dispute. Rejecting Preston's argument that the TAA did not apply on the theory that he was acting merely as a "manager" rather than a "talent agent," the court held that "it is appropriate for the Commissioner to resolve the dispute between the parties, for '[t]he Commissioner's expertise in applying the Act is particularly significant in cases where, as here, the essence of the parties' dispute is whether services were by a talent agency for an artist.'" Pet. App. 7a (quoting *Styne*, 26 Cal. 4th at 58). Agreeing with the Commissioner that the matter presented a colorable case for application of the TAA, the court concluded that "the questions as to whether [Preston] is a talent agent and whether his contract with [Ferrer] is valid properly are submitted to the Commissioner *in the first instance*." Pet. App. 10a (emphasis supplied).

Turning to the question whether the FAA preempts the Commissioner's jurisdiction under this Court's decision in *Buckeye*, the court held that *Buckeye* does not apply in this case. Reasoning that the proceedings before the Commissioner are a form of exhaustion of administrative remedies, the court noted that "*Buckeye* did not consider whether the FAA preempts application of the exhaustion doctrine." Pet. App. 10a. Acknowledging the "strong public policy in favor of contractual arbitration," the court concluded that Preston nevertheless could not

avoid his obligation to complete the administrative process required under the TAA. *Id.* 11a-12a.

On February 14, 2007, the California Supreme Court denied Preston's petition for review.

SUMMARY OF ARGUMENT

Preston and Ferrer agreed in their Contract to be bound by California law and, further, that any conflict between the Contract and applicable law must be resolved in favor of the latter. California law includes section 1700.44 of the TAA, which does not preclude arbitration where there is a valid and applicable arbitration clause, but merely postpones it pending the Commissioner's review. Because the parties agreed contractually to abide by this law, and because the TAA does not preclude arbitration, the FAA does not preempt the TAA's provisions. *Volt*, 489 U.S. at 479.

Even if the parties had not agreed in the Contract to be bound by California law, the FAA still does not preempt section 1700.44. The TAA represents an exercise of California's police power over an area traditionally reserved to the State. Accordingly, the presumption against preemption applies, and Preston may overcome the presumption only by demonstrating that preemption was Congress's clear and manifest purpose. *Medtronic*, 518 U.S. at 485. Preston cannot meet this burden.

There is no evidence that, in enacting the FAA, Congress intended to preempt administrative proceedings of the kind prescribed by the TAA. Further, no conflict exists between the FAA and the TAA suf-

ficient to justify a finding of preemption. Far from frustrating the purposes of the FAA, the TAA promotes expeditious, expert resolution of controversies arising under the TAA, while at the same time providing for ultimate *de novo* resolution of the controversy by a court or arbitrator. Accordingly, the two laws are in harmony and no finding of preemption is warranted.

Moreover, consistent with the Court's decision in *WaffleHouse*, there is no basis to conclude that, by entering into a private contractual arrangement, parties may preclude a governmental agency from investigating and conciliating claims entrusted to the agency for review. 534 U.S. at 288. Private parties have no power to disable the Commissioner's statutory function and remedial authority. That is all the more so in this case, where the Commissioner's determination is subject to *de novo* resolution by a court or arbitrator and, at most, the TAA merely postpones arbitration if the parties have entered into a valid and applicable arbitration agreement.

The Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and its progeny, holding that the FAA preempts state laws that proscribe arbitration in certain categories of state court litigation, are not to the contrary and are readily distinguishable. The TAA does not proscribe arbitration, and *Southland* and its progeny do not address the question whether the FAA preempts agency review. To the extent the Court determines that *Southland* and its progeny apply to restrict or invalidate section 1700.44 of the TAA, the Court should reconsider and

either limit or overrule *Southland* and affirm the decision below.

Overturning an administrative agency's exercise of its statutory authority to investigate and conciliate claims is far removed from both the problem addressed in *Southland* and Congress's intent in enacting the FAA. In considering the reach of the FAA, the Court should balance the interests of the State and the purposes of the FAA, and should conclude that the FAA does not preempt state law because the state statute does not impair the basic purposes of the federal statute.

Alternatively, the Court should reconsider and overrule *Southland*. The text, history, purpose, and logic of the FAA demonstrate that Congress never intended it to apply to state court proceedings over state law issues. Because this is clear, and because the consequences of preemption are fundamentally disruptive to legitimate state regulatory procedures, *stare decisis* should not stand in the way of overturning the Court's precedent.

ARGUMENT

A. The FAA Does Not Preempt State Procedural Laws That The Parties Expressly Incorporate Into Their Contracts.

1. The principal purpose of the FAA is to enforce the parties' contract in accordance with its terms.

The FAA's "passage 'was motivated first and foremost, by a congressional desire to enforce agree-

ments into which parties had entered.'" *Volt*, 489 U.S. at 478 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). The FAA thus manifests congressional intent to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs." *Southland*, 465 U.S. at 15-16 (citing H.R. REP. NO. 68-96, at 1 (1924)).

Consistent with these purposes, "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). As the Court has explained, "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967). It is well settled, therefore, that "the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt*, 489 U.S. at 478-79 ("[P]arties are generally free to structure their arbitration agreements as they see fit.") (citing *Byrd*, 470 U.S. at 219; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Thus, determining the effect of the FAA on any dispute necessarily requires the Court to interpret and enforce the parties' contract as it does any other contract – under state law principles designed to give effect to the parties' intent. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . .

should apply ordinary state-law principles that govern the formation of contracts."); *Volt*, 489 U.S. at 478 (stating that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

2. The FAA requires enforcement of contracts that expressly incorporate state law where, as here, state law merely postpones arbitration.

Consistent with the FAA's essential purpose, the Court expressly held in *Volt* that the FAA does not preempt California procedural laws where the parties bargained for California law to govern their disputes. 489 U.S. at 479. The *Volt* rule controls and requires affirmance of the decision below.

In *Volt,* the Board of Trustees of Leland Stanford Junior University ("Stanford") sued Volt Information Sciences, Inc. ("Volt") for allegedly breaching a construction contract between the parties. 489 U.S. at 470. The contract contained an arbitration clause requiring arbitration of all disputes "arising out of or relating to" their contract or any breach as well as a choice of law clause providing that "the Contract shall be governed by the law of the place where the Project is located," which was California. *Id.* Volt moved to compel arbitration of the dispute, and Stanford moved to stay arbitration pursuant to a California state law rule permitting any court "to stay arbitration pending resolution of a related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or

fact.'" *Id.* at 471 (quoting CAL. CIV. PROC. CODE § 1281.2(c) (1982)). The California Superior Court denied the motion to compel arbitration, finding that the FAA did not preempt state law. *Id.* The California Court of Appeal affirmed, and, after the California Supreme Court denied further review, this Court granted certiorari and also affirmed. *Id.* at 471-72.

The issue before the Court was "whether application of CAL. CIV. PROC. CODE ANN. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA." 489 U.S. at 477-78. The Court answered that question in the negative. *Id.* at 478. In holding that the FAA did not preempt the California law at issue, the Court noted that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476. The Court reasoned that, although the FAA preempts state laws requiring a judicial forum for resolving claims that contracting parties agreed to arbitrate,

> it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.

Id. at 479. Thus, the rule of *Volt* is that the FAA does not preempt state laws that the parties agreed

to follow in their contract, "even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Id.*

Here, as in *Volt*, Preston and Ferrer agreed that their dispute would be governed by California law. JA 17. Indeed, the Contract is even clearer on this point than the agreement in *Volt*, which merely applied the "law of the place where the Project was located," which happened to be California. 489 U.S. at 472. The Contract further reinforces its clear incorporation of California law by including a provision in the arbitration clause itself expressly stating that any conflict between the Contract and applicable law must be resolved in favor of the latter. JA 18. Here the parties clearly agreed to be bound by the TAA. *See Chronus Investments, Inc. v. Colman*, 35 Cal. 4th 376, 387 (2005) (parties' selection of California law to govern their contract incorporates California's procedural rules applicable to arbitration). Under *Volt*, the FAA does not preempt the TAA because the Contract is enforceable under the FAA.

Neither party has ever disputed that California law governs here, and thus, the court below construed the parties' contract and resolved the appeal in accordance with state law, including the TAA. Pet. App. 5a-6a. That the parties agreed to follow California law is perhaps best exemplified by the fact that neither party invoked the FAA before the arbitrator, the Commissioner, or the Superior Court. In fact, in the proceedings in the Superior Court, Ferrer sought injunctive relief staying arbitration pursuant to California Code of Procedure §§ 526 and 527, and Preston moved to compel arbitration pursuant to

California Code of Procedure § 1281.2 – the very provision at issue in *Volt*. Pet. App. 20a. Neither party so much as mentioned the FAA until Preston inserted a three-paragraph argument concerning FAA preemption in his opening brief to the Court of Appeal. Given the parties' clear agreement to follow California law, the FAA, as applied in *Volt*, does not preempt the TAA, and the parties' Contract is enforceable under the FAA no less than in *Volt*.

Ignoring the choice of law and conflict provisions of the Contract discussed above, Preston contends that the parties agreed to have the arbitrator decide questions of arbitrability by incorporating the rules of the American Arbitration Association ("AAA") into the Contract. Pet. Br. at 17-22. Preston argues that, by doing so, the parties vested the arbitrator with exclusive authority to construe the validity of the Contract. *Id.* at 17. This argument misses the relevant point entirely. The question here is not *whether* the arbitrator may decide the validity of the Contract, but *when* he may decide it. Under *Volt*, the answer is that the parties must follow California law. And under the TAA, the Commissioner may decide first whether the Contract violates the TAA. Nothing in any of the provisions of the AAA are to the contrary or purport to override the TAA, and Preston does not argue that they are or do. In any event, even if there were such a conflict, the Contract itself expressly provides that, if any conflict arises between its provisions and applicable law, applicable law governs. Accordingly, any conflicting provision of the AAA would not control.

Southland and its progeny are not to the contrary. In *Southland*, the Court reversed the California Supreme Court's holding that claims arising under the California Franchise Law must be resolved in a judicial forum and may not be submitted to arbitration even if the claims fall within the scope of the parties' arbitration agreement. 465 U.S. at 5. The Court concluded that a State's placement of an entire category of disputes outside the province of arbitration conflicted with section 2 of the FAA, and, specifically, that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. *Southland* is clearly distinguishable from this case.

First, *Southland* involved a state law rule that denied in its entirety the arbitrability of an entire category of state law disputes. In contrast, this case, like *Volt*, involves a state law rule that merely postpones arbitration. Second, *Southland* did not involve consideration of whether the parties agreed to be bound by a state law rule that requires the exhaustion of administrative remedies before proceeding to arbitration; this case does. Third, *Southland* simply did not consider whether Congress intended the FAA to preempt administrative agency action where, as here, full recourse to arbitration is ultimately preserved. As in *Volt*, this case involves an arbitration-postponing rule that the parties bargained for; not an arbitration-defeating rule at war with the parties' contractual arbitration agreement.

The Court's decision in *Buckeye* also is not to the contrary. There, the Court considered whether a court or arbitrator must decide the legality of a con-

tract where one party resists arbitration on the ground that the entire contract (as opposed to the arbitration clause itself) is void *ab initio* under state law. 546 U.S. at 442. The Court held that, where the challenge is to the legality of the entire contract and not the arbitration clause itself, the arbitrator normally decides the issue of the legality of the contract. *Id.* at 449. *Buckeye* is also entirely distinguishable.

First, like *Southland*, *Buckeye* involved a state law rule that denied in its entirety the arbitrability of an entire category of state law disputes – contracts that are allegedly void *ab initio* as a matter of state law. This case, of course, involves no such arbitration-defeating rule. Second, *Buckeye* did not involve consideration of whether the parties agreed to be bound by a state law rule that requires the exhaustion of administrative remedies before proceeding to arbitration. In *Buckeye*, the contract expressly provided that resolution of any dispute "shall be governed . . . [by] the Federal Arbitration Act," and that the arbitrator must apply the law "[consistent] with the FAA." *Id.* at 442-43. Here, in contrast, the parties agreed to be bound by California law, including, by incorporation, the TAA. Third, like *Southland*, *Buckeye* simply did not consider whether Congress intended the FAA to preempt administrative agency action where, as here, full recourse to arbitration is ultimately preserved.

Fairly construed, the Court's precedents reveal a clear dichotomy. On the one hand, the Court has overturned state laws that categorically prevent the arbitration of certain disputes. *See Buckeye*, 546

U.S. at 449; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding that the FAA preempted a Montana law rendering arbitration agreements unenforceable); *Mastrobuono*, 514 U.S. at 64 (holding that the FAA preempted decisional law eliminating the arbitrator's authority to award punitive damages); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 282 (1995) (holding that the FAA preempted an Alabama law making written, predispute arbitration agreements unenforceable); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (holding that the FAA preempted a California wage law rendering particular arbitration agreements unenforceable); *Southland*, 465 U.S. at 16.

On the other hand, the FAA does not preempt state laws that the parties incorporate into their contract and that, although postponing or regulating arbitration, do not render the arbitration agreement unenforceable. *Volt*, 489 U.S. at 479 (holding that the FAA does not preempt "agreements to arbitrate under different rules than those set forth in the Act itself"); *see Doctor's Assocs.*, 517 U.S. at 688 ("*Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."). This case falls clearly within the scope of *Volt*.

Indeed, for at least two reasons, the state law procedural rule at issue in this case (*i.e.*, section 1700.44 of the TAA, which postpones arbitration until after the Commissioner's review) is likely to have far less impact on arbitration than the procedural rule at issue in *Volt* (*i.e.*, CAL. CIV. PROC. CODE § 1281.2(c), which requires a stay of arbitration

pending the outcome of related litigation). First, proceedings before the Commissioner are typically informal and expeditious, lasting months rather than years. They are thus likely to result in far less delay than awaiting the outcome of related state or federal court litigation. In this case, the Commissioner scheduled a hearing to resolve the matter four months following her determination that she had jurisdiction to review the controversy. JA 33.[7]

Second, unlike proceedings before the Commissioner under the TAA, the outcome of related state or federal court litigation may have preclusive effects on an arbitration proceeding under applicable principles of estoppel. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-32 (1979) (rejecting common law doctrine of mutuality of parties and authorizing offensive use of collateral estoppel). Thus, the rule postponing arbitration in favor of litigation at issue in *Volt* may have the effect of tying the arbitrator's hands. In contrast, the Commissioner's determination under the TAA is subject to *de novo* review and has no preclusive effect. Because the arbitration-postponing rule at issue in this case has less of an

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[7] In her dissenting opinion in the Court of Appeal, Judge Vogel speculated that proceeding before the Commissioner would "cause a delay of years and triple or quadruple the parties' expenditures." JA 17a. But there is no basis for this speculation in the record or otherwise. As noted, proceedings before the Commissioner are expeditious and informal and, thus, do not entail the expense or delay associated with trials or arbitration proceedings.

impact on arbitration than the rule upheld in *Volt*, the Court should affirm the decision below.

B. Under Established Principles, The FAA Does Not Preempt The Administrative Procedure Prescribed By Section 1700.44 Of The TAA.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing U.S. Const. art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). The Court has applied this mandate by holding that federal law may preempt state law in three distinct ways: (i) by express language in a congressional enactment (express preemption), *e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); (ii) by implication from the depth and breadth of a congressional scheme that occupies the legislative field (field preemption), *e.g., Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), or (iii) by implication due to a conflict with a congressional enactment (conflict preemption), *e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000). *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (discussing three types of preemption).

Because "[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," *Volt*, 489 U.S. at 477, the relevant inquiry is one of conflict preemption only. As the Court has explained, conflict preemption exists "where it is impossible for a private party to comply with both state and federal

law, *see, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and where "under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby*, 530 U.S. at 372-73 (internal quotation marks, alterations, and citation omitted). The determination of "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* at 373. If that purpose "cannot otherwise be accomplished – if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage v. Jones*, 225 U.S. 501, 533 (1912) (citations omitted). That there is "[t]ension between federal and state law is not enough to establish conflict preemption." *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007) (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)). Accordingly, the Court finds conflict preemption only in "those situations where conflicts will necessarily arise." *Goldstein v. California*, 412 U.S. 546, 554 (1973).

Anchoring the Court's analysis, and of particular relevance when the preemption question concerns a state statute, is the presumption against preemption, which applies regardless of whether the Court is considering express, field, or conflict preemption. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995). As the Court has held repeatedly, "because the States

are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law." *Medtronic*, 518 U.S. at 485. Accordingly, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (internal quotation marks and citations omitted); *see generally* THE FEDERALIST, No. 32, 198 (A. Hamilton) (1788) (Mentor ed. 1961). This presumption is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic,* 518 U.S. at 485; *see also Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715-16 (1985) (analyzing presumption).

Licensing is an exercise of a State's traditional police power. *See, e.g., Cleveland v. United States*, 531 U.S. 12, 21 (2000) ("[T]he statute . . . licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization. In this regard, it resembles other licensing schemes long characterized by this Court as exercises of state police powers.") (citing cases); *Brazee v. Michigan*, 241 U.S. 340, 343 (1916). Here, of course, the TAA is, in significant part, a licensing regime. Moreover, at the center of this controversy is Ferrer's allegation that the Contract is void because, among other reasons, Preston was not a licensed talent agent. The TAA prescribes a comprehensive scheme for regulating relations between artists and those

who procure employment for them. *See Styne*, 26 Cal. 4th at 58 (noting the TAA's purpose and breadth of administrative regulation "to protect artists from unscrupulous and unqualified talent agencies"). Moreover, California plainly enacted the TAA pursuant to its substantive police and regulatory power:

> The Act [the predecessor to the TAA] is a remedial statute. Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision. Such statutes are enacted for the protection of those seeking employment. They properly fall within the police power of the state and their constitutionality has been repeatedly affirmed.

Buchwald v. Superior Court, 62 Cal. Rptr. 364, 367 (Cal. App. Ct. 1967) (citations omitted); *see Styne*, 26 Cal. 4th at 50, 58. Accordingly, in arguing that the FAA preempts this regulatory regime, Preston "bear[s] the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (internal quotation marks and citations omitted).

1. Under general preemption principles, there is no conflict between the TAA and the FAA.

As the Court has often held, "[t]he purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic*, 518 U.S. at 485 (internal quotation marks and citation omitted). Critically, there is no evidence, indication, or even implication

that, in enacting the FAA, Congress intended to preempt state law regimes such as the TAA that, at most, merely postpone arbitration.

As noted, the purpose of the FAA was "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Volt*, 489 U.S. at 478 (internal quotation marks and citations omitted). As also noted, however, enforcement of the TAA in this case would not represent a departure from this purpose. Whether a contract within the purview of the TAA contains an arbitration clause or not, the Commissioner has original jurisdiction to determine whether the TAA has been violated, subject to *de novo* resolution by either (i) a court if there is no valid or applicable arbitration agreement between the parties, or (ii) an arbitrator if there is. It is thus fully possible to comply with both the TAA and the FAA, and the TAA presents no genuine obstacle to the ultimate resolution of a controversy through arbitration if the parties have, in fact, agreed to arbitrate.

In enacting the FAA, Congress intended to ensure that private arbitration agreements are enforced "in accordance with their terms." *Volt*, 489 U.S. at 478 (quoting *Prima Paint*, 388 U.S. at 404 n.12) ("the Act was designed 'to make arbitration agreements as enforceable as other contracts, but not more so'"). To that end, the Court has counseled that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Here, however, there are no doubts.

The question in this case is not whether any particular issue is or is not arbitrable. Nor is it whether an arbitration agreement may be enforced. Rather, the relevant question is temporal – *i.e.*, when the pertinent issues may be arbitrated. The purposes of the FAA simply are not frustrated by the administrative review that the TAA prescribes.

Critically, the TAA incorporates significant administrative investigatory functions into the Commissioner's review. Section 1700.44 of the TAA provides for an initial hearing before the Commissioner. CAL. LAB. CODE § 1700.44(a). A predicate to that hearing is an investigation. For example, the statute states that "[t]he Labor Commissioner may certify without a hearing that there is no controversy within the meaning of this section if he or she has *by investigation* established that there is no dispute" under the statute. *Id.* (emphasis supplied). This investigative feature of the TAA is obviously distinct from the role of either a court or an arbitrator. So is the Commissioner's ability to take administrative action following her investigation and hearing, including the adjustment of talent agency agreements and the pursuit of any enforcement proceedings.

Further, the *de novo* resolution feature of the TAA is purposefully designed to preserve the adjudicatory roles of a court or arbitrator. As the California Supreme Court has explained, following the Commissioner's determination, the post-administrative *de novo* proceeding before the Superior Court would be "a complete new trial . . . that is in no way a review of the prior proceeding" before the Commissioner. *Buchwald v. Katz*, 8 Cal. 3d 493, 502 (1972). In

Buchwald, the court reached this conclusion following an exhaustive analysis of the TAA's legislative history. *Id.* at 501-02. There is no reason why the same would not apply to post-administrative proceedings before an arbitrator. Thus, proceedings under the TAA are not a compulsory substitute for proceedings before either a court or arbitrator. Under the TAA, the Commissioner's role is distinct, and the respective roles of a court or arbitrator are fully preserved by the Act's *de novo* feature.

At the same time that the TAA preserves ultimate adjudicatory review for a court or arbitrator, the TAA also affords any ultimate decision maker the benefit of the Commissioner's expertise. *See Styne*, 26 Cal. 4th at 58 ("[R]eferral to the Commissioner serves the intended purpose of the doctrine of exhaustion of administrative remedies – to reduce the burden on courts while benefiting from the expertise of an agency particularly familiar and experienced in the area. The Commissioner's expertise in applying the [TAA] is particularly significant in cases where, as here, the essence of the parties' dispute is whether services performed were by a talent agency."); *Waisbren v. Peppercorn Prods., Inc.*, 41 Cal. App. 4th 246, 255 (1995).

It is precisely this concern with expertise that drives the doctrine of exhaustion of administrative remedies, which applies expressly to the TAA. The California Supreme Court has held emphatically that "[t]he reference of disputes involving the [A]ct to the Commissioner is *mandatory*[, that] [d]isputes *must* be heard by the Commissioner, and [that] all remedies before the Commissioner *must* be exhausted be-

fore the parties can proceed to the superior court." *Styne*, 26 Cal. 4th at 54 (citations omitted);[8] *see also REO Broadcasting Consultants v. Martin*, 69 Cal. App. 4th 489, 495 (1999) (same); *Humes v. Margil Ventures, Inc.*, 174 Cal. App. 3d 486, 494 (1985) ("Not only was respondent permitted to petition the Labor Commissioner for determination as to the alleged violation of the talent agency licensing requirement, she was obligated by the doctrine of exhaustion of remedies to seek determination by the Labor Commissioner before taking any judicial action.").

The Court has long extolled the benefits of the doctrine of exhaustion of administrative remedies: (i) to avoid "frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency by encouraging people to ignore its procedures," *McKart v. United States*, 395 U.S. 185, 195 (1969); *see also Woodford v. Ngo*, 126 S. Ct. 2378, 2385 (2006); (ii) to "prevent[] premature interference with agency processes, so that the agency may function efficiently," *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); and (iii) to "afford the parties and the courts the benefit of its experience and expertise," *id.* Moreover, requiring exhaustion of administrative remedies may have the salutary effect of promoting settlement or some other quick and economical resolution. *Woodford*, 126 S. Ct. at 2385 ("[E]xhaustion promotes efficiency. Claims generally

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[8] *Styne* did not involve an arbitration provision in the parties' contract, which explains the reference "proceed to the superior court."

can be resolved much more quickly and economically in proceedings before an agency than in litigation in . . . court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in . . . court."); *McKart*, 395 U.S. at 195 ("A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene.").

In addition, requiring that the dispute be heard by the Commissioner in the first instance keeps the Commissioner abreast of potentially illegal activity and serves the prophylactic purpose of imparting to potential transgressors that the Commissioner is actively monitoring their activities. All of these considerations weigh in favor of initial review by the Commissioner, as contemplated by the TAA.

As a final point, the TAA is decidedly not anti-arbitration. As noted, section 1700.45 of the TAA permits parties to bypass the Commissioner's review in favor of proceeding straight to arbitration if they include in their arbitration clause provision for reasonable notice to the Commissioner of the "time and place of all arbitration hearings" and the right for her to attend these hearings. CAL. LAB. CODE § 1700.45. The plain intent of section 1700.45 is to accommodate arbitration as fully as possible while still permitting the Commissioner to exercise her oversight function consistent with the overall structure of the TAA. In this case, it is undisputed that Preston was an unlicensed talent agent, and that the Contract that he drafted did not meet the requirements of section

1700.45. Accordingly, section 1700.45 does not apply and the parties may proceed with arbitration only after the Commissioner conducts her review.

Based on the foregoing, a finding of preemption is not warranted in this case. Under the circumstances, the parties may readily comply with both state law (TAA) and federal law (FAA), *see, e.g., Florida Lime*, 373 U.S. at 142-43; the TAA does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA, *see Crosby*, 530 U.S. at 372-73; and thus, no conflict exists that would warrant preemption. This is particularly so in light of the presumption against preemption that attaches to cases in which Congress has "legislated . . . in a field which the States have traditionally occupied," and "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal quotation marks and citations omitted).

2. Ousting the administrative procedure prescribed by the TAA would contravene the Court's preemption precedents concerning agency regulation in the FAA context.

Even if the arbitration-postponing aspects of the TAA are found to have some impact on arbitration in tension with the FAA, it defies credulity to suggest that, in enacting the FAA, Congress intended categorically to oust administrative agency action simply because two parties enter into an arbitration clause.

If so, parties could suspend an agency's exercise of its regulatory police authority simply by agreeing to arbitrate disputes otherwise within the agency's jurisdiction. No such conclusion is warranted, and review of the Court's precedents concerning the interplay between the FAA and agency action demonstrates that the FAA does not preempt the Commissioner's role under the TAA. *See WaffleHouse*, 534 U.S. at 288; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

In *WaffleHouse,* the Court held that the existence of an arbitration agreement between two parties would not bar the EEOC, as a non-party to that agreement, from pursuing victim-specific judicial relief on behalf of the employee. 534 U.S. at 288. In *WaffleHouse*, Eric Baker suffered a seizure, was discharged by his employer, WaffleHouse, and filed a charge of discrimination with the EEOC, alleging that his discharge violated the federal Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*. 534 U.S. at 282-83. The EEOC filed an enforcement action in the district court, to which Baker was not a party. *Id.* at 283. WaffleHouse filed a petition under the FAA to stay the EEOC's suit and compel arbitration or dismiss the suit. *Id.* at 284. In concluding that the parties' arbitration clause posed no barrier to the EEOC's action, the Court discussed at some length the EEOC's "independent statutory responsibility to investigate and conciliate claims," concluding that neither statutory language nor case law "suggest[s] that the existence of an arbitration agreement between private parties materially changes the *EEOC's statutory function or the reme-*

dies that are otherwise available." *Id.* at 288 (emphasis supplied).

This conclusion is all the more warranted where, as here, the mission of the agency is predicated on the protection of the public. As discussed, the "clear object" of the TAA is "to prevent improper persons from becoming [talent agents] and to *regulate such activity for the protection of the public*." *Waisbren*, 41 Cal. App. 4th at 261 (emphasis supplied). The Labor Commissioner, like the EEOC, "depends on the filing of charges to notify" her of violations of the statute entrusted to her. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987). When an agency acts on this information, "albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest." *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980). For this reason, courts have held that "an employer and an employee cannot agree to deny the EEOC the information it needs to advance th[e] public interest," and that "[a] waiver of the right to file a charge is void as against public policy." *Cosmair*, 821 F.2d at 1090.

The Court's analysis in *Gilmer* reinforces its holding in *WaffleHouse*. In *Gilmer*, Robert Gilmer filed an age discrimination charge against his employer with the EEOC, and then subsequently brought suit in the district court under the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, *et seq*. 500 U.S. at 23-24. His employer filed a motion to compel arbitration on the basis of an arbitration clause in his employment agreement, which the district court denied. *Id.* The Fourth Circuit reversed, and this Court affirmed. *Id.*

Although the Court held that Gilmer and his employer were obligated to arbitrate their dispute as between themselves, the Court also stated that it was "unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA" because "[a]n individual ADEA claimant subject to an arbitration agreement *will still be free to file a charge with the EEOC*, even though the claimant is not able to institute a private judicial action." *Id.* at 28 (emphasis supplied). This reasoning applies to the circumstances presented here: The proceedings before the Commissioner, analogous to those before the EEOC in *Gilmer*, may still proceed provided that arbitration is the final destination of the controversy as between the parties. And, like the EEOC in *Gilmer*, the Commissioner has independent investigatory authority, *see* CAL. LAB. CODE § 1700.7, and may receive information concerning alleged violations of the TAA from any source. *See* 500 U.S. at 27. Indeed, as noted, the Commissioner's investigatory role is a predicate to the hearing contemplated in section 1700.44 of the TAA. CAL. LAB. CODE § 1700.44(a).[9]

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[9] Petitioner's reliance on *Gilmer* to support his theory of preemption is misplaced. *See* Pet. Br. at 12-14. In *Gilmer*, the claimant argued that the FAA did not prevent him from pursuing his discrimination claim in court under the theory that Congress intended all claims under the ADEA to be exempt from the FAA. The Court did not address the issues presented here except to state that the parties' obligation to arbitrate did not prevent the employee from filing a charge with the EEOC.

Recognition of and respect for the roles of administrative agencies is particularly relevant in preemption determinations concerning agencies vested with authority by state statutes pertaining to health and public safety in light of the presumption against preemption, which is at its zenith in these contexts. *Medtronic*, 518 U.S. at 485; *Hillsborough*, 471 U.S. at 715-16. Given the absence of any conflict that would give rise to preemption in this case, and the presence of an administrative agency charged by a state statute with protecting the public's welfare and exercising the State's traditional police power of licensing in order to fulfill its charge, Preston has failed to shoulder his "considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *De Buono*, 520 U.S. at 814 (internal quotation marks and citation omitted).

C. Alternatively, The Court Should, If Necessary, Limit *Southland* To Affirm The Decision Below, Or Overrule *Southland* And Hold That The FAA Does Not Apply To Preempt State Statutes That Exempt Certain State Law Controversies From Arbitration.

For the reasons discussed above, the Court should affirm the decision below either (i) because the parties agreed to be bound by California law and, under *Volt*, a state procedural rule that, at most, postpones arbitration is not preempted by the FAA, or (ii) because, under the Court's general preemption precedents and, specifically, *WaffleHouse*, the FAA does not preempt agency review of the kind at issue

under the TAA. In the event the Court rejects these arguments, the Court should nonetheless affirm because the FAA (i) applies only in federal court as a remedial procedural device and does not apply in state court; (ii) does not abrogate substantive state law limitations on arbitration agreements governed by state law, even though these limitations preclude arbitration in certain classes of state law controversies; or, at the very least, (iii) does not abrogate procedural state law limitations on arbitration agreements governed by state law that merely regulate or postpone arbitration. To the extent they hold otherwise, the Court should limit or overrule *Southland* and its progeny.

1. *Southland* and its progeny have created problems in the lower courts and should be limited.

In *Allied-Bruce*, the Court declined the invitation of the respondents and their State *amici* to overrule *Southland*, noting, among other things, that "no unforeseen practical problems ha[d] arisen" in the years since *Southland* was decided. 513 U.S. at 272. Serious problems, however, have arisen, as evidenced by the lower courts' interpretations of *Southland* and its progeny as requiring them to overturn a host of state statutory regimes intended to vindicate important state interests.

For example, in *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990), the Fourth Circuit held that section 2 of the FAA preempted a section of the Virginia Motor Vehicle Dealer Licensing Act prohibiting non-negotiable arbitration clauses in franchise

agreements between automobile manufacturers and dealers. 905 F.2d at 722. Relying on *Southland* and *Perry*, the Fourth Circuit stated: "The argument that the Virginia statute is a necessary part of the state's scheme to protect dealers must . . . fail." *Id.* at 727. [10] A dissenting judge stated that "the majority abandons the proper and appropriate preemption analysis and fails to take account of Virginia's inherent right to protect her own citizens." *Id.* at 727 (Widener, J., dissenting). This erosion of essential state substantive policies and protections in the wake of *Southland* warrants further consideration, particularly with respect to comprehensive statutes, such as the TAA, enacted to protect a State's citizens from abuse.

If, under *Southland* and its progeny, the FAA is deemed to preempt the Commissioner's role under the TAA in this case, this result would constitute an extraordinary erosion of a State's ability to craft comprehensive regulatory regimes designed to pro-

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[10] *See also, e.g.*, *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) (FAA preempts Louisiana law prohibiting employers' use of forum selection and choice of law clauses in employment contracts), *cert. denied*, 546 U.S. 826 (2005); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001) (FAA preempts Louisiana statute invalidating as against public policy construction contracts requiring suits or arbitrations arising therefrom to be brought outside the state); *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215 (5th Cir. 1997) (FAA preempts Texas employment retaliation law that disfavors arbitration for such claims); *Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334 (5th Cir. 1984) (FAA preempts Texas Deceptive Trade Practices Act provisions requiring judicial resolution of claims brought thereunder).

tect its citizens from abusive conduct. It would also cut deeply into the fabric of state law in a manner far removed from the principles articulated in *Southland* and in the Court's subsequent decisions applying it. Accordingly, if *Southland* and its progeny are the basis for overturning section 1700.44 of the TAA in this case, *Southland* and its progeny should be limited to preserve the role of the Commissioner under the Act.

Unlike the Alabama statute at issue in *Allied-Bruce*, the TAA does not render arbitration agreements wholly unenforceable; on the contrary, it explicitly permits arbitration in lieu of review by the Commissioner under section 1700.44. CAL. LAB. CODE § 1700.45.[11] Nor does the TAA limit the availability of arbitration as an alternative to a judicial forum for the resolution of disputes; on the contrary, through its *de novo* feature, the TAA preserves this path. *Contrast Allied-Bruce*, 513 U.S. at 273; *Perry*, 482 U.S. at 490-91; *Southland*, 465 U.S. at 10-11. And far from exemplifying "state legislative attempts to undercut the enforceability of arbitration agreements" that concerned the Court in *Southland*, *see* 465 U.S. at 16, the TAA merely ensures that the Commissioner is informed of, and involved as appro-

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[11] Under this provision, arbitration is permitted subject only to limited procedural requirements that, if not complied with, merely postpone rather than defeat arbitration. CAL. LAB. CODE § 1700.45. In other words, even if the parties fail to comply with the requirements of section 1700.45, they may still arbitrate, but must wait until after the Commissioner's review to do so.

priate in, matters arbitrated under a statute that she is charged with enforcing.

A critical distinction exists between legislation that a State enacts simply to foreclose arbitrations *in toto* and statutes like the TAA that preserve the right to arbitrate while also preserving the jurisdiction of an administrative forum in furtherance of important public policies. The latter type of legislation seeks to address concerns unique to the State's polity, providing substantive protections and benefits deemed appropriate by the particular State's legislature. The State's independent judgment in this regard should be afforded considerable latitude. *See*, *e.g.*, *Southland*, 465 U.S. at 19 (Stevens, J., concurring in part, dissenting in part) ("The existence of a federal statute enunciating a substantive federal policy *does not necessarily require* the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens.") (emphasis supplied); *Perry*, 482 U.S. at 494 (Stevens, J., dissenting) ("the States' power to except certain categories of disputes from arbitration should be preserved unless Congress decides otherwise").

Broad application of *Southland* to overrule California's statutory regime in this case would imperil other State statutes that require private parties to submit their disputes to an administrative panel. In so doing, the Court would severely limit state efforts to craft prelitigation administrative reviews, either to streamline dispute resolution and promote settle-

ment, or to enable an administrative body to enhance its expertise and ability to take regulatory action by observing an entire class of disputes.

For example, several States require parties who wish to challenge the adequacy of a physician's care to submit their claims to "mandatory prelitigation screening and mediation panels." ME. REV. STAT. ANN. tit. 24 § 2851; *see also* ALASKA STAT. § 09.55.536; IDAHO CODE Ann. § 6-1001; MASS. GEN. LAWS ch. 231, § 60B; MICH. COMP. LAWS § 600.4903; MONT. CODE ANN. § 27-6-701; NEB. REV. STAT. § 44-2840; N.M. STAT. § 41-5-14; WASH. REV. CODE ANN. § 7.70.100; WYO. STAT. ANN. § 9-2-1518.

Congress did not pass the FAA to prohibit States from crafting more efficient methods to resolve claims through the use of panels of experts. Nor did Congress, in enacting the FAA, indicate any desire to deprive States of the ability to use case-screening panels to build administrative expertise over specialized areas of the law. If the Court holds, however, that the FAA preempts the TAA in this case, it will effectively bar state efforts to capture and screen all cases of a certain type, regardless of the State's motive, where the parties have executed an arbitration agreement. For example, by the simple expedient of executing an arbitration clause, parties could defeat a State's effort to have an administrative panel review in advance all claims for medical malpractice before proceeding either to litigation or arbitration.

As the Court's precedents demonstrate generally, the need to respect a State's independent judgment is especially acute in cases involving statutes that were

enacted pursuant to a State's substantive police powers. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (courts should exercise caution and be "absolutely certain" that Congress intended to displace substantive state law before it allows for the preemption). This principle ought to apply in full in the Court's consideration of the TAA, which California plainly enacted as a remedial, substantive body of regulation. *Styne*, 26 Cal. 4th at 50. To the extent the Court determines that *Southland* and its progeny establish a bright-line preemption standard barring administrative review prior to arbitration, the Court should reconsider *Southland* and adopt instead an approach that balances the interests of the State and the purposes of the FAA. Where, as here, the state law does not prohibit arbitration but merely postpones it in favor of a state administrative process that serves important state interests, the Court should conclude that the State's procedures do not run afoul of the FAA. The State's independent judgment in the exercise of its police powers should be preserved, especially where, as here, it is possible to do so without sacrificing the essential purposes of the FAA.

In the final analysis, the problems underlying the Court's decision in *Southland* (and Congress's enactment of the FAA) simply do not arise in this case. Given that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules," *Volt*, 489 U.S. at 476, and the TAA's narrow "remedial" purpose of "protect[ing] artists seeking professional employment from the abuses of talent agencies," *Styne*, 26 Cal. 4th at 50, the Commissioner's review

of this dispute in the first instance does no violence to any federal policy favoring arbitration. In contrast, applying the FAA to preempt the role of the Commissioner would do significant violence to the unique California policy embodied in the TAA. And given that the FAA has "no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," *Volt*, 489 U.S. at 477, there is room enough under the FAA for the State interests at stake in this case to be "recognized without impairing the basic purposes of the federal statute," *Southland*, 465 U.S. at 864 (Stevens, J., concurring in part, dissenting in part). To the extent that *Southland* and its progeny compel a different conclusion, they should be limited.

2. If necessary, the Court should overrule *Southland* and its progeny as contrary to the text, history, purpose, and logic of the FAA.

Much has been written about *Southland*, with several Justices and nearly all commentators opining that it is inconsistent with Congress's intent and wrongly decided. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 129 (2006); *see* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 83-133 (1992); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and*

the Federal Arbitration Act, 67 LAW & CONTEMP. PROBS. 5, 8-54 (2004).[12]

As has been noted repeatedly, the FAA's legislative history demonstrates that "[t]he primary purpose of the statute is to make enforcible [sic] in the Federal courts . . . agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts." Joint Hearings (statement of Julius Cohen); *id.* at 37 (stating that "[t]he statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements" and "is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws"); *id.* at 39-40 ("Nor can it be said that the Congress of the United States, *directing its own courts*. . . would infringe upon the provinces or prerogatives of the States. . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law.") (emphasis supplied); H.R. Rep. No. 68-96, at 1 (1924); *Committee on Commerce, Trade and Commercial Law, The United States Arbitration Law and its Application*, 11 A.B.A. J. 153, 154-55 (1925) ("ABA Report") ("That the enforcement of arbitration contracts is within the law of procedure as distinguished

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[12] It should be noted that, in litigating *Southland*, the state court private plaintiffs who appeared as appellees had stipulated in the lower courts that the FAA applies in state court. *See* Br. of Appellees in No. 82-500 (filed June 6, 1983) at 25 n.30. Accordingly, the Court in *Southland* apparently lacked the full benefit of adversarial briefing.

from substantive law is well settled by decisions of our courts."); *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting) ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts . . . .").

Notably, the proposed legislation faced a "complete lack of opposition," which is unsurprising given that all understood it to be limited to the federal courts. MACNEIL, *supra*, at 115. The FAA "would have been viewed in 1925 as a massive interference with state law had it been intended to apply in state courts." *Id.*; *see Allied-Bruce*, 513 U.S. at 287-88 (Thomas, J., dissenting) (noting that at the time of the FAA's enactment, federal legislation mandating procedures applicable in state courts "would have been extraordinary"). Shortly after the FAA's enactment, the American Bar Association Committee that had drafted and supported the legislation wrote:

> The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. . . . A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure in the Federal courts. . . . [W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure . . . That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts.

ABA Report at 154-55; *see also* Julius Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275-76 (1926).

Interpreting the FAA as applicable to state courts, or as invalidating state law substantive and procedural limitations on arbitration in state law controversies, is also contrary to the text of the statute. Although section 2 of the FAA provides that a written arbitration agreement "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, sections 3 and 4 identify the courts in which the FAA's requirements apply and set forth procedures concerning the statute's enforcement, 9 U.S.C. §§ 3, 4. The express application of sections 3 and 4 to "courts of the United States" or "any United States district court" demonstrates Congress's intent to limit the FAA's application to federal courts. *See Southland,* 465 U.S. at 29 (O'Connor, J., dissenting) ("The structure of the FAA itself runs directly contrary to the reading the Court today gives to § 2. §§ 3 and 4 are the implementing provisions of the Act, and they expressly apply only to federal courts."); *Allied-Bruce*, 513 U.S. at 291 (Thomas, J., dissenting) ("[T]he text of the statute nonetheless makes clear that § 2 was not meant as a statement of substantive law binding on the States . . . [and] the ensuing provisions of the Act . . . clearly rest on the assumption that federal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute.") (citing 9 U.S.C. §§ 3, 4, 8).

That the FAA is procedural and not substantive is demonstrated further by the fact that section 2 "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Southland*, 465 U.S. at 15 n.9; *see Allied-Bruce*, 513 U.S. at 291 (Thomas, J., dissenting) (explaining that the "*reason* that § 2 does not give rise to federal-question jurisdiction is that it was enacted as purely a procedural provision"). Indeed, "the FAA is the only federal 'substantive' statute in which there is no federal subject matter jurisdiction." Moses, *supra*, at 131.

The broad reach of the FAA as applied in *Southland* and its progeny is not based upon congressional intent but on judicially created federal common law. *See Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) ("There is little doubt that the Court's interpretations of the Act has given it a scope far beyond the expectations of the Congress that enacted it."). Under the circumstances, *stare decisis* should not stand as a bar to limiting or overruling *Southland*. *See Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting) ("*Southland* clearly misconstrued the Federal Arbitration Act. . . and entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. Abandoning it does not impair reliance interests to a degree that justifies this evil."); *id.* at 295 (Thomas, J., dissenting) ("[T]he doctrine [of *stare decisis*] is insufficient to save *Southland*.").

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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STATUTORY ADDENDUM

9 U.S.C.A. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

* * * * *

CAL. CODE CIV. PROC. § 1281.2 (2007)

§ 1281.2. Order to arbitrate; Determination of other issues

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground

that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

CAL. LABOR CODE § 1700.4 (2007)

§ 1700.4. "Talent agency" and "artists" defined

(a) "Talent agency" means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

(b) "Artists" means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.

CAL. LABOR CODE § 1700.5 (2007)

§ 1700.5. Necessity of talent agency license; posting an advertisement; renewal of prior licenses

No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner. The license shall be posted in a conspicuous place in the office of the licensee. The license number shall be referred to in any advertisement for the purpose of the solicitation of talent for the talent agency.

* * * * *

CAL. LABOR CODE § 1700.23 (2007)

§ 1700.23. Approval of talent agency contracts; grounds for disapproval; required statements in contracts

Every talent agency shall submit to the Labor Commissioner a form or forms of contract to be utilized by such talent agency in entering into written contracts with artists for the employment of the services of such talent agency by such artists, and secure the approval of the Labor Commissioner thereof. Such approval shall not be withheld as to any proposed form of contract unless such proposed form of contract is unfair, unjust and oppressive to the artist. Each such form of contract, except under the conditions specified in Section 1700.45, shall contain an agreement by the talent agency to refer any controversy between the artist and the talent agency relating to the terms of the contract to the Labor Commissioner for adjustment. There shall be printed on the face of the contract in prominent type the following: "This talent agency is licensed by the Labor Commissioner of the State of California."

CAL. LABOR CODE § 1700.24 (2007)

§ 1700.24. Filing and posting of talent agency fee schedule; changes in schedule

Every talent agency shall file with the Labor Commissioner a schedule of fees to be charged and collected in the conduct of that occupation, and shall also keep a copy of the schedule posted in a conspicuous place in the office of the talent agency. Changes in the schedule may be made from time to time, but no fee or change of fee shall become effective until seven days after the date of filing thereof with the Labor Commissioner and until posted for not less than seven days in a conspicuous place in the office of the talent agency.

CAL. LABOR CODE § 1700.44 (2007)

§ 1700.44. Dispute; hearing; determination; bond; certification of no controversy; failure to obtain license; limitations of actions

(a) In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo.

* * * * *

The Labor Commissioner may certify without a hearing that there is no controversy within the meaning of this section if he or she has by investigation established that there is no dispute as to the amount of the fee due. Service of the certification shall be made upon all parties concerned by registered or certified mail with return receipt requested and the certification shall become conclusive 10 days after the date of mailing if no objection has been filed with the Labor Commissioner during that period.

* * * * *

CAL. LABOR CODE § 1700.45 (2007)

§ 1700.45. Arbitration; contract provisions

Notwithstanding Section 1700.44, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment, or

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency, and

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

(d) If the contract provides that the Labor Commissioner or his or her authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any arbitration shall be governed by the provisions of Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

* * * * *