S. Ct. Case No. S167169

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEARSON DENTAL SUPPLIES, INC. and PEARSON DENTAL SUPPLY CO.
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

LUIS TURCIOS,
Real Party in Interest.

Petition for Review of a Decision of the Court of Appeal, Second Appellate District, Division Four, Case No. B206740, Granting a Writ of Mandate to the Superior Court for the County of Los Angeles, Case No. BC359605, Dept. 31, Honorable Alan S. Rosenfield, Judge

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REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Defendant's answer fails to demonstrate why this Court should not grant review of this published decision, *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 Cal. App. 4th 71 (*Pearson*), to clarify issues of immeasurable importance to millions of California employees subjected to mandatory employment arbitration agreements and discrimination in violation of the Fair Employment and Housing Act (FEHA).

It is clear from Plaintiff's petition for review and the letters supporting Plaintiff's petition for review/requesting depublication, that the *Pearson* decision muddies the defined standards set forth in *Armendariz v. Foundation Health Psychcare, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*). *Pearson* applies the incorrect standard of review to arbitrator's decisions in mandatory employment arbitration; creates an inconsistent "adequate time" framework to analyze arbitration time provisions; and in applying this "adequate time" framework, concludes that a mandatory employment arbitration agreement can eliminate an employee's remedy before the DFEH.

The importance of these issues is apparent as evidenced by the letters from third parties requesting this Court grant review or depublish the *Pearson* opinion. Without a grant of review, seeking an administrative proceeding with the DFEH serves as a time trap for employees rather than an appropriate remedy. And although the employer forced arbitration on the employee as a term of employment, a court could not prevent an arbitrator from using an artificial time limitation provision to penalize the employee for seeking a valid remedy because, under *Pearson,* a mistake of law which deprives an employee of his statutory rights is insulated from review.

This diverges from this Court's statements in *Armendariz* that the arbitrator must provide "a written decision that will permit a limited form of judicial review"

and that "[n]othing in this opinion . . . should be interpreted as implying that an arbitration agreement can restrict an employee's resort to the Department of Fair Employment and Housing." (*Armendariz, supra,* 24 Cal.4th at 90, 99.)

II. ARGUMENT

A. Review Should Be Granted to Clarify an Important Question of Law this Court Raised in *Armendariz*: To What Extent May Courts Review an Arbitrator's Undisputed and Obvious Mistake of Law in Mandatory Employment Arbitration which Deprives an Employee of His or Her Statutory Rights.

Review is necessary to clarify how the court of appeal in *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 Cal.App.4th 71 (*Pearson*) could be presented with the exact confluence of circumstances as addressed in *Armendariz v. Foundation Health Psychcare, Inc.* (2000) 24 Cal.4th 83, 90, 106-107 (*Armendariz*)—a mandatory employment arbitration agreement; claims under the FEHA; and an arbitrator's undisputed misapplication of law which deprived the plaintiff of multiple statutory rights and a determination of his FEHA claims—yet, refuse to apply the judicial review this Court authorized under these exact circumstances in *Armendariz.* This important question of law determines whether by forcing an employee to arbitrate his statutory claims as part of employment, the employee "'. . . forgo[es] the substantive rights afforded by the statute [or] only submits to their resolution in an arbitral, rather than a judicial, forum.'" (*Armendariz, supra,* 24 Cal.4th at 98-99, quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628 (*Mitsubishi Motors*).)

To address this issue, Defendant's answer merely restates the California rule—that generally, trial and appellate courts cannot judicially review arbitrator's decisions for errors of fact or law. Answer 3-4. Defendant's focus on the California rule does little to shed light on this issue or diminish the importance of granting review of this issue. In *Armendariz,* this Court discussed the California rule when

it created the minimum requirement that for mandatory employment arbitration of FEHA rights, an arbitrator must issue written findings which are not required under the California Arbitration Act (CAA) "that will permit a limited form of judicial review." (*Armendariz, supra,* 24 Cal.4th at 90, 106-107.)

Contrary to Defendant's conclusory statements that this Court should not grant review in this case, review is necessary "to articulate precisely what standard of judicial review is 'sufficient to ensure that arbitrators comply with the requirements of [a] statute.'" (*Armendariz, supra,* 24 Cal.4th at 107.) Without a more precise standard, divergent interpretations of what judicial review is available pursuant to *Armendariz* will likely continue in other trial and appellate courts causing further degradation of the judicial and arbitration processes. This Court must grant review to clarify this important question of law, streamline the transition from arbitration to enforcement through judgment, and ensure that arbitration is an adequate forum when an employee is compelled as a condition of employment to arbitrate FEHA claims.

B. Review Should Be Granted to Correct the Pearson Court's Divergence from Armendariz on Whether a Mandatory Employment Arbitration Agreement Can Restrict an Employee's Right to Seek an Administrative Remedy from the DFEH for Violations of the FEHA—an Issue of Fundamental Importance to Victims of Discrimination.

In *Armendariz,* this Court explicitly stated:

> Nothing in this opinion . . . should be interpreted as implying that an arbitration agreement can restrict an employee's resort to the Department of Fair Employment and Housing, the administrative agency charged with prosecuting complaints made under the FEHA, or that the department would be prevented from carrying out its statutory functions by an arbitration agreement to which it is not a party. (See *Gilmer*[*v. Interstate/Johnson Lane Corp.* (1991)] 500 U.S. [20] at p. 28 [111 S. Ct. at p. 1653] [employment

> arbitration agreement does not preclude employee's complaint to the United States Equal Employment Opportunity Commission].)

(*Armendariz, supra,* 24 Cal.4th at 99, first and second bracketed insertions added, third and fourth bracketed insertions appearing in the original material.) This Court based its statement on the United Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 28 (*Gilmer*) that an arbitration agreement cannot prevent an employee from filing a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) because the EEOC has independent authority to perform its investigative and prosecuting functions.[1]

In direct contradiction to this Court's statement in *Armendariz,* the *Pearson* court stated, in relevant part:

> Of course, by signing the [mandatory employment arbitration agreement], the parties in this case explicitly eliminated an administrative proceeding or a lawsuit as a dispute resolution vehicle.[2] They were permitted to do so, so long as the arbitration agreement did not unreasonably burden plaintiff's ability to vindicate his statutory rights under the FEHA. Having agreed not to submit employment disputes to administrative review or civil litigation, it was not unreasonable for the parties to also eliminate the maximum one-year statutory period within which

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[1] Contrary to Defendant's implications in its letter opposing depublication, in *Preston v. Ferrer* (2008) 128 S.Ct. 978, 986-987 (*Preston*), the U.S. Supreme Court reiterated an arbitration agreement cannot divest the EEOC of its role as "prosecutor, pursuing an enforcement action in its own name or reviewing a discrimination charge to determine whether to initiate judicial proceedings." The Court distinguished *Preston* from *Gilmer* on the basis that under the statutory scheme in *Preston,* the administrative agency was not functioning as an independent "advocate advancing a cause before a tribunal authorized to find the facts and apply the law; instead, the [agency] serves as impartial arbiter", the very role which the parties had agreed would be played by the arbitrator; not the agency. (*Id.*)

[2] "As set forth earlier, the DRA stated that the parties were agreeing to arbitration '[t]o avoid the inconvenience, cost and risk that accompany formal administrative or judicial proceedings.'"

> plaintiff would otherwise have been required [to] exhaust his administrative remedies. Thus, in context, the [mandatory employment arbitration agreement]'s requirement to commence arbitration within [one] year after the dispute arises is comparable to the one-year period within which a plaintiff must file a lawsuit for statutory discrimination after obtaining a right-to-sue letter from the DFEH. [Fn. Omitted.]

(*Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 Cal. App. 4th 71, 85.) Accordingly, the *Pearson* court's published decision expressly states that an employer may force an employee to give up his right to a remedy before the DFEH with a mandatory employment arbitration agreement. The *Pearson* court predicated its conclusion—that the arbitration agreement's one year time limitation was "adequate" because it is analogous to the statute of limitations under the FEHA statutes—on its improper holding that a mandatory employment arbitration agreement can eliminate an employee's administrative remedy with the DFEH. (*Id.* at 86.)

Defendant attempts to argue in its answer that the *Pearson* court did not make these conclusions and that the *Pearson* court intended to state that an employee does not have to exhaust administrative remedies with the DFEH before demanding arbitration. Answer 6-7. The Defendant's misinterpretation of the *Pearson* decision is predicated on its own mistaken understanding that the DFEH's only role is to issue right to sue letters. Answer 6-7. The DFEH does more that issue right to sue letters and, like the EEOC, investigates complaints as a neutral party to determine whether the complainants allegations are substantiated by evidence. If these allegations are substantiated and the case does not settle, the DFEH's legal department litigates the case before the Fair Employment and Housing Commission or in court in the name of the Department of Fair Employment and Housing against the employer—not as a representative of the

complainant. However, the complainant's interests are vital in the litigation and the complainant receives all of the remedies recovered, absent administrative fines. Therefore, there is a real remedy which the *Pearson* court has expressly eliminated in direct contradiction to this Court's statement in *Armendariz.*

In eliminating the one year period to file an administrative complaint with the DFEH to uphold the one year arbitration time limitation, the *Pearson* court creates a nightmare scenario. As an employee may not be aware he or she has entered into an arbitration agreement, the employee may file a DFEH complaint and if that investigation lasts beyond the artificial arbitration agreement time limitation, the employee's claim is time barred when he or she demands arbitration. This undermines the legislative framework governing the interaction of time limitations, DFEH complaints, and civil actions/arbitrations. It also undermines the very purpose of a time limitations provisions—to put parties on notice of pending litigation to preserve evidence—by permitting an employer to treat the arbitration agreement's time limitation as a time trap rather than a notice provision intended to preserve evidence. Hence, even with notice of the employee's claims, an employer is encouraged to keep quiet about the existence of an arbitration agreement until the time period passes. No equitable tolling would be available to ensure the employee preserved his or her statutory rights during a DFEH proceeding because, under *Pearson*, the parties agreed to eliminate that remedy. And the tolling provision of the CAA—misapplied by the arbitrator in this case—would not help the employee even if the arbitrator applied it correctly, because it expressly begins tolling the time limitations at the filing of a civil action not a DFEH complaint. (Code Civ. Proc. § 1281.12.) This court must grant review to re-establish the efficacy of its statement in *Armendariz* that a mandatory employment arbitration agreement cannot prevent an employee from seeking a remedy before the DFEH.

III. CONCLUSION

The published *Pearson* decision splits from *Armendariz* on two fundamental issues. This departure creates tangible dangers for employees forced to sign an arbitration agreement as a term of employment. Review must be granted review to eliminate the *Pearson* court's positions inconsistent with *Armendariz* and to ensure that mandatory employment arbitration is an adequate forum for the determination of statutory rights. If this Court refuses to grant review, a fundamental purpose of the Fair Employment and Housing Act to prevent employment discrimination will be weakened by arbitration agreement terms created exclusively by employers and forced on employees as a term of employment.

Dated: October 30, 2008

Respectfully submitted
LAVI & EBRAHIMIAN, LLP

By: _____
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Jordan D. Bello, Esq.

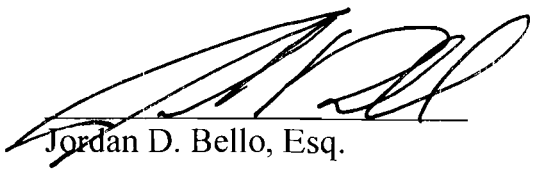
Attorneys for Petitioner, Real Party in Interest, and Plaintiff LUIS TURCIOS

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1))

Pursuant to California Rules of Court, rule 8.504(d)(1), the text of this brief consists of 1,808 words as counted by the Microsoft Word 2003 word-processing program used to generate this brief.

Dated: October 30, 2008



Jordan D. Bello, Esq.

LUIS TURCIOS vs. PEARSON DENTAL SUPPLIES, INC., et al.
CASE NO. BC359605/B206740

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 8383 Wilshire Blvd., Suite 840, Beverly Hills, California 90211.

On October 30, 2008, I served the foregoing document, described as **"REAL PARTY IN INTEREST LUIS TURCIOS' REPLY TO ANSWER TO PETITION FOR REVIEW"** on all interested parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

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Pearson Dental Supplies, Inc., & Pearson Dental Supply Co. represented by: Russell F. Behjatnia, Esq. SBN: 172289 Afzali & Behjatnia, LLP 14401 Gilmore Street, No. 200 Van Nuys, California 91401 Tel: (818) 779-8888	Petitioner: 1 Copy
Clerk of the Court of Appeal California Court of Appeal Second Appellate District 300 South Spring St., Fl. 2, N. Tower Los Angeles, CA 90013-1213	California Court of Appeal: 1 Copy
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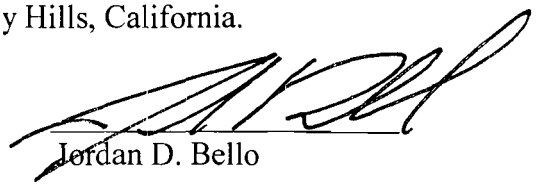

Jordan D. Bello